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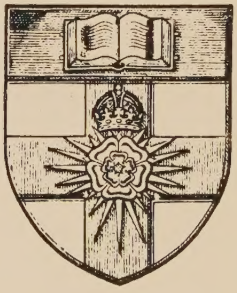

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CASES REPORTED IN THIS VOLUME

PAGE

ADMIRALTY COMMISSIONERS *v.* VOLUTE (OWNERS), THE VOLUTE [H.L.] 193
AKSIONAIRNOYE OBSCHESTVO A. M. LUTHER *v.* JAMES SAGOR & CO. [C.A.] 138
ALLEN *v.* PUBLIC TRUSTEE, *Re* WEDGWOOD (DECEASED) [C.A.] 545
ARZPEITIA, THE [ADM.] 523
A.-G. *v.* ARD COASTERS, LTD. [H.L.] 72
BAKER *v.* JAMES BROS. & SONS, LTD. [K.B.D.] 590
BARNETT *v.* COHEN [K.B.D.] 528
BARTON & MITCHELL *v.* FINCHAM [C.A.] .. 87
BLACKPOOL CORPN. *v.* STARR ESTATE CO., LTD. [H.L.] 79
BLUNDELL-LEIGH *v.* ATTENBOROUGH [C.A.] 525
BOSTOCK'S SETTLEMENT, *Re*, NORRISH *v.* BOSTOCK [C.A.] 125
BOULTER, *Re*, CAPITAL & COUNTIES BANK *v.* BOULTER [CH.D.] 167
BOYCE *v.* COX [K.B.D. DIVL. CT.] 658
BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* GAUNT [H.L.] 447
BRITISH REINFORCED CONCRETE ENGINEERING CO., LTD. *v.* SCHELFF [CH.D.] 202
BURRELL (CHARLES) & SONS, LTD. *v.* SELVAGE [H.L.] 122
BURROUGHES *v.* ABBOTT [CH.D.] 709
C. (OTHERWISE H.) *v.* C. [DIV.] 268
CAP PALOS, THE [C.A.] 249
CAPITAL AND COUNTIES BANK *v.* BOULTER, *Re* BOULTER [CH.D.] 167
CELIA (OWNERS) *v.* VOLTURNO (OWNERS) [H.L.] 110
CHELLEW *v.* ROYAL COMMISSION OF SUGAR SUPPLY [K.B.D.] [C.A.] 635
CITY TAILORS, LTD. *v.* EVANS [C.A.] 399
COLLEY *v.* OVERSEAS EXPORTERS (1919), LTD. [K.B.D.] 596
COMMISSIONERS OF WORKS *v.* HULL [K.B.D. DIVL. CT.] 508
CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS [H.L.] 19
CUBAN LAND & DEVELOPMENT CO. (1911), LTD., *Re* [CH.D.] 661
DASHWOOD *v.* HINCKES, *Re* HINCKES [C.A.] .. 558
DAVIES *v.* POWELL DUFFRYN STEAM COAL CO., LTD. [C.A.] 421
DENBIGH, COWAN & CO. AND R. ATCHERLEY & CO., *Re* [C.A.] 245
DENTON *v.* WEST, *Re* WEST [CH.D.] 152
DESSAU *v.* PETERS, RUSHTON & CO., LTD. [CH.D.] 566
DIAMOND ALKALI EXPORT CORPN. *v.* BOURGEOIS [K.B.D.] 283
DRAKE, *Re*, DRAKE *v.* GREEN [CH.D.] 157
ELLIS *v.* DUBOWSKI [K.B.D. DIVL. CT.] .. 272
FARNSWORTH, *Ex p.*, R. *v.* EDITOR OF "DAILY MAIL" [K.B.D. DIVL. CT.] 476
FARROW'S BANK, LTD., *Re* [C.A.] 511
FITCH *v.* DEWES [H.L.] 13
FORD *v.* METROPOLITAN POLICE DISTRICT RECEIVER [K.B.D.] 493
FOSTER *v.* FOSTER [C.A.] 490
FRENCH *v.* GETHING [C.A.] 415
FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ [H.L.] 726
GASKILL *v.* GASKILL [DIV.] 365
GIBAUD *v.* GREAT EASTERN RAIL. CO. [C.A.] .. 35
GLASGOW CORPN. *v* TAYLOR [H.L.] 1
GOLDEN BREAD CO., LTD. *v.* HEMMINGS [CH.D.] 569
GOOCH, *Re*, *Ex p.* JUDD [C.A.] 470
GOODWIN *v.* SCOTT, *Re* WALKER [CH.D.] .. 163

PAGE

GOSSAGE, IN THE ESTATE OF, WOOD *v.* GOSSAGE [C.A.] 107
GRAHAM JOINT STOCK SHIPPING CO., LTD. *v.* MOTOR UNION INSURANCE CO., LTD. [C.A.] 394
GREAT WEST SADDLERY CO. *v.* R., AND CONNECTED APPEALS [P.C.] 605
HALL *v.* MINTER [CH.D.] 573
HAWKINS AND SUNDERLAND *v.* DUCHÉ & SONS [K.B.D.] 673
HEMELRYCK *v.* WILLIAM LYALL SHIPBUILDING CO., LTD. [P.C.] 136
HILL, *Re*, *Ex p.* HOLT & CO. [K.B.D. DIVL. CT.] 650
HINCKES, *Re*, DASHWOOD *v.* HINCKES [C.A.] 558
HORTON *v.* GWYNNE [K.B.D.] 497
HOLT & CO., *Ex p.*, *Re* HILL [K.B.D. DIVL. CT.] 650
HUGHES, *Re*, HUGHES *v.* FOOTNER [CH.D.] .. 310
JAMES *v.* SMITH [C.A.] 255
JOACHIMSON (N.) (A FIRM NAME) *v.* SWISS BANK CORPN. [C.A.] 92
JOHNSTONE *v.* PEDLAR [H.L.] 176
JUDD, *Ex p.*, *Re* GOOCH [C.A.] 470
KUTNER, *Re* [C.A.] 641
LONDON COUNTY COUNCIL (NO. 1), *Ex p.*, R. *v.* POPLAR BOROUGH COUNCIL [C.A.] .. 429
LONDON COUNTY COUNCIL (NO. 2), *Ex p.*, R. *v.* POPLAR BOROUGH COUNCIL [C.A.] .. 437
LONDON COUNTY COUNCIL *v.* WETTMAN [K.B.D. DIVL. CT.] 576
LEAVIS *v.* LEAVIS [DIV.] 266
LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. *v.* MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA [H.L.] 72
MCLUSKEY *v.* COLE [C.A.] 315
MACKWORTH *v.* HELLARD [C.A.] 324
MAGNHILD (OWNERS) *v.* MCINTYRE BROS. & CO. [C.A.] 359
MAHMOUD AND ISPAHANI, *Re* AN ARBITRATION BETWEEN [C.A.] 217
MALONE, *Ex p.*, R. *v.* CHESHIRE COUNTY COURT JUDGE [C.A.] 344
MASON, HERRING & BROOKS *v.* HARRIS [K.B.D.] 741
MAYHEW *v.* HALTON, *Re* MORRIS [C.A.] .. 651
MENDIP RANGE (OWNERS) *v.* RADCLIFFE [H.L.] 224
MERTENS *v.* HOME FREEHOLDS CO., LTD. [C.A.] 372
METROPOLITAN ASYLUMS BOARD (NO. 1), *Ex p.*, R. *v.* POPLAR BOROUGH COUNCIL [C.A.] 429
METROPOLITAN ASYLUMS BOARD (NO. 2), *Ex p.*, R. *v.* POPLAR BOROUGH COUNCIL [C.A.] 437
METROPOLITAN RAILWAY CO. *v.* DELANEY [H.L.] 301
MILLETT *v.* VAN HEEK & CO. [C.A.] 519
MOORE & CO., LTD. AND LANDAUER & CO., *Re* [C.A.] 466
MORGAN *v.* PARR [K.B.D. DIVL. CT.] 579
MORRIS, *Re*, MAYHEW *v.* HALTON [C.A.] .. 651
MOUNTAIN *v.* WHITTLE [H.L.] 626
MOUSSA, *Ex p.*, R. *v.* CAMPBELL [K.B.D. DIVL. CT.] 499
NATIONAL PROVINCIAL & UNION BANK OF ENGLAND *v.* LINDSELL [K.B.D.] 308
NIBLETT, LTD. *v.* CONFECTIONERS' MATERIALS CO., LTD. [C.A.] 459
NORRISH *v.* BOSTOCK, *Re* BOSTOCK'S SETTLEMENT [C.A.] 125
NYE *v.* DAVIS [K.B.D. DIVL. CT.] 322
OAKLEY *v.* MERTHYR TYDFIL CORPN. [K.B.D. DIVL. CT.] 292

PAGE

OLDHAM, ASHTON & HYDE ELECTRIC TRAMWAYS, LTD. *v.* ASHTON CORPORATION [C.A.] 664
OXTED MOTOR CO., *Re* [K.B.D. DIVL. CT.] .. 646
PAYNE *v.* BRITISH TIME RECORDER CO., LTD. AND W. W. CURTIS, LTD. [C.A.] 388
PEEL'S RELEASE, *Re* [CH.D.] 103
PHILLIPS *v.* BARNETT [C.A.] 385
POLEMIS & FURNESS, WITHY & CO., LTD., *Re* [C.A.] 40
PONDER, *Re*, PONDER *v.* PONDER [CH.D.] .. 164
PRIOR, *Re*, *Ex p.* PRIOR [C.A.] 277
PUBLIC TRUSTEE *v.* ALLDER, *Re* TOWNLEY [CH.D.] 586
R. *v.* CAMPBELL, *Ex p.* Moussa [K.B.D. DIVL. CT.] 499
R. *v.* CHESHIRE COUNTY COURT JUDGE, *Ex p.* MALONE [C.A.] 344
R. *v.* EDITOR OF "DAILY MAIL", *Ex p.* FARNSWORTH [K.B.D. DIVL. CT.] 476
R. *v.* POPLAR BOROUGH COUNCIL, *Ex p.* LONDON COUNTY COUNCIL (NO. 1) [C.A.] .. 429
R. *v.* POPLAR BOROUGH COUNCIL, *Ex p.* LONDON COUNTY COUNCIL (NO. 2) [C.A.] .. 437
R. *v.* POPLAR BOROUGH COUNCIL, *Ex p.* METROPOLITAN ASYLUMS BOARD (NO. 1) [C.A.] 429
R. *v.* POPLAR BOROUGH COUNCIL, *Ex p.* MANAGERS OF METROPOLITAN ASYLUMS BOARD (NO. 2) [C.A.] 437
R. *v.* STOCKS [C.C.A.] 602
R. *v.* WANDSWORTH LICENSING JUSTICES, *Ex p.* WHITBREAD & CO., LTD. [K.B.D. DIVL. CT.] 504
R. *v.* WHEAT [C.C.A.] 602
RAINHAM CHEMICAL WORKS, LTD. *v.* BELVEDERE FISH GUANO CO., LTD. [H.L.] .. 48
REDERIAKTIEBOLAGET AMPHITRITE *v.* R. [K.B.D.] 542
REEVES *v.* DAVIES [C.A.] 744
REMMINGTON *v.* LARCHIN [C.A.] 298
RUSSIAN COMMERCIAL & INDUSTRIAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE [H.L.] 329
SHEPPARD *v.* GLOSSOP CORPN. [C.A.] 61
SIMPSON *v.* CROWLE [K.B.D. DIVL. CT.] .. 715
SINCLAIR *v.* POWELL [C.A.] 379

PAGE

SOCIÉTÉ DES HOTELS LE TOUQUET-PARIS-PLAGE *v.* CUMMINGS [C.A.] 408
STIRK (JOHN) & SONS, LTD. *v.* HALIFAX ASSESSMENT COMMITTEE [K.B.D. DIVL. CT.] 355
STONEHOUSE *v.* MASSON [K.B.D. DIVL. CT.] .. 534
SUMNER, PERMAIN & CO. *v.* WEBB & CO. [C.A.] 680
SUN PERMANENT BENEFIT BUILDING SOCIETY *v.* WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY [C.A.] 690
THOMAS *v.* A.-G., *Re* WELSH HOSPITAL (NETLEY) FUND [CH.D.] 170
TOWNLEY, *Re*, PUBLIC TRUSTEE *v.* ALLDER [CH.D.] 586
UNDERWOOD, LTD. *v.* BURGH CASTLE BRICK & CEMENT SYNDICATE [K.B.D.] [C.A.] .. 515
URQUHART LINDSAY & CO., LTD. *v.* EASTERN BANK, LTD. [K.B.D.] 340
VAUGHAN *v.* GRINDELL [K.B.D. DIVL. CT.] .. 621
VER MEHR *v.* VER MEHR [DIV.] 743
VERSCHURES CREAMERIES, LTD. *v.* HULL & NETHERLANDS STEAMSHIP CO. LTD. [C.A.] 215
WALKER, *Re*, GOODWIN *v.* SCOTT [CH.D.] .. 163
WARWICK *v.* WILLCOCKS, *Re* WILLCOCKS [CH.D.] 161
WATERMAN *v.* FRYER [K.B.D. DIVL. CT.] .. 582
WEDGWOOD (DECEASED). *Re*, ALLEN *v.* PUBLIC TRUSTEE [C.A.] 545
WELSH HOSPITAL (NETLEY) FUND, *Re*, THOMAS *v.* A.-G. [CH.D.] 170
WEST, *Re*, DENTON *v.* WEST [CH.D.] 152
WESTMINSTER'S SETTLED ESTATES, *Re*, DUKE OF WESTMINSTER *v.* EARL OF SHAFTESBURY [CH.D.] 702
WESTWOOD *v.* HEYWOOD [CH.D.] 721
WHITBREAD & CO., LTD., *Ex p.*, R. *v.* WANDSWORTH LICENSING JUSTICES [K.B.D. DIVL. CT.] 504
WILLCOCKS, *Re*, WARWICK *v.* WILLCOCKS [CH.D.] 161
WILLMOTT *v.* WILLMOTT [DIV.] 747
WOMBWELL, *Re* [K.B.D.] 483
WOOD *v.* GOSSAGE, IN THE ESTATE OF GOSSAGE [C.A.] 107
WRIGHTSON *v.* MCARTHUR & HUTCHISONS (1919), LTD. [K.B.D.] 261

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GLASGOW CORPORATION *v.* TAYLOR

[House of Lords (Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Sumner and Lord Wrenbury), July 26, November 18, 1921]

[Reported [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 38 T.L.R. 102; 20 L.G.R. 205]

Child—Negligence—Allurement—Poisonous berries on shrub in public recreation ground—Knowledge of local authority.

In an action in the Court of Session the pursuer averred that his son, aged seven years, went with other children to a playground in a recreation ground owned and controlled by the defendant corporation; that the defenders had growing on a piece of ground, adjacent to the playground and easily accessible to young children, shrubs including the shrub atropa belladonna which bore poisonous berries that were similar in appearance to grapes or cherries and presented a very tempting appearance to young children; and that his (the pursuer's) son picked and ate berries from this shrub, as a result of which he was poisoned and died. The pursuer further averred that the defenders knew that the playground and the plot of ground where the shrub grew were much frequented by children, and that they were aware of the poisonous character of the berries and that their inviting and deceptive appearance had led to serious accidents, but that no warning was given of the poisonous character of the berries nor were any reasonably adequate precautions taken by the defenders to protect children. The pursuer claimed reparation from the defenders.

Held: the liability of the defenders rested on their knowledge that by their action they might bring children of tender years, unable to take care of themselves, yet inquisitive and easily tempted, into contact, in a place in which they (the children) had a right to be, with things alluring or tempting to them, and possibly in appearance harmless, but which, unknown to them and well known to the defenders, were hurtful or dangerous if meddled with, and, therefore, if the averments were proved, the defenders would be shown to have been guilty of negligence.

Notes. Considered: *Ellis* v. *Fulham Corpn.*, [1937] 3 All E.R. 454; *Sutton* v. *Bootle Corpn.*, [1947] 1 All E.R. 92; *Williams* v. *Cardiff Corpn.*, [1950] 1 All E.R. 250; *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283; *Phipps* v. *Rochester Corpn.*, [1955] 1 All E.R. 129; *O'Connor* v. *British Transport Commission*, [1958] 1 All E.R. 558. Referred to: *Liddle* v. *North Riding of Yorkshire County Council*,

[1934] All E.R.Rep. 222; *Purkis* v. *Walthamstow Borough Council*, [1934] All E.R.Rep. 64; *Pearson* v. *Coleman Bros.*, [1948] 2 All E.R. 274; *Pearson* v. *Lambeth Borough Council*, [1950] 1 All E.R. 682; *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Dyer* v. *Ilfracombe U.D.C.*, [1956] 1 All E.R. 581.

As to the standard of care required of the occupier of premises in relation to children, see 28 HALSBURY'S LAWS (3rd Edn.) 16–19; and for cases see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

(1) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(2) *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(3) *Hastie* v. *Edinburgh Magistrates*, 1907 S.C. 1102; 44 Sc.L.R. 829; 15 S.L.T. 194; 36 Digest (Repl.) 119, **869*.

(4) *Stevenson* v. *Glasgow Corpn.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest (Repl.) 74, **423*.

(5) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(6) *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, *135*.

(7) *Jewson* v. *Gatti* (1886), 2 T.L.R. 441, C.A.; 36 Digest (Repl.) 116, *582*.

(8) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

(9) *Reilly* v. *Greenfield Coal and Brick Co.*, 1909 S.C. 1328.

(10) *Grant* v. *Caledonian Rail. Co.* (1870), 9 Macph. (Ct. of Sess.) 258; 43 Sc. Jur. 115; 36 Digest (Repl.) 124, **908*.

(11) *Lygo* v. *Newbold* (1854), 9 Exch. 302; 2 C.L.R. 449; 23 L.J.Ex. 108; 22 L.T.O.S. 226; 2 W.R. 158; 156 E.R. 130; 36 Digest (Repl.) 70, *376*.

(12) *Davidson* v. *Monklands Railways Co.* (1855), 17 Dunl. (Ct. of Sess.) 1038; 27 Sc. Jur. 541; 36 Digest (Repl.) 123, **892*.

Appeal by the defenders from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, LORD DUNDAS, and LORD ORMIDALE, LORD SALVESEN dissenting), reversing a decision of the Lord Ordinary, LORD HUNTER.

The appellants were, under the provisions of the Glasgow Public Parks Act, 1878, proprietors and custodians of the Botanic Gardens, Glasgow, a public garden or park open to the public, including young children. The appellants planted near a playground in the gardens to which children resorted various specimen plants, among others a specimen of atropa belladonna, or "deadly nightshade," which produced berries of an alluring appearance, but of a very poisonous nature. These plants were enclosed by a wooden fence, in which was a gate which a child could open easily. There was a general notice warning people not to meddle with the plants and shrubs, but there was no notice calling special attention to the danger of eating these berries. A child of the respondent, aged seven, was lawfully in the park with other children and opened the gate and was averred to have picked and eaten some of the berries of the atropa belladonna, and to have died in consequence from poisoning. The father brought an action against the corporation for reparation. The defenders pleaded that the facts disclosed no negligence or breach of duty on their part for which they were liable.

Sandeman, K.C., J. A. Gilchrist (both of the Scottish Bar) and *W. Kerr Chalmers* for the appellants.

MacRobert, K.C. (of the Scottish Bar), *A. P. Duffes* and *A. Dewar Gibb* for the respondent.

The House took time for consideration.

Nov. 18. The following opinions were read.

LORD BUCKMASTER (read by LORD SHAW).—It would have been less easy to find the correct pathway through the difficulties which this case presents were it not that the road has already been travelled by learned judges who have left clear and definite signposts by which to guide our feet. I do not propose to leave the beaten track thus pointed out, and shall content myself with saying that, according to these directions which are in my opinion correct, this appeal ought to fail. The case is raised on a plea in law raised by the defenders, who asserted that the averments in the pursuer's condescendence were irrelevant and insufficient to support the conclusions, and that the action should be dismissed. The Lord Ordinary sustained this plea; but the Lords of the Second Division recalled his interlocutor and approved the issue proposed by the pursuer. From that judgment the present appeal is brought.

The case, as alleged in the pursuer's condescendence, is that—that the Botanic Gardens of Glasgow were a public park open to the public and in the custody of the defendants, the Glasgow Corporation. On a small piece of fenced ground in the gardens the respondents grew, among other botanical specimens, a shrub known as atropa belladonna, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence, the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub, nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children; and, according to the pursuer's allegations, the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of the shrub, and would eat the berries. The knowledge that these berries were poisonous was also said to be possessed by the defenders. The pursuer's child, a little boy of seven, ate some of these berries, and in consequence died. The question is whether the allegations heretofore mentioned established a cause of action by the father to obtain the money reparation for his affliction which the Scottish law permits. [And now also in England: see Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.]

The important facts which must be borne in mind in forming a conclusion on this matter are, first, that the children were entitled to go to the spot where the shrub was grown; secondly that there was no warning giving parents, and those who had the custody of children, any knowledge of the danger; and thirdly, that the danger was known to the appellants. In *Cooke* v. *Midland Great Western Railway of Ireland* (1) LORD ATKINSON states the principle applicable to such a case in terms which are, in substance, repeated by LORD SUMNER in *Latham* v. *R. Johnson & Nephew, Ltd.* (2), where he says ([1913] 1 K.B. at p. 416):

> "Then the presence in a frequented place of some object of attraction, tempting him [a child] to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness of the peril of the object."

I can see no distinction between the conditions which are there postulated and those which obtain in the present case. How the questions of fact will be ultimately resolved is a matter for the jury before whom the case will be heard, but the condescendence alleges in plain terms all the essential conditions summarised by LORD SUMNER. To the same effect also is the opinion of LORD MACNAGHTEN in *Cooke* v. *Midland Great Western Railway of Ireland* (1). With regard to *Hastie* v. *Edinburgh Magistrates* (3) and *Stevenson* v. *Glasgow Corpn.* (4), both of which related to danger by water—the one of a pond, and the other of a river—it is

sufficient to say that the element of mistake and deception which is undoubtedly involved in the present case did not, and could not, arise. Here the children had, according to the allegations, placed within their reach something which they were tempted to eat, and to eat was the certain prelude to sickness and the probable precursor of death.

LORD ATKINSON.—In this case the pursuer claims a right to recover from the appellants a sum of £500, together with a sum of £100 for expenses, as a solatium for the loss of his son, a boy of seven years of age, who was poisoned by eating berries of an atropa belladonna shrub which grew in the Botanic Gardens, Glasgow, of which gardens the appellants are the proprietors and custodians. The respondents are bound to permit, or do in fact permit, their gardens to be used as a public park open to all members of the public, including those of the immature age of seven years, even though these latter should be unattended by persons capable of taking care of them. The question for decision upon this appeal is, as I understand it, whether, if the averments contained in the pursuer's condescendences were proved or admitted, they would primâ facie establish the cause of action upon which the plaintiff relies. The question resembles that which would, under the English practice, be raised upon demurrer to a statement of claim.

It is averred in condescendence No. 1 that on Aug. 20, 1919, the pursuer's son, aged seven years, proceeded with some other young children to the playground in these gardens, which playground surrounds a bandstand; that this part of the gardens was, as the defenders well knew, much frequented by young children. In condescendence No. 3 it is averred that, on Aug. 20, 1919, and for some time prior thereto, the defenders had growing, upon a small piece of ground adjoining this playground, specimen plants and shrubs of various kinds, including a shrub named atropa belladonna, bearing berries rather similar in appearance to small grapes, and presenting a very alluring and tempting appearance to small children. That this plot of ground, which was enclosed by a wooden fence, was open to the public, access being obtained to it by a gate in the fence, and was, as the defenders well knew, frequented by numbers of the public of all ages. It is in this condescendence admitted that there is a wire loop on this fence which may be passed over the end of the gate, and it is explained that the gate and fence are only three feet in height; that the gate is a light and rustic one which, even when held in position by the wire loop, could easily be opened by a child of tender years. In the fourth condescendence it is averred that on Aug. 20, 1919, this belladonna shrub was about five feet in circumference, that it overhung the adjoining walk, although not the adjoining fence, that there are a number of paths in the enclosed piece of ground, and that the pursuer's son was attracted, while passing the place, by the beautiful and tempting appearance of this shrub which was covered with the berries described, that he picked a few of these berries and ate them, and that he shortly afterwards became ill and, although he received medical attention, died the following morning. In the fifth condescendence it is averred that in a well-known book on botany it is stated that the attractive character of these berries, looking, as they do, to the uncritical eyes of young children, like cherries, or big black currants, has led to many serious accidents; that the poisonous character and inviting and deceptive appearance of these berries were well known to the defenders and their servants; that they knew, or ought to have known, if they had exercised reasonable supervision, that this belladonna shrub was growing in a conspicuous position in their gardens, on a part open to and much frequented by children; that it was probable, indeed, practically certain, that children would be tempted and deceived by the appearance of the shrub and would eat its berries, which have a sweet taste; that the defenders and their servants knew, or ought to have known, that these berries were a deadly poison, and that if one or two of them were eaten by a child it was certain to cause dangerous illness likely to result in death; and that the defenders did not take any precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so. In the sixth

A condescendence it is averred that there was no adequate notice of any kind in these gardens warning the public of the poisonous or dangerous character of these specimen shrubs growing therein. It was not disputed that the unfortunate child who lost his life was in these gardens on Aug. 20, not merely as a licensee, but by right. It was not even suggested in argument that the child could by himself have ascertained the true nature and character of this shrub. Their Lordships' B attention was called by counsel to s. 37 of the Glasgow Public Parks Act, 1878, which reads as follows:

> "The Lord Provost, magistrates, and council may from time to time make such byelaws as they shall think fit for the good government and regulation of the said public parks, gardens, and open spaces, and of the museums, galleries, C and collections of natural history, science, and art, and other buildings, and persons frequenting the same, and of the superintendents, curators, rangers, parkkeepers, and other officers or servants appointed and employed by them, . . ."

Section 41 provides for the publication and posting in the park of these byelaws where made. It was admitted, however, that no byelaws of the kind mentioned D were ever made. The appellants must be taken, I think, to have assumed the responsibility, whatever it was, of this omission.

The question for decision is: If the relevant averments of fact contained in these condescendences be taken to be true for the purposes of this appeal, as I understand that they must be taken, do they establish that a duty lay upon the defenders to take reasonably adequate precautions to protect, on Aug. 20, 1919, E the pursuer's son from the danger by which the child lost his life? In my opinion, that question should be answered in the affirmative. If so, it is not contended that the duty was discharged. They did nothing to protect the child, and contend they were not bound to do anything. There is, in my view, no resemblance between this case and those cases where mischievous boys sustain injury by interfering with or misusing natural objects, such as trees in public parks, up F which they may be tempted to climb, or water, ornamental or other, into which they may accidentally fall or be tempted deliberately to enter. The appearance of such objects as these is well known and unmistakable. There is nothing deceptive or misleading about them. They cannot well be mistaken for things other than, or different from, what they really are. Whereas, if the averments in the condescendences be true, in this belladonna plant, with the deadly berries G which it bore, there was something in the nature of a trap. The berries looked alluring and as harmless as grapes or cherries. It is averred that the defenders and their agents knew this, and also knew, which the deceased child did not know, that the berries were, if eaten, highly poisonous. The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely H ignorant and could not by himself reasonably discover; yet they did nothing to protect him from that danger, or even inform him of its existence.

Many authorities are dealt with in the able judgment delivered by the learned judges in the Second Division of the Court of Session. They have also been cited in argument before your Lordships on the hearing of this appeal. I only think it I necessary to refer to a few of them, but particularly *Cooke* v. *Midland Great Western Railway of Ireland* (1) and *Latham* v. *R. Johnson & Nephew, Ltd.* (2). The decision of this House in the first of these two cases has, no doubt, been frequently criticised. I am familiar with the criticisms, and have noticed that in them not unfrequently either no weight or not full weight is given to the vital fact that there was evidence to go to the jury from which they might reasonably conclude that the children mentioned in that case not only entered upon the lands of the company with the leave and licence of the company itself, but also played upon the dangerous machine, the turntable, they found there, with that very same

leave and licence. That is the feature of the case dwelt upon by LORD MACNAGHTEN in his judgment. He said ([1909] A.C. at p. 234): A

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common-sense and ordinary intelligence, placed in the position in which the company was placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred." B

I emphasise the words "playing with the turntable." LORD COLLINS says (ibid. at p. 241): C

"I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it; and that, situate as it was in such a conspicuous place, and frequented so largely by young people without remonstrance from the defendants, with easy access from the Bridge Road through a gap in the hedge and along a well-trodden path down the embankment, it could hardly fail to present an irresistible attraction to young persons. I think all these facts in combination were evidence from which a jury might well infer not merely a licence, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely those who from their tender age would be deemed incapable of caution and therefore of contributory negligence." D E

I myself, after referring to the question which would arise in a case where the boys or children were trespassers, proceeded to say (ibid. at p. 239):

"In the view I take it is not necessary to determine that question in the present case, because I think that there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable—a most important addition—with the leave and licence of the defendant company." F

Such were the real facts and the real question decided in *Cooke* v. *Midland Great Western Railway of Ireland* (1). G

Questions as to the liabilities of those who place in the public street, or other places which children of tender years have a right to frequent, and do in fact frequent, things, whether machinery or others, tempting and alluring in appearance to young children unable to take care of themselves, yet to the knowledge of those who placed them there most dangerous to children yielding to this temptation and interfering with them, are different questions from those decided in *Cooke* v. *Midland Great Western Railway of Ireland* (1). The principle applicable to these latter questions is, I think, clearly stated by LORD DENMAN, C.J., in his judgment in *Lynch* v. *Nurdin* (5). In that well-known case the defendant negligently left his horse and cart unattended in the public streets. The plaintiff, a child of seven, got into the cart in play. Another child incautiously led the horse on, and the first child, the plaintiff, was thereby thrown out and hurt. It was held that the defendant was liable in an action on the case, although the plaintiff was a trespasser, not upon the street, where he had a right to be, but upon the tempting thing the defendant had left unguarded in the street—the cart. In giving judgment LORD DENMAN, C.J., said (1 Q.B. at p. 38): H I

"But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged in the natural instinct in a child in amusing himself

A with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant's having tempted the child, he ought not to reproach the child with yielding to that temptation."

I do not think LORD DENMAN would have had much difficulty in dealing with *Lynch* v. *Nurdin* (5) if there had been evidence to go to the jury that the child B had got into the cart with the leave and licence of the owner of it. It would appear to me that every word of this passage of LORD DENMAN's judgment applies to the present case. The child in the present case was of right in the gardens, as the child in that case was of right in the public street. The defendants planted and maintained in the garden, near the playground which children like the deceased C frequented, a shrub bearing, to their knowledge berries in appearance alluring and tempting to children, apparently harmless, but really poisonous. The deceased child yielded to the temptation which was presented to him. The defendants, if the averments of the condescendences be true, knew of the nature, character, and strength of the temptation, and the dangerous, possibly deadly, result of yielding to it. The deceased child did not know, and could not have reasonably have D discovered, this latter fact. If one of the servants of the defendants had left unattended in his garden a cart and horse, and the deceased yielding to temptation had got into it, had fallen from it and been killed, his father could have recovered according to the principle of the decision in *Lynch* v. *Nurdin* (5). I utterly fail to see on what ground he is not equally entitled to recover in the present case.

In *Clark* v. *Chambers* (6) COCKBURN, C.J., after reviewing all the authorities, E says (3 Q.B.D. at p. 339):

"It appears to us that a man who leaves in a public place along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another F may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion."

In *Jewson* v. *Gatti* (7) there was a cellar beside a highway in which painting was going on. A bar was placed round the opening. A passing child naturally looked down to see what was going on; the bar gave way, and she fell into the cellar. DAY, J., nonsuited the plaintiff. LORD ESHER, in giving judgment in the Court of G Appeal, said

"this was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was H more than that. For there was painting going on in the cellar, and it must have been known that this would attract children; and there was a bar put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on. This was almost an invitation, certainly an inducement, to the children to lean against the bar. The child leant against it and it gave way and she fell down I into the area."

Harrold v. *Watney* (8) approved of and followed in principle *Lynch* v. *Nurdin* (5) on the question of the necessity of taking into account in such cases the propensities of children. *Latham* v. *R. Johnson & Nephew, Ltd.* (2) was, on its facts in my view, quite different both from *Cooke* v. *Midland Great Western Railway of Ireland* (1) and from the present case. The land upon which the injured child had there entered, and where it met with its injury, was the site of some old houses and a wall, which had been pulled down, leaving an open space of waste ground upon which were heaps of debris. The public were allowed by the defen-

dants to traverse this piece of waste ground, and children were in the habit of playing upon the heaps of debris and other materials deposited by the defendants upon the ground. The waste ground did not adjoin the public highway, but was accessible by a path which led from the back of the house in which the injured child lived. On the morning of the day upon which the child was injured a quantity of paving stones were deposited on this waste ground in an irregular heap. The child, unobserved by anybody, left her mother's house, and a short time afterwards was found sitting on one of the stones with her hand beneath another by which it was crushed. There was no evidence to show how the accident occurred. The jury found (i) that the children played upon the land with the knowledge and permission of the defendants; (ii) that there was no invitation to the children to go on the land unaccompanied; (iii) that they ought to have known that there was a likelihood of the children being injured by the heap of stones; and (iv) that the defendants did not take reasonable care to prevent the children being injured. If the jury had found that the heap of paving stones was in the nature of a dangerous machine, and that the child was sitting upon the heap and meddling or interfering with the stones with the leave and licence of the defendants, the case might to a slight extent resemble *Cooke's Case* (1), while if, on the other hand, the jury had found that the child was on the waste ground as of right, and that heaps of paving stones are so enticing and alluring to children that they will be tempted to sit upon them and meddle with them, the case might have some slight resemblance to the present case; but, as the Court of Appeal found, according to the headnote ([1913] 1 K.B. 398), that there was neither allurement, nor traps, nor invitation, nor dangerous objects placed upon the land, I utterly fail to see how the facts of that case resemble those of the present if the averments of the condescendences be taken as true, which for the purposes of this appeal they admittedly must be.

The liability of defendants in cases of this kind rests, I think, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves, yet inquisitive and easily tempted, into contact, in a place in which they, the children, have a right to be, with things alluring or tempting to them, and possibly in appearance harmless, but which, unknown to them and well known to the defendants, are hurtful or dangerous if meddled with. I am quite unable to see any difference in principle between placing among children a dangerous but tempting machine, of whose parts and action they are ignorant, and growing in the vicinity of their playground a shrub whose fruit is harmless in appearance and alluring, although, in fact, most poisonous. I think, in the latter case, as much as in the former, the defendant would be bound, by notice or warning or some other adequate method, to protect the children from injury. In this case the averments are that the appellants did nothing of the kind. If that be true they were in my view guilty of negligence, giving the plaintiff a right of action. For this reason I think the judgment appealed from was right and should be affirmed, and this appeal dismissed with costs.

LORD SHAW.—In a discussion taking place upon the relevancy of the pursuer's averments, the House must, of course, assume that the whole of these averments are true. That is the familiar and settled condition of the argument. The articles of the condescendence are before the House. In the case for the appellants there is so clear and accurate a statement of the contents of these articles that for convenience' sake I insert it here: The place and circumstances of the occurrence are described in arts. 2, 3, and 4 of the respondent's condescendence. In these articles the respondent avers that on Aug. 20, 1919, his son, aged seven, with some other young children proceeded to the Botanic Gardens, Glasgow, which are open to the public as a public park. The children went to the playground surrounding the bandstand there, a part of the gardens which in the knowledge of the appellants was and is much frequented by young children. At that date, and for some time prior thereto, the appellants had growing in a small plot immediately adjoining

this playground specimen plants and shrubs of various kinds. Inter alia there were specimens of wheat, barley, oats, &c., and also a shrub atropa belladonna, bearing berries rather similar in appearance to small grapes, and presenting a very tempting and alluring appearance to children. This plot was enclosed by a wooden fence, but was open to the public, access being obtained by a gate in the fence, fastened by a wire loop. The plot was frequented by members of the public and by students. The gate could be easily opened by a young child. On the date in question, being attracted by the beautiful and tempting appearance of the berries, some of the children, including the respondent's son, entered the plot through the said gate and picked and ate a few of the berries. Shortly afterwards they became ill, and the pursuer's son died the following morning. The respondent further avers in condescendence 5 that the attractive character of the berries is accurately described in a well-known book on botany as follows:

> "The attractive character of the berries, looking as they do to the uncritical eyes of young children like cherries or big black currants, has led to many serious accidents,"

and that the poisonous character and the inviting and deceptive appearance of the berries were well known to the appellants and their servants. I agree with your Lordships that these averments are relevant to be admitted to probation, and if true, to infer liability on the respondents for the death of the pursuer's child.

This is not a case of trespass. It is only indirectly that the cases of trespass throw light upon the present appeal. According to the averments of the pursuer, his son, aged seven, had a right to go where he was. He had, equally with any other citizen, a right to open the little gate which gave access to the shrubbery containing the poisonous plant. There is no trespass in the case. The child, having a right to be in these gardens, was, in my opinion, entitled, as were also his parents, to rely upon the gardens being left in a reasonably safe condition: or in the language of the Lord Justice-Clerk (58 Sc.L.R. at p. 163):

> "The playground for the children must be taken as being provided as a place reasonably suitable and safe for children, and I think the parents were entitled so to regard it."

To this would I venture to add that it matters not that the gardens were, or were called, Botanic Gardens. They admittedly were a public place of recreation for the citizens of Glasgow. In ground open to the public as of right the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious, should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited. The two Scottish cases of *Hastie* v. *Edinburgh Magistrates* (3) and *Stevenson* v. *Glasgow Corpn.* (4) clearly illustrate the distinction. Grounds thrown open by a municipality to the public may contain objects of natural beauty, say, precipitous cliffs or the banks of streams, the dangers of the resort to which are plain. In the language of LORD M'LAREN in *Stevenson's Case* (4) (1908 S.C. at pp. 1038, 1039), I do not doubt

> "that the corporation, as proprietors, are bound to give reasonable protection to members of the public against unusual or unseen sources of danger, should such exist. But in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures."

LORD DUNDAS very properly, if I may say so, accentuated this consideration in the present case. When the danger is familiar and obvious no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this—that the municipality or owner is entitled to take into account that reasonable parents will

not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each, but each is entitled to assume it of the other. Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise. In the case of objects, whether artificial and, so to speak, dangerous in themselves, such as loaded guns or explosives, or natural objects, such as trees bearing poisonous fruits which are attractive in appearance, it cannot be considered a reasonably safe procedure for a municipality or owner to permit the exhibition of these things with their dangerous possibilities in a place of recreation, and without any special and particular watch and warning. There can be no fault on the part of a parent in trusting that such obligations of safety would be duly performed by the municipality or owner, and in allowing his child accordingly to pass into the grounds unattended the parent commits no negligent act. As for the child itself, while it may do things and incur dangers by inquisitively meddling with things which it should not touch, it is plain that, when the occurred danger, against which no protection or sufficient warning was directed to anybody, produces its unfortunate evil effect, the municipality or owner is answerable for these, and there is no defence of contributory negligence. LORD MACNAGHTEN made this observation in *Cooke* v. *Midland Great Western Railway of Ireland* (1) ([1909] A.C. at p. 236):

> "It does not seem unreasonable to hold that, if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves."

The present is a case much stronger than one of tacit permission to resort, and the observation which I have ventured to quote seems to me to apply with singular cogency to the owners or guardians of public property and places of recreation.

I do not find myself able to draw a distinction in law between natural objects, such as shrubs whose attractive fruitage may be injuriously or fatally poisonous, and artificial objects, such as machines left in a public place unattended and liable to produce danger if tampered with. The act of tampering might be contributory negligence on the part of a grown-up person, but would not be so reckoned on the part of a child. I think the language of COCKBURN, C.J., in *Clark* v. *Chambers* (6) still remains of the highest authority (3 Q.B.D. at p. 339):

> "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion."

I think that the same principle completely covers the present case, and that it does not make any difference that the object which produced the danger was an artificial machine or a growing shrub. I think that there was fault in having such a shrub where it was, without definite warning of its danger, and definite protection against the danger being incurred. To give such protection was part of the reasonable duty of the corporation, and citizens were entitled to rely upon it having been given.

I have stated the case as I view it, without entering upon those points as to allurement or trap which more naturally occur in the leave and licence cases. But I must not be held to dissent in any way from the view that has been taken in regard to that aspect of the case. I might indeed venture to repeat LORD SUMNER'S

A language in *Latham* v. *R. Johnson & Nephew, Ltd.* (2), and respectfully adopt it ([1913] 1 K.B. at p. 416):

> "The presence in a frequented place of some object of attraction tempting him to meddle where he ought to abstain may well constitute a trap and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier if he ought as a reasonable man to have
B anticipated the presence of the child and the attractiveness and peril of the object."

I do not desire to close my opinion without stating that I attach my express concurrence to the statement of LORD ATKINSON in regard to the true scope and effect of *Cooke* v. *Midland Great Western Railway of Ireland* (1).

C **LORD SUMNER.**—That this case must go to trial there can be no doubt. It was admitted by counsel for the appellants that the child had a right to be in the park where the bush was. If so, and if the pursuer can prove his allegations, the case would fall within the principle of *Lynch* v. *Nurdin* (5). How the right arose was not explained. Under their Act the defenders could have, but had not, made byelaws for the regulation of the park so as to affect this case. Perhaps the section
D would not justify total prohibition of the entrance of infants under the name of regulation, even if public opinion would tolerate it. Perhaps a regulation that a child must be, and remain, in the charge of some responsible person, as a condition both precedent and subsequent to its admission, would not be worth much in itself; and a jury might find that, being often evaded, it had been waived. On the other hand, the admission may have been meant no more than that the child
E was not doing wrong in being in the Botanic Garden, having an unconditional leave and licence from the defenders. Be this as it may, for present purposes I think that the admission must go to its full extent. As, however, it is an admission only, nothing is decided as to the rights of any other case in accepting it, and nothing prevents the nature of the admitted right from being further examined, if necessary, at a later stage of this case. The position, therefore, I take to be that the
F child had a right to be in the part of the park where the defenders had a right to grow their bush, and the law has to place the exercise of each of these two rights in a just relation to that of the other. The child had no right to pluck the berries; but the corporation had no right to tempt the child to its death, or to expose it to temptation without references to consequences. The question is, therefore, one of the relative duties of care between the corporation and the child, when each was
G exercising a right, and neither right was, as such, subordinated to the other. Nothing, I think, turns on the fact that the corporation's right arose out of ownership of the soil, and the child's did not. It would have made no difference in *Lynch* v. *Nurdin* (5) if the cart had belonged to the road authority, and the careless carter had been its servant, or if the soil of the road had belonged to the infant, and the cart had been there in the exercise of a public right of way.

H Further elaboration of the case at this stage is needless, and perhaps undesirable. I think that I can probably be of more service if I indicate what, in my opinion, your Lordships' decision does not involve than what it does. We are not dealing with trespassers, or with licensees, or with invitees, as such. Nothing is laid down as to the duty of private landowners towards such persons; nothing as to any general duty to erect fences, or to alter the natural features and state of private
I lands; nothing as to safeguarding at all hazards any children found thereon; nothing as to seen dangers, or as to places in which the presence of children is not to be expected. Such cases must be discussed in the light of other decisions appropriate to them. At the Bar some argument arose as to the pursuer's own responsibility in respect that he either had not effectually taught the child not to take what did not belong to it, or that he had not caused it to be in charge of someone able to take care of it while in the defenders' park. In some previous cases these points have been spoken of as going to the measure of care which the defenders owed to the child, so that the child would be entitled to no greater care

than an adult: *Stevenson* v. *Glasgow Corpn.* (4), per LORD JOHNSTON (1908 S.C. at p. 1036). The same learned judge, in *Reilly* v. *Greenfield Coal and Brick Co.* (9), speaks of a parent's negligence being the same, whether he sues as tutor-in-law for the injured infant to recover for it damages for injury or in his own right to recover solatium for himself, and says that such negligence is "attributable vicariously to the child." LORD ARDMILLAN, in *Grant* v. *Caledonian Rail. Co.* (10) (9 Macph. (Ct. of Sess.) at p. 464), regards the age of the infant as unimportant, for either the child was able to take care of itself, or, if not, it should have been taken care of by its parents. The parents' obligation has often been stated as being a material matter—for example, by ALDERSON, B., in *Lygo* v. *Newbold* (11), and by LORD KINNEAR and LORD SALVESEN in *Hastie* v. *Edinburgh Magistrates* (3): see also *Davidson* v. *Monklands Railways Co.* (12). It is evident that these propositions, although much alike, are not really identical. The child's own contributory negligence, in the true sense of the term, is for the defender to prove; so, it would seem, is the parents'. In the former case it must be direct or not remote; in the latter it is not easy to see, apart from cases where the parents' negligence is continuing so as to constitute a joint cause of the injury concurrent with the negligence of the defender, why the neglect to have the child better taught, or to keep it in charge of a competent person, is not too remote to be a contributory cause of the accident. On the other hand, if the child's inability to take care of itself is part of those circumstances which define the defenders' obligation of care, it is the pursuer who should prove it. Again, if the true proposition is that a parent can only sue for solatium in his own right where he can show that he has satisfied the condition precedent of having taken all reasonable precautions to protect the child from the consequences and risks of its own childishness, it is for him to prove the fulfilment of this condition. But what if the person provided, although proper, is careless; and what if the accident would have happened all the same, whether such a person was provided or not? If the parent, who presumably knows all about his child, did not anticipate risk enough to require that the child should not go alone, can it be negligence in the defenders, who do not, to take no precautions for their part in view of the possible tender age of the visiting child? If so, the matter is one to be raised by the defenders. Again, the pursuer no doubt owes a duty to his child; but what is the duty to be careful of the child which he owes to the defenders, as distinct from mere conduct on his part, qualifying him to recover his own solatium? The former duty the defenders would have to prove; the latter, as part of his own qualification, must be proved by the pursuer. I confess that, in view of such opinions as I have cited, the law on this point, in actions brought by the parent for the loss of his child, does not seem to me to be settled or even to be simple. If a parent sues because he is bereaved, what if it appears that, if he had done his parental duty, no harm would have come to the child, and he would not have been bereaved at all? Is the matter merely one of cause and effect? If a parent's neglect of that duty is not a cause, but at most a sine qua non of the child's death, who then in law has caused the child's death? I offer no opinion on any unsettled question. All that I desire to make quite clear is that, although these matters were discussed in the court below, and to some extent also at your Lordships' Bar, none of them has arisen for decision at this stage of the case, but they remain open if it becomes necessary to raise them later on.

The position is the same as to the age of the child. The question whether it was or was not capable of contributory negligence on its own part, just as the question whether the parents are or are not guilty of contributory negligence in fact, is untouched. It was contended before the Court of Session that a child has in such matters as this a separate and distinct right in regard to the care which is due to it—"that there is a recognised difference in law between the duty of public authorities to a child and to an adult": 58 Sc.L.R. at p. 158. This is not really a correct statement. Where a question is raised as to the care to be used between persons using the place where they respectively act, as of right, infancy as such is no more a status conferring right or a root of title imposing obligations on others

to respect it than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know of, or ought to anticipate, the presence of such persons within the scope and hazard of their own operations. I think that the appeal fails.

LORD WRENBURY concurred.

Appeal dismissed.

Solicitors: *Martin & Co.*, for *Campbell & Smith*, Edinburgh, and *Sir John Lindsay (Town Clerk)*, Glasgow; *Faithfull, Owen, Blair & Wright*, for *Menzies & White*, Edinburgh, and *Paterson & Ross*, Glasgow.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

FITCH *v.* DEWES

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Cave, Lord Sumner, Lord Parmoor and Lord Carson), June 2, 1921]

[Reported [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 37 T.L.R. 784; 65 Sol. Jo. 626]

Contract—Illegality—Public policy—Restraint of trade—Covenant by solicitor's managing clerk—Not to practise within specified distance of employer's business—No limit as to time—Public interest and protection of employer—Questions of fact.

The plaintiff, who was a solicitor, employed the defendant as managing clerk in his business under an agreement which provided that he should serve him for three years or more and that after the expiration of his term of service he would not, directly or indirectly, be engaged or concerned in the business of a solicitor within a radius of seven miles.

Held: the question whether or not the unlimited restriction as to time in the agreement was void as being in restraint of trade and so against public policy depended on whether it was against the public interest and whether it exceeded what was required for the protection of the plaintiff, and the answer to those two questions depended on the facts of the case; on the facts of the case and taking into account the limited restriction in the agreement as to space, the restriction as to time was in the public interest and was also reasonable to give the plaintiff the protection to which he was entitled.

Per LORD BIRKENHEAD, L.C.: It is in the public interest that a proper restrictive agreement of this kind between an established solicitor, possibly an elderly man, and a younger man should be allowed, because otherwise solicitors, perhaps carrying on business without a partner, would be extremely chary of admitting competent young men to their offices and to the confidential knowledge to be derived from frequenting those offices.

Decision of Court of Appeal, [1920] 2 Ch. 159, affirmed.

Notes. Considered: *Dickson* v. *Jones*, [1939] 3 All E.R. 182; *Empire Meat Co.* v. *Patrick*, [1939] 1 All E.R. 606; *Routh* v. *Jones*, [1947] 1 All E.R. 758. Referred to: *Connors Bros., Ltd.* v. *Connors*, [1940] 4 All E.R. 179; *Jenkins* v. *Reid*, [1948] 1 All E.R. 471; *Whitehill* v. *Bradford*, [1952] 1 All E.R. 115; *Ronbar Enterprises, Ltd.* v. *Green*, [1954] 2 All E.R. 206; *M. & S. Drapers (a firm)* v. *Reynolds*, [1956] 3 All E.R. 814.

As to agreements in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq.; and for cases see 43 DIGEST 19 et seq.

Case referred to:

(1) *May* v. *O'Neill* (1875), 44 L.J.Ch. 660; 43 Digest 68, *723*.

(2) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; 43 Digest 36, *326*.

Appeal by the defendant from an order of the Court of Appeal reported [1920] 2 Ch. 159, affirming a decision of EVE, J.

The plaintiff was a solicitor practising at Tamworth. The defendant first entered the plaintiff's service as a clerk in 1899. Later, he was given his articles, and by an agreement dated Aug. 17, 1912, it was agreed that he should serve the plaintiff as managing clerk for the term of three years from Dec. 31, 1911, and for such longer time as might be agreed upon, and that he should not, without the consent of the plaintiff, divulge any secrets or dealings in relation to the profession or business of the plaintiff, and would not during the said term engage in any similar profession or business without the written consent of the plaintiff. Clause 8 of the agreement was as follows:

> "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office, profession, or business of a solicitor within a radius of seven miles of the town hall of Tamworth, but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth or within the aforesaid radius thereof."

The agreement was modified by a memorandum on Feb. 5, 1914, giving the defendant the right to open an office at Nuneaton, some thirteen miles from Tamworth, and to carry on business there on his own account and for his own profit, but he was required to devote three days a week at least in the service of the plaintiff at his Tamworth office. On June 30, 1914, the employment of the defendant was terminated by the plaintiff and thereafter the defendant continued to practise at Nuneaton. In May, 1919, the defendant informed the plaintiff by letter that he intended to break the agreement of Aug. 17, 1912, for the purpose of having the position of the parties under it defined, and the plaintiff brought an action against the defendant for an injunction to restrain him from practising as a solicitor in breach of the agreement. EVE, J., granted the plaintiff a perpetual injunction (122 L.T. 366), and the defendant appealed. The Court of Appeal (LORD STERNDALE, M.R., WARRINGTON and YOUNGER, L.JJ.) affirmed that decision, being of opinion on the evidence that, notwithstanding the restriction was imposed for the whole of the defendant's life, and after the plaintiff's business had terminated, it was not unreasonable nor too wide for the proper protection of the plaintiff, and was not, as contended by the defendant, against the interest of the public. The defendant appealed.

Clayton, *K.C.*, and *John Harman* for the appellant.

Maughan, *K.C.*, and *Henry Johnston* for the respondent were not called on to argue.

LORD BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal dated May 4, 1920, which affirmed a judgment of EVE, J., in favour of the respondent. The question which requires decision at your Lordships' hands is whether or not an agreement, to which I will more particularly refer in a moment, in restraint of practice entered into by a solicitor upon his engagement by another solicitor as his managing clerk is valid. The facts in the cases are either admitted or have been the subject of concurrent findings in the courts below, and so far as I think them material I will very shortly summarise them.

The respondent has been for more than twenty years a solicitor practising at Tamworth, in the county of Warwick. In the year 1899 the appellant, who was then a youth of some fifteen years of age, entered into the employment of the respondent in the capacity of a junior clerk, and he continued in that employment

until June, 1914. In May, 1903, when the appellant was about nineteen years of age, he was articled to the respondent, and the articles contained, in anticipation of the time when the former would be in a position to practise, a stipulation in restraint of such practice upon which I do not think it is necessary to dwell inasmuch as further stipulations were made at a later date. On Jan. 22, 1908, an agreement entered into between the respondent and the appellant provided that if the appellant was successful in his final examination he should serve the respondent as managing clerk, and that agreement also contained a stipulation in restraint of practice by the appellant with which equally and for the same reason I think it is unnecessary to deal. By an agreement dated Aug. 17, 1912, the appellant undertook to serve the respondent as managing clerk for a term of three years from Dec. 31, 1911, or for such longer period as was contingently contemplated in the instrument. It is not necessary that I should trouble your Lordships with the further provisions of that agreement, but cl. 8, which falls to be construed, is in the following terms:

> "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office, profession or business of a solicitor within a radius of seven miles of the town hall of Tamworth, but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth or within the aforesaid radius thereof."

The appellant impeaches the clause which I have just read on the ground that it is against public policy as being in restraint of trade. The controversy is the old one between freedom of contract and certain considerations of public policy which have received much attention at the hands of the courts in the last few years. It is sufficient for me to say here that the contract was entered into between two solicitors; that at the time it was entered into the appellant had reached the age of twenty-seven years; he had been for some thirteen years employed in a solicitor's office; and it is reasonable to infer from the promotion which he had received, and from the evident appreciation which his employer had formed of his services, that he was a young man alert and very competent both to understand and to safeguard his own interests. The agreement then into which he entered, and in respect of which he has accepted for a lengthy period the consideration which was to move from the covenantee towards himself, is to stand unless he satisfies your Lordships that it is bad as being in restraint of trade.

What, then, is said by the appellant under that head? He does not complain of the restriction of space, and indeed it would have been very difficult for him to do so. The clause only restricts him from being directly or indirectly engaged in the office, profession or business of a solicitor within a radius of seven miles of the town hall of Tamworth. We need not, therefore, trouble ourselves with any question of the restriction in respect of space, but may confine ourselves to the complaint which is made that the agreement cannot stand because the restriction in respect of time is unlimited and is against the public interest. But it is to be noticed here, as has been said in more than one of the earlier cases, that guidance may be derived in dealing with a restriction relating to time from an examination of the restriction which is made in respect of space. And the converse remark is, of course, equally true. For instance, if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than would otherwise have been the case. The courts have been generous in elucidating these matters by the enunciation of general principles in the course of the last few years, and I am extremely anxious not to add to their number today. Therefore, I say plainly, and, I hope, simply, that it has for long now been accepted that such an agreement as this, if it is

impeached, is to be measured by reference to two considerations. First: Is it against the public interest? And, second: Does that which has been stipulated for exceed what is required for the protection of the covenantee? It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, does it exceed what is necessary for the protection of both the parties? But the impeachment which is in fact made in this case demands the consideration of this question only: Does the restriction which is attacked exceed that which was reasonably necessary for the protection of the covenantee? The answer to these questions is to be found in an examination of the circumstances, and counsel for the appellant was undoubtedly right when he said towards the close of his argument that in order to determine whether or not in a particular case such a restriction did exceed that which was so reasonable it became necessary to understand the facts of the particular case.

What, then, are the facts here? A boy of the age of fourteen is taken from a humble employment in the office of the local Co-operative Society, and he is trained in the office of a solicitor of position in this particular neighbourhood. He is plainly competent to acquire information with facility; he is presented with his articles by his employer; one agreement succeeds to another until he finds himself in a position within the town both of influence and of importance. In those circumstances, the agreement is entered into which contains the restriction which is now the subject-matter of litigation. What, then, is it in respect of which on such facts the covenantee is entitled to be protected, because it is not until we reach a conclusion upon this point that we shall be in a position to decide whether or not this restriction does in fact exceed that which is so required. I conceive that the covenantee is entitled to this. He is the founder, or at least the possessor, of the business of an attorney. Such a business depends upon the existence of goodwill, upon the association and the intimacy which exist between him who carries on that business and the clients of the firm, an intimacy founded upon many complex considerations not easily to be defined, but very easily to be understood. Such a covenantee is taking into his employment in his firm a young man in circumstances which make it quite certain that the latter will acquire a close and intimate personal acquaintance with the clients of this firm from whom, and from whom alone, of course, the business of the firm arises. How intimate were the opportunities given to the appellant in this case of acquiring a close acquaintance with the clients of the firm is made abundantly plain by some figures which were presented in evidence, and to which his counsel made reference, which distributed into percentages the number of interviews which took place in the office with the appellant and respondent respectively. The table which has been produced shows that in the year 1910 the respondent had 942 interviews and the appellant 322, the percentage of the appellant's interviews being 25; in 1911 the proportions were respondent 944, appellant 464—the appellant's percentage 33; in 1912, respondent 960, appellant 900—the appellant's percentage 48; in 1913, respondent 915, appellant 1,014—the appellant's percentage 52; in 1914, in the period of six months in relation to which we are told the appellant only attended three days a week, the respondent interviewed 519, the appellant 248—so that the appellant's percentage was 32. It is, therefore, clear that if you take the period between 1910 and 1914 it is not a very great exaggeration to say that half the people who came to this office, perhaps not particularly caring whom they saw, but merely asking to consult somebody who represented the business, were shown in to the appellant, so that under the ægis of the firm, he either originally made or continued their business acquaintance. This circumstance enables me to answer without the slightest ambiguity, so far as I myself am concerned, the question which I proposed a moment ago: What was it that in such a case the protection of the covenantee rendered reasonable? He was entitled, in my judgment, for his protection that that business which was his and to which he had admitted the appellant in the manner defined by the successive agreements should continue to be his, and that, if at any time the contract of employment between himself and

A his employee came to an end, on such determination the latter should not be in a position to use the intimacies and the knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place, and by doing so undermine the business and the connection of the respondent. I have only to ask myself whether the restriction which is contained in cl. 8 is excessive for that purpose, because I dismiss in this connection the contention B which was not seriously argued that there is anything in such a clause which is in conflict with the public interest. Indeed, I am of opinion that it is in the public interest that a proper restrictive agreement of this kind between an established solicitor, possibly an elderly man, and a younger man should be allowed. It is in the public interest because, otherwise, solicitors, perhaps carrying on their business without a partner, would be extremely chary of admitting competent C young men to their offices, and to the confidential knowledge to be derived by frequenting those offices. There is, therefore, nothing in the clause which I have read which conflicts with the public interest unless, of course, it exceeds what is necessary for the protection of the covenantee, in which case the excess itself would be against the public interest.

It is not contended that there is anything which is open to attack in cl. 8 except D that part of the clause which for all time excludes the appellant from carrying on practice within seven miles of Tamworth. Are we, then, to say that such a restriction so unlimited goes further than is permitted in relation to the standard which I have re-stated? I am of opinion that it does not go too far. One of your Lordships asked counsel for the appellant, in the course of his argument, what period in his judgment would be a reasonable period, and counsel replied that he E thought that ten years might be a reasonable period. Why? Why is it to be said that ten years is a reasonable period? I can quite easily understand that at the end of a period of ten years the appellant, who by this very clause is not prevented from maintaining and even developing his business acquaintance with the clients of the firm so long as he does not practise within a range of seven miles, might have retained all these circumstances of special, and as I think of illegitimate, F advantage for the purpose of competing with the business of the respondent, and then might come forward and do that very thing against which, in my judgment, the covenantee is abundantly entitled to be protected. Therefore, I should dismiss a period of ten years, and I should even say of twenty or thirty years that it was quite impossible to be dogmatic as to what was in each individual case the proper period. Some men live very long lives, and it might easily be that in a case in G which two men were both tenacious of life the very same danger which applies at this moment in this case would present itself, in a more striking and formidable shape, at the end of twenty years or at the end of an even longer period. I have no doubt that it is for this reason that the courts long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time and of space as one of H the elements by the light of which they would measure the reasonableness of the restriction taken as a whole. I am, therefore, for the reasons I have stated, of opinion that the attack which has been made upon this restriction fails. I find that it is not opposed to the public interest, and that it does not exceed what is reasonably required in the circumstances of this case for the protection of the covenantee.

I It is to be observed that a similar question was discussed in *May* v. *O'Neill* (1) by SIR GEORGE JESSEL, M.R., in 1875. The restriction in that case was far more oppressive than the one under consideration in the present case. The defendant bound himself to a London solicitor by articles for a certain term, and covenanted that he would not, at the expiration of the term, or any term thereafter, directly or indirectly practise the business of an attorney or a solicitor within the city of London or the counties of Middlesex or Essex. It may be that the outlook of the courts upon these doctrines has somewhat developed of recent years, though I do not find that the form in which the rules have been defined has differed very much

over a considerable period; but it is worth noticing that SIR GEORGE JESSEL upheld a restriction as rigorous as that which I have indicated. He says:

> "I think this case quite within both limits. However numerous the plaintiff's clients may be, there must be plenty left for the defendant, if he can gain their confidence, and there is nothing against the public interest in a clerk's agreeing not to take away the clients from his master."

So he granted an injunction. I must not be taken as necessarily assenting to the view taken by the Master of the Rolls upon a restriction so extremely wide as that with which he was dealing; it will be time enough for this House to pronounce upon it if and when such a case arises. But, confining myself to the restriction which is under consideration in this case, in my judgment, the attack upon it fails. It was a restriction which was reasonable in all the circumstances of the case, and in no way opposed to public policy. I move, your Lordships, therefore, that the appeal be dismissed, with costs.

VISCOUNT CAVE.—This is a contract in restraint of trade, and the question which we have to consider is whether the contract is so unrestricted in space or time, or both, as to render it unreasonable in reference either to the interests of the contracting parties or to the interest of the public. That the contract in this case is reasonably restricted as regards space is not in dispute. The restriction is confined to a radius of seven miles from the town hall at Tamworth, and only excludes the covenantor from practising in an area containing a population of about 20,000. No one would say that that is an unreasonable restriction. As regards time, there is no limit other than the life of the person entering into the contract, and the question is whether the clause is for that reason unreasonable from either point of view. But in considering that question we must not entirely put out of sight the limit of space, which may have a bearing upon the question arising as to the limit of time. It has been settled, I think, since *Hitchcock* v. *Coker* (2), that where there is a goodwill to be protected a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, and this although it may be necessary for the purpose to impose a restriction upon the covenantor for the remainder of his life. Here the practice to be protected is that of a solicitor, to which a goodwill is no doubt attached. It is manifest that a person employed in such a practice as managing clerk must, in the course of his dutes, acquire a knowledge of the affairs, the documents and the disposition of the clients of the business such as to give him a special equipment which he could, if not restrained by contract, use in obtaining employment as their legal adviser and so in impairing or perhaps destroying the goodwill of the business of his employer. The object being to protect the employer's business against the use of that special advantage, was it unreasonable to extend this covenant to the life of the employee? I think not. It is, I think, impossible to say that there must in every case be some specified limit of time defined by a figure. Nor can we say that the contract ought to be confined to the life of the covenantee, for he might die in the next year or so, and the goodwill might then be lost to his successors. It was, no doubt, thought necessary to continue the protection throughout the period during which the covenantee and his successors in interest might carry on the practice, and for that purpose to bind the appellant (so far as the limited area was concerned) for the remainder of his life. I cannot think that, in the circumstances of this case, the restriction imposed was unreasonable from any point of view, and, accordingly, I agree that the appeal fails, and should be dismissed.

LORD SUMNER.—I think the judgments below are right, and I concur in the motion which has been proposed from the Woolsack.

LORD PARMOOR.—I concur in the motion which has been made, and I agree that on both tests the agreement in restraint is, in this case, reasonable. The first

A question to be asked is whether the covenant is reasonable in the interests of the parties, and the only test of reasonableness between the parties is whether the covenant affords any more than adequate protection for the party in whose favour it is imposed. It is not a question of consideration between the parties, but whether the party in whose interests the restriction is imposed is seeking to obtain more than adequate protection. As regards the area of limitation, the limitation B is no more than is required. As regards the limitation of time, it appears to me, having regard to the business of a solicitor, that a restriction during the lifetime of the appellant is not too wide a restriction. It is, in fact, no more than adequate protection for a solicitor who desires to protect his professional secrets and to protect his clients from being enticed away by a former clerk who has had access to all his papers, and has been in direct personal relation with a number of his C clients. I should adopt myself the words used by YOUNGER, L.J., who says that the covenant does no more than protect the professional connection of the respondent, who is a solicitor. I think there is no public interest involved, and I concur in the motion proposed from the Woolsack.

LORD CARSON.—I concur in the motion which has been proposed by the D noble and learned lord on the Woolsack, for the reasons given by him.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *James, Barton & Kentish*, Birmingham; *Andrew, Wood, Purves & Sutton*, for *J. H. Dewes*, Tamworth.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

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CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS

[HOUSE OF LORDS (Viscount Finlay, Lord Dunedin, Lord Atkinson, Lord Summer and Lord Parmoor), April 21, 22, 25, June 6, 1921]

[Reported [1921] 2 A.C. 299; 90 L.J.K.B. 1160; 125 L.T. 642; G 85 J.P. 245; 37 T.L.R. 788; 65 Sol. Jo. 642; 27 Cox, C.C. 43; 15 Cr. App. Rep. 183]

Criminal Law—Appeal—New trial—Power of Court of Criminal Appeal to order —Trial a nullity—Prisoners charged on separate indictments and tried together—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1 (7), *s.* 4 (2), *s.* 20 (4).

H An indictment was preferred at quarter sessions for the city of L. against the appellant for receiving skins knowing them to be stolen. One M. was charged on a separate indictment containing two counts, one for stealing and the other for receiving the skins. At the trial M. and the appellant were given in charge to the same jury and tried together, it being erroneously supposed that they were jointly indicted. Both were found guilty. On an appeal by I the appellant,

Held: (i) the words "convicted on indictment" in s. 3 of the Criminal Appeal Act, 1907 (which provided that a person so convicted might appeal against his conviction to the Court of Criminal Appeal), did not mean "validly convicted," and, therefore, a person against whom there stood a conviction, which, however, was a nullity by reason of irregularity at the trial, was not debarred from appealing under s. 3; persons charged in separate indictments could not be tried together, and, therefore, the whole proceedings against the appellant were a mis-trial and a nullity and the indictment on which he was

charged stood as if he had never been tried; s. 4 (2) of the Act of 1907 (which provided that if the Court of Criminal Appeal allowed an appeal against conviction they should quash the conviction and direct a judgment of acquittal to be entered) was "subject to the special provisions of" s. 1 (7) of the Act (which gave the court power to determine "any questions necessary to be determined for the purpose of doing justice in the case before the court") and s. 20 (4) (which transferred to the court the jurisdiction and authority of the Court for Crown Cases Reserved); in the present case it was necessary "for the purpose of doing justice" (s. 1 (7)) that the appellant should be tried for the offence for which he had been indicted but never legally tried, and part of the jurisdiction of the Court for Crown Cases Reserved which had been transferred to the Court of Criminal Appeal (s. 20 (4)) was the power in a proper case to grant a venire de novo; and, therefore, the Court of Criminal Appeal had power to annul the conviction of the appellant and order that he "do appear at the next quarter sessions to be holden in and for the city of L. there to take his trial according to law upon the said indictment."

So **held** by LORD DUNEDIN, LORD ATKINSON, LORD SUMNER and LORD PARMOOR (VISCOUNT FINLAY dissentiente).

Notes. Followed: *R.* v. *Dennis*, *R.* v. *Parker*, [1924] 1 K.B. 867. Applied: *R.* v. *Williams* (1925), 19 Cr. App. Rep. 67; *R.* v. *McDonnell* (1928), 20 Cr. App. Rep. 163. Referred to: *R.* v. *Morton* (1920), 15 Cr. App. Rep. 30; *R.* v. *Hammer*, [1923] 2 K.B. 786; *R.* v. *Gee*, *R.* v. *Bibby*, *R.* v. *Dunscombe*, [1936] 2 All E.R. 89; *R.* v. *Cronin*, [1940] 1 All E.R. 618; *R.* v. *Davies*, *Ex parte Delbert-Evans*, [1945] K.B. 435; *R.* v. *Neal*, [1949] 2 All E.R. 438.

As to the power of the Court of Criminal Appeal to grant a new trial, see 10 HALSBURY'S LAWS (3rd Edn.) 540, 541; and for cases see 14 DIGEST (Repl.) 661–666. For Criminal Appeal Act, 1907, see 5 HALSBURY'S STATUTES (2nd Edn.) 926.

Cases referred to:

(1) *R.* v. *Baker* (1912), 7 Cr. App. Rep. 217; 14 Digest (Repl.) 661, *6704*.

(2) *R.* v. *Ingleson*, [1915] 1 K.B. 512; 84 L.J.K.B. 280; 112 L.T. 313; 24 Cox, C.C. 527; 11 Cr. App. Rep. 21; 78 J.P.Jo. 521, C.C.A.; 14 Digest (Repl.) 661, *6706*.

(3) *R.* v. *Golathan* (1915), 84 L.J.K.B. 758; 112 L.T. 1048; 79 J.P. 270; 31 T.L.R. 177; 24 Cox, C.C. 704; 11 Cr. App. Rep. 79, C.C.A.; 14 Digest (Repl.) 661, *6707*.

(4) *R.* v. *Wakefield*, [1918] 1 K.B. 216; 87 L.J.K.B. 319; 118 L.T. 576; 82 J.P. 136; 34 T.L.R. 210; 62 Sol. Jo. 309; 26 Cox, C.C. 222; 13 Cr. App. Rep. 56; C.C.A.; 14 Digest (Repl.) 662, *6711*.

(5) *R.* v. *Edmonds* (1821), 4 B. & Ald. 471; 1 State Tr.N.S. 785; 106 E.R. 1009; 30 Digest (Repl.) 256, *135*.

(6) *R.* v. *Fowler* (1821), 4 B. & Ald. 273; 106 E.R. 937; 14 Digest (Repl.) 367, *3557*.

(7) *Campbell* v. *R.* (1846), 11 Q.B. 799; 15 L.J.M.C. 76; 10 Jur. 329; 1 Cox, C.C. 269; affirmed (1847), 11 Q.B. 814; 2 New Mag. Cas. 354; 17 L.J.M.C. 89; 10 L.T.O.S. 396; 12 Jur. 117; 2 Cox, C.C. 463; 116 E.R. 680, Ex. Ch.; 14 Digest (Repl.) 376, *3682*.

(8) *Winsor* v. *R.* (1866), L.R. 1 Q.B. 390; 7 B. & S. 490; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; 12 Jur.N.S. 561; 14 W.R. 695; sub nom. *R.* v. *Winsor*, 10 Cox, C.C. 327, Ex. Ch.; 14 Digest (Repl.) 370, *3590*.

(9) *R.* v. *Mellor* (1858), Dears. & B. 468; 27 L.J.M.C. 121; 30 L.T.O.S. 309; 22 J.P. 191; 4 Jur.N.S. 214; 6 W.R. 322; 7 Cox, C.C. 454; 169 E.R. 1084, C.C.R.; 30 Digest (Repl.) 265, *287*.

(10) *R.* v. *Yeadon and Birch* (1861), Le. & Ca. 81; 31 L.J.M.C. 70; 5 L.T. 329; 26 J.P. 148; 7 Jur.N.S. 1128; 10 W.R. 64; 9 Cox, C.C. 91, C.C.R.; 14 Digest (Repl.) 359, *3496*.

A (11) *R.* v. *Murphy* (1869), L.R. 2 P.C. 535; 6 Moo.P.C.C.N.S. 177; 38 L.J.P.C. 53; 17 W.R. 1047; 16 E.R. 693; sub nom. *A.-G. for New South Wales* v. *Murphy*, 21 L.T. 598; 11 Cox, C.C. 372, P.C.; 14 Digest (Repl.) 347, *3360.*

(12) *R.* v. *Dickman* (1910), 74 J.P. 449; 26 T.L.R. 640; 5 Cr. App. Rep. 135, C.C.A.; 14 Digest (Repl.) 627, *6430.*

(13) *R.* v. *Martin* (1872), L.R. 1 C.C.R. 378; 41 L.J.M.C. 113; 26 L.T. 778; 36 B J.P. 549; 20 W.R. 1016; 12 Cox, C.C. 204, C.C.R.; 14 Digest (Repl.) 343, *3325.*

(14) *R.* v. *Dyson*, [1908] 2 K.B. 454; 77 L.J.K.B. 813; 99 L.T. 201; 72 J.P. 303; 24 T.L.R. 653; 52 Sol. Jo. 535; 21 Cox, C.C. 669; 1 Cr. App. Rep. 13, C.C.A.; 14 Digest (Repl.) 650, *6614.*

Appeal from an order of the Court of Criminal Appeal, reported [1920] 3 K.B. C 236.

The appellant, William Crane, was convicted on an indictment which charged him with receiving certain skins knowing them to have been stolen. One Morton was charged on a separate indictment with stealing the skins and also with receiving the same. Both prisoners were tried together at Leicester Quarter Sessions and were convicted, Crane being sentenced for receiving to twelve months' imprison- D ment with hard labour. Crane appealed to the Court of Criminal Appeal on the ground of misdirection and that the verdict was against the weight of evidence. On the hearing of the appeal the court discovered that the prisoners, though given in charge to the same jury, were charged on separate indictments, and the court, being of opinion that there had been a mis-trial, quashed the conviction, ordered that the appellant should be tried according to law at the next quarter sessions at E Leicester, and admitted him to bail in the meantime. The appellant claimed that when the Court of Criminal Appeal quashed the conviction they were bound to enter a judgment of acquittal for him. The point thus raised as to the power of the Court of Criminal Appeal to award a venire de novo was submitted to the Attorney-General (SIR GORDON HEWART, K.C.), who certified that the matter of the appeal by Crane "involved a point of law of exceptional public importance" F within the meaning of the Criminal Appeal Act, 1907, and that it was desirable, therefore, that the question should be considered by the House of Lords.

J. B. Matthews, K.C., and *Wightman Powers* for the appellant.

The Attorney-General (Sir Gordon Hewart, K.C.), Travers Humphreys and *F. Hinde* for the respondent.

G The House took time for consideration.

June 6. The following opinions were read.

VISCOUNT FINLAY.—An indictment was preferred against Crane at the Leicester City Quarter Sessions for receiving skins knowing them to have been stolen. Morton was charged on a separate indictment containing two counts, the H one for stealing, the other for receiving the skins. Crane and Morton were given in charge to the same jury and were tried together. Crane was found Guilty, also Morton. Notice of appeal was given on behalf of Crane on the ground that the verdict was against the weight of evidence and of misdirection, also that the summing-up was unfair and the sentence excessive. On the hearing of the appeal it was pointed out from the Bench that there was no joint indictment, and it was J suggested that the trial might be a nullity. LORD READING, C.J., in giving judgment, after stating the course of proceedings, said:

> "At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth there were separate indictments. The result is that there never has been a trial at all. It is sufficient for this court to say that the proceedings were void ab initio. It has been argued that the proceedings were only irregular and that where there was an irregularity in procedure, the court

could not treat the trial as a nullity. But that argument cannot be accepted. The court must view the proceedings as if there had been no trial at all." A

The Lord Chief Justice proceeded, after citing *R.* v. *Baker* (1), *R.* v. *Ingleson* (2), *R.* v. *Golathan* (3), *R.* v. *Wakefield* (4), to say:

"These cases are, in our opinion, authority for the course which this court proposes to take in this case, that is, to treat the verdict and sentence as a nullity. Following the course taken in *R.* v. *Baker* (1), the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant on which no trial has taken place. He must stand his trial on that indictment." B

The order of the court was:

"Upon consideration being this day had by the Court of Criminal Appeal, as duly constituted for the hearing of appeals under the Act, of the appeal of the above-named appellant against conviction, the court doth finally determine the same and doth order that the conviction and judgment on the indictment whereupon the appellant was convicted be set aside and annulled and that the appellant do appear at the next quarter sessions to be holden in and for the city of Leicester there to take his trial according to law upon the said indictment and that in the meantime the appellant be admitted to bail upon his own recognizance in the sum of £80 and upon the recognizance of two sufficient sureties in the sum of £40 each." C D

Crane appealed against the words in the order: "that the appellant do appear at the next quarter sessions to be holden in and for the city of Leicester there to take his trial according to law upon the said indictment." In other words, he asked that judgment of acquittal should be entered. The Attorney-General gave his certificate on the ground that the appeal involved a point of law of exceptional public importance, and that it was desirable in the public interests that a further appeal should be brought. E

It was contended on behalf of the appellant at your Lordships' Bar that the Court of Criminal Appeal must, if they allow an appeal against a conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. The question turns upon the terms of the Act setting up the Court of Criminal Appeal, the Criminal Appeal Act, 1907. Section 1 of that Act provides for the constitution of a Court of Criminal Appeal, and by sub-s. (7) enacts: F

"The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court." G

Section 3 gives the power of appeal on certain grounds:

"A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(a) against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law." H I

It is necessary also to refer to sub-ss. (1) and (2) of s. 4:

"(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision

A of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. (2) Subject to the special provisions of this Act, the Court of Criminal Appeal B shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

Section 5 is as follows:

"(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been C properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted. (2) Where an appellant has been convicted of an offence and the jury could D on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be E warranted in law for that other offence, not being a sentence of greater severity. (3) Where on the conviction of the appellant the jury have found a special verdict and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears F to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law. (4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made, so as not to be responsible according to law for his actions, the court may quash the sentence passed G at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act."

The only other provisions to which it is necessary to refer are sub-ss. (1) and (4) of s. 20:

H "(1) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished. . . . (4) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of I Criminal Appeal, under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a Case should be followed and require a Case to be stated accordingly under that Act in the same manner as if a question of law had been reserved."

The clause mainly relied upon by the appellant was s. 4 (2), which provides that, subject to the special provisions of the Act, the court shall, if they allow an appeal,

direct judgment and verdict of acquittal. It was argued that there is no special provision in the Act which authorises the direction in the order that the appellant should appear at the next quarter sessions to take his trial upon the indictment. It appears to be clear upon the terms of the Act (s. 4 (2)) that, if an appeal is allowed, an acquittal must be entered unless there is something to the contrary to be found in the special provisions referred to in the subsection. The Crown relied greatly upon s. 1 (7) as giving a general power to make orders according to the circumstances of the particular case. I am unable to read the subsection in this way. There are no words in it which authorise the making of any order. All that it does is to give "full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court." There is no general power here to make any order which the court thinks justice requires. The power, and the only power, conferred is to determine any question necessary to be determined for the purpose of doing justice in the case. It appears to me that it would be contrary to all principles of construction to construe these words as giving power to make any order other than those authorised by the Act. What it does is to authorise the court to "determine in accordance with the Act" any question necessary to enable it to see that the order made does justice, and this power is conferred "subject to the provisions of this Act." Justice might require a new trial, but there is no power to order it.

A good deal of argument was devoted to s. 4 (1). That subsection provides that the appeal shall be allowed in four cases: (i) If the court thinks that the verdict should be set aside on the ground that it is unreasonable; (ii) if they think that it cannot be supported having regard to the evidence; (iii) if they think that the judgment should be set aside on the ground of a wrong decision on any point of law; (iv) if they think that on any ground there was a miscarriage of justice; and it goes on to provide that the court "in any other case shall dismiss the appeal." There is a proviso that the court may dismiss the appeal if they consider that no miscarriage of justice has actually occurred. It was contended for the Crown that this subsection applies only to cases therein specified, and that the present case is not one of them. But, in fact, this subsection covers the whole ground and applies to the present case. The court is to allow the appeal (subject to the proviso) if any one of the four grounds enumerated is made good, "and in any other case shall dismiss the appeal." This subsection deals with every possible case of appeal. Every appeal either does or does not fall within the four enumerated grounds; in the first case it is to be allowed, always subject to the proviso; in the second case it is to be dismissed. Then follows sub-s. (2), with its enactment that, subject to any special provisions of the Act, the court shall, if they allow an appeal, quash the conviction and direct a judgment and verdict of acquittal. If the appeal is dismissed there is, of course, an end of the matter, and sub-s. (2) is clear that, if the court allows an appeal, there is to be an acquittal subject to the special provisions of the Act. Section 5 makes what appear to me to be "the special provisions referred" to in s. 4 (2). Subsection (1) provides for a case in which the appellant, though not properly convicted on part of the indictment, has been properly convicted on some other part, and gives power either to affirm the sentence passed or to pass an appropriate sentence. Subsection (2) deals with any case in which the appellant has been convicted of an offence, and the jury could, on the indictment, have found him guilty of some other offence, and provides that if it appears to the court that the jury must have been satisfied of the facts which proved him guilty of that other offence, the court may substitute a verdict of "Guilty" of that other offence. Subsection (3) provides for the case of a special verdict on which a wrong conclusion has been arrived at by the court below, and gives power to the Court of Criminal Appeal to draw the right conclusion. Subsection (4) provides for the case of insanity. Each of these provisions (correctly described in the marginal note as "powers of court in special cases") is a qualification of the general enactment in s. 4 (2). They exactly answer the description of "the special provisions" and the section containing them imme-

A diately follows s. 4. It appears to me that there are no other parts of the Act which can be made to fit the description in s. 4 (2) of "the special provisions."

I have already referred to s. 1 (7) the first case suggested by the Crown as a "special provision" within s. 4 (2). I have given my reasons for my view that it does not bear the meaning which the Crown seek to put upon it. But in any case it does not answer the description of a "special provision." The second case B suggested by the Crown as a "special provision" under s. 4 (2) arises under s. 20. Section 20 begins by abolishing writs of error. But for this provision the miscarriage in the present case could have been at once corrected. It would appear on the face of the record that, although there were separate indictments, the two men had been tried together. The verdict would have been quashed and a venire de novo awarded. The section goes on to abolish the powers and practice pre- C viously existing in the High Court as to new trials in criminal cases, so that we must now look only to the provisions of the present Act if there is anything that requires to be set right. The second part of the Act on which the Crown relied as one of "the special provisions" under s. 4 (2) is s. 20 (4). That subsection vests in the Criminal Appeal Court the jurisdiction and authority of the court under the Crown Cases Act, 1848, in relation to questions of law on criminal trials, and D provides that, if there is an appeal which involves a question of law alone, the court may decide that the procedure under the Crown Cases Act, 1848, as to the statement of a Case should be followed, and require the Case to be stated in the same manner as if a question of law had been reserved. I respectfully think that it would be a mistake to regard this as one of the "special provisions" within the meaning of s. 4 (2). It is a provision of a general nature as to procedure under E the Crown Cases Act, 1848. The ingenious argument by which counsel for the Crown tried to show that this clause amounted to a special provision, as I understand it, was this. The Court for Crown Cases Reserved had, it was said, power to award a venire de novo and this power was transferred to the Court of Criminal Appeal under the general words of s. 20 (4). It is far from clear that the Court for Crown Cases Reserved had this power—indeed, there is only one case, so we F are informed, in which such a power was exercised by that court and that case was in 1861. But assuming that the Court for Crown Cases Reserved had that power, would this clause transfer it to the Court of Criminal Appeal? I think not. To get rid of the effect of the precise enactment of s. 4 (2) you must find something in "the special provisions" to the contrary. The transfer of the jurisdiction under the Crown Cases Act is not such a special provision. The enactment in s. 20 (4) G cannot override the express provisions of s. 4 (2) unless there were something to show that it was intended so to operate. It is indeed alien to the scope of s. 20 (4) to regard it as anything but a general enactment transferring to the Court of Criminal Appeal the powers of the Court for Crown Cases Reserved. Assuming this latter court had the power to issue a venire de novo, can such a general transfer be regarded as overriding the express enactment that if an appeal is H allowed the Court of Appeal shall direct a verdict of acquittal? If anything of the kind had been intended, there would have been a special provision to that effect. One cannot rely for such a purpose upon a general enactment under which, amid all the powers of the Court for Crown Cases Reserved, lurks the power to order a venire de novo. In truth "the special provisions" are the group of provisions in the next section, s. 5.

I But, indeed, the Court of Criminal Appeal have not ordered a venire de novo. Their order proceeds on the basis that the trial was a nullity and that the proceedings should simply be resumed at the point where the mistake was made. It was urged before your Lordships, as it had been urged in the Court of Criminal Appeal, that the whole proceedings at the Leicester City Sessions were a nullity, that there had been in truth no trial at all, and that Crane should go to Leicester to be tried on the indictment. It is suggested that the proceedings should simply be taken up at the point at which they stopped; that he was wrongly given into the charge of the jury jointly with Morton; that all the subsequent proceedings

at the Leicester sessions may be regarded as non-existent; and that the trial should now take place. I cannot accept this view of the case. The trial of Crane was not a nullity. But for the fact that it had been quashed by the Court of Criminal Appeal, these proceedings would have been for Crane a very grim reality. The idea appears to be that Crane was tried upon a non-existent indictment in which it was supposed that he and Morton were jointly charged. I do not think that this is a correct view of the situation. Crane was tried upon the indictment against him separately, the only indictment that existed. It is true that a very grave irregularity occurred. Along with him Morton was tried, and this irregularity supplied ample grounds for quashing the conviction which ensued. But to treat the proceedings which followed the giving of the persons in charge as a nullity appears to me to be playing with words. They were so irregular that they have had to be set aside, and the result is that in the terms of the Act there must be judgment of acquittal.

The sentence upon Crane would have been a good return to a writ of habeas corpus. Proceedings which are a nullity could afford no justification for imprisonment. If the trial was a nullity, the recorder might forthwith have proceeded to try Crane again without any order from the Court of Criminal Appeal. The same result would have followed if the jury had found Crane "Not Guilty"—if the proceedings were a nullity, there was no trial and no verdict. The theory of nullity does not bear examination.

It is not the fact that Crane was tried upon a non-existent indictment. Persons with knowledge of criminal practice may have supposed that there must have been a joint indictment. But, in fact, there was none, and he was tried on the separate indictment.

I do not think that there was any slip in the drafting of the Act. It appears to me that it was the deliberate policy of the legislature in this Act to prevent any further proceedings such as would have taken place on an award of a venire de novo by the Court of Error or the granting of a new trial by the High Court in criminal cases. If the appeal was allowed, the defendant was to be acquitted, and there was to be nothing which could be represented as putting a man in peril a second time on a criminal trial. Whatever view may be taken of the policy embodied in the Act, any alteration must be a matter for the legislature. In the present case it appears that the Act may lead to a grave miscarriage of justice by putting an end to proceedings which have miscarried under a mere blunder at quarter sessions. But it does not fall within the province of any court of law to try to correct an occasional injustice arising from a statute by putting a strained construction upon its provisions. In my opinion, the appeal should be allowed.

LORD ATKINSON.—In this case the two persons accused were tried together as if they had been jointly indicted, as they might have been under the Larceny Act, 1861, s. 91. They were not jointly indicted. On the contrary, an indictment was found against one of them charging him in one count with stealing goods, and in a second count with receiving those goods knowing them to have been stolen, and another and independent indictment was found against the appellant, William Crane, charging him with the offence of receiving goods knowing them to have been stolen. When an accused person has pleaded "Not Guilty" to the offences charged against him in an indictment, and another accused person had pleaded "Not Guilty" to the offence or offences charged against him in another separate and independent indictment, it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together. It is obvious that many inconveniences would arise in practice if they were tried together; one among them would be that in a case where a felony was charged against each the one might by his peremptory challenges put off from the jury the very men by whom the other desired to be tried, whereas had they been indicted jointly and did not join in their challenges they might have been and probably would have been tried in succession and only those jurors whom the person on trial

objected to would have been peremptorily challenged. But that consideration is, in my view, quite beside the point. The appellant, Crane, was never, as far as I can discover, properly arraigned in the indictment found against him. He never pleaded to that indictment, the jury who found him guilty were never sworn to try him separately, and had no jurisdiction to find against him the verdict they have found. The whole proceedings were, in my view, as against him, a mis-trial and a nullity. When the conviction and judgment against him, Crane, had been set aside and annulled as they, most properly, have been by the Court of Criminal Appeal, the indictment found against him stands, in my view, as if he never had been tried at all. It is, I think, plain that if under the old practice this mis-trial had been brought before the Court of Queen's Bench on a writ of error, the error in the proceedings being set out in full on the record as it must have been, the verdict and judgment would have been set aside and annulled, and a venire facias juratores de novo would have been awarded.

In *R.* v. *Edmonds* (5) the accused, who was indicted for a misdemeanour, took two challenges, one to the array of the jurors and the other to the polls, but took them before a full jury had appeared, a fatal defect. These challenges were disallowed. ABBOT, C.J., in delivering judgment, said:

> "It must be further observed that the disallowing of a challenge is a ground not for a new trial but for what is strictly and technically a venire de novo. The party complaining thereof appeals to the court, not for the exercise of the sound discretion of the judges but for the benefit of an imperative rule of law, and the proper granting or the improper refusing of a challenge is alike the foundation of a writ of error. Every challenge to the array or to the polls ought to be propounded in such a way that it may be put at the time on the nisi prius record. The distinction between a venire de novo properly so called and a new trial is here clearly taken."

In *R.* v. *Fowler* (6) the two accused were, at quarter sessions for the county of Sussex, indicted for the felony of stealing. They pleaded "Not Guilty," and put themselves upon their county. Upon the indictment they were found guilty. The record stated that after the evidence had been given and after the jury had retired to consider their verdict, one of the jurors, before the delivery of the verdict, had, without the permission of the justices, separated himself from his fellows and held conversation with a person, not a member of the jury, concerning the trial and the verdict about to be given. The justices thereupon quashed the verdict given as bad and erroneous, and ordered that a new jury should come before the justices at the next general quarter sessions of the peace for the county of Sussex to be held at Chichester, to try whether the defendants or either of them were guilty of the premises charged in the indictment against them. The accused were tried at the quarter sessions at Chichester and convicted. A writ of error was applied for in the Court of King's Bench on the ground that the justices so assembled had no jurisdiction to try the accused on the indictment so found. The court, in giving judgment, said:

> "The verdict imposed was either good or bad. If it was good, then the second trial was coram non judice, and might be considered a nullity. If, on the other hand, the first verdict was bad, then, inasmuch as the prisoners had put themselves on the county, they might well be tried at the next sessions, and the second trial was not to be considered as a new trial, but the first trial was to be considered as a mis-trial, and, therefore, as a nullity."

See also *Campbell* v. *R.* (7), a decision which, in *Winsor* v. *R.* (8), was criticised and approved of by LORD BLACKBURN.

The fact that the trial of Crane was rightly held to be a mis-trial and a nullity does not disentitle him, under s. 3 of the Criminal Appeal Act, 1907, to appeal against it. He is still a person convicted on an indictment within the meaning of that section, since those words cannot mean validly convicted, otherwise the statute would be futile and unworkable. The provisions of s. 4 clearly show that

convictions which the Court of Criminal Appeal decide to be bad may be and are properly brought before them by the person convicted. The very purpose for which the court was created was to consider whether the convictions of persons who had, in fact, been convicted were valid or the contrary, and to deal with them accordingly. The Act of 1907, by s. 20, abolishes not only writs of error, but in addition the powers and practice of the High Court, as they then existed, in respect of motions for new trials or the granting thereof in criminal cases. As by s. 1 (7) of this statute jurisdiction is conferred upon the court by it created to determine, subject to and in accordance with its provisions, any questions necessary to be determined for the purpose of doing justice in a case before it, one would naturally expect to find that the statute would provide some adequate substitute for the machinery, so protective of the rights of the subject, which by s. 20 it so completely sweeps away. This feature of this statute is in marked contrast with the provisions of s. 5 of the Crown Cases Act, 1848, which created the Court for Crown Cases Reserved. That section, so far from abolishing writs of error, increased the powers and improved the procedure of Courts of Error dealing with criminal cases. In the important case of *R.* v. *Mellor* (9), to be presently referred to, much importance was attached to what was in this respect affected by this s. 5; and it would appear to me that in the construction of the Act of 1907 one is similarly entitled to attach much importance to the sweeping provision of s. 20. If some adequate substitute be not expressly or impliedly provided for the valuable machinery which is thus taken away, one would be forced to the conclusion that a mischievous and unaccountable blunder, most hurtful to the subject and embarrassing in the administration of justice, had been committed in the drafting of the Act.

By sub-s. (4) of this same s. 20 all the jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which are transferred to judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, are vested in the Court of Criminal Appeal. It is necessary to consider what is the nature and extent of the jurisdiction and authority thus transferred and vested. The Act of 1848, by its first section, provided that, where a person shall have been convicted of any treason, felony, or misdemeanour before any court of oyer and terminer or gaol delivery or quarter sessions, the judge, commissioner, or justices of the peace before whom the case shall have been tried may in his or their discretion reserve any question of law which shall have arisen at the trial for the consideration of the justices of either Bench and Barons of the Exchequer. The judge, commissioner, or court of quarter sessons so reserving this question of law, is to state in a Case in the manner usual the question of law so reserved, with the circumstances in which same shall have arisen, and this Case is to be transmitted to the justices and barons (s. 2). The Court of Criminal Appeal may, to an appropriate extent, adopt and follow this procedure where a person convicted appeals against a conviction on any ground of appeal involving a question of law alone: s. 20 (4). It is most important to consider what by this same s. 2 of the Act of 1848 the justices and barons are empowered to do when the case comes before them. They are empowered finally to hear and determine the question or questions so reserved, and thereupon to

> "reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition in the trial of which the said question or questions shall have arisen, or to avoid such judgment and to order that an entry be made on the record that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer and of gaol delivery or other sessions of the peace, if no judgment shall have before that been given, as they shall be advised, or to make such other order as justice shall require."

The important question for the purposes of the present case is to determine

whether these last ten words empowered the justices and barons, in addition to holding that the trial in which the question referred to them was a mis-trial, to award a venire de novo. If they had that power, it has passed to the Court of Criminal Appeal under s. 20 (4) of the Act of 1907, even if they had not got the same power, which is by no means admitted, under some of the other provisions of this Act of 1907. This question has given rise to a most marked division of judicial opinion, in *R.* v. *Mellor* (9) already mentioned. In that case Aaron Mellor was tried at the Liverpool Assizes for murder, was convicted, and was sentenced to death. The jury panel contained the names of two men, one named I.T. and the other named W.T. The name of I.T. was called when W.T. by mistake answered and was, without objection, sworn. The mistake that had been made was discovered next day, and a question was reserved by WIGHTMAN, J., who had tried the case, for the opinion of the Court for Crown Cases Reserved as to the effect of what had happened. Fourteen judges, including LORD CAMPBELL, C.J., COCKBURN, C.J., and PIGGOTT, C.B., composed the court which heard and decided the question of law referred. Eight, including the Chief Baron, held that the mistake was only a ground of challenge, and did not make the trial which had been held a mis-trial, and apparently held also, but this is not quite so clear, that even if it had made the trial a mis-trial a venire de novo could not have been awarded, and that the verdict and judgment should not be disturbed. Six judges, including LORD CAMPBELL, C.J., and COCKBURN, C.J., held that this was a mis-trial, and that a venire de novo could properly be awarded. The ground the minority chiefly relied upon to show that the trial was a mis-trial was that the mistake interfered with the prisoner's right of challenge, inasmuch as he might well have had no objection to the juror whose name was called, but every objection to the juror who was sworn had he known who that juror really was. The six learned judges who composed the minority were LORD CAMPBELL, C.J., COCKBURN, C.J., COLERIDGE and WIGHTMAN, JJ., and MARTIN and WATSON, BB. The majority was composed of PIGGOTT, C.B., EARLE, WILLIAMS, COMPTON, WILLES and BYLES, JJ., and CROWDEN and CHANNELL, BB. LORD CAMPBELL, C.J., delivered an exhaustive judgment, reviewing all the authorities, and held that the language of the statute should be liberally construed; that the trial was a mis-trial, and that the words "or make such other order as justice may require" justified the award of a venire de novo when there was a mis-trial. The remaining five judges, forming the minority, apparently agreed with him, but while the judges of the majority apparently held that there had been no mis-trial, they did not agree as to the grounds upon which they respectively based their opinions that, even had there been a mis-trial, a venire de novo could not have been awarded. For instance, PIGGOTT, C.B., relied much on the existence of the power expressly preserved to an accused person by the Act of 1848 to proceed by writ of error. WILLIAMS, J., held that the question referred was not a question of law arising at the trial within the meaning of the statute, since the mistake was only discovered after the trial had concluded, and that, therefore, the court had no jurisdiction to deal with it. COMPTON, J., relied upon the fact that there was no record of fact found by the judge before them, but seemed to think that there was no power in the court to grant a venire de novo. CROWDEN, B., thought there was no mis-trial, but doubted whether the case fell within the statute. WILLES, J., agreed with the Chief Baron, and CHANNELL, B., based his opinion that there could be no venire de novo on this ground, that the statute required that the court should "hear and finally determine the question referred."

There was not, of course, any means of reviewing the decision of the Court for Crown Cases Reserved, touching the construction they put upon the Act which called it into existence, or as to the nature and limits of its powers and authority. It is extremely difficult to say whether the result of all the conflicting opinions delivered in that case was not that in a case where there has, as in the present case, been a real and undoubted mis-trial, the court had power to award a venire de novo. The learned judges composing the majority do not, it would appear to

me, seem ever to have faced the difficulty which would arise in a case like the present, where the trial in which the verdict was found was such a mis-trial that the conviction could not by any possibility be lawfully affirmed, and yet justice imperatively required that the accused should be tried on the indictment found against him. A

In the doubt and difficulty which the decision in *R.* v. *Mellor* (9) leaves one, the decision in *R.* v. *Yeadon and Birch* (10) becomes most important and helpful. The court there was composed of POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., and MARTIN and CHANNELL, BB. Of these, POLLOCK, C.B., WILLIAMS, J., and CHANNELL, B., had formed three of the majority of eight which decided *R.* v. *Mellor* (9). In *R.* v. *Yeadon and Birch* (10) the accused was tried at the quarter sessions for the West Riding of Yorkshire at Bradford under the Criminal Procedure Act, 1851, s. 29, and the Prevention of Offences Act, 1851, s. 4, on an indictment containing three counts. The first charged him with inflicting grievous bodily harm on a person named, the second with unlawfully and maliciously cutting and wounding this person, the third with assaulting and occasioning to him actual bodily harm. The indictment did not contain any count for a common assault. The jury found the accused guilty of a common assault. The chairman at quarter sessions refused to receive this verdict, owing to the absence of the count for common assault, and told the jury they should re-consider the verdict. The jury then returned a verdict of Guilty, and the verdict entered up was "guilty of occasioning actual bodily harm." The accused was accordingly sentenced. The opinion of the Court for Crown Cases Reserved was asked on the question whether the verdict of Guilty of a common assault should have been taken, and whether it was tantamount to an acquittal, or whether the verdict should stand, and the accused should undergo his sentence. The court unanimously decided that the verdict of "guilty of a common assault" should have been taken; that the second verdict ought not to have been accepted; that the accused should not have to undergo the sentence; and that there had been a mis-trial; and awarded a venire de novo to the Court of Sessions. I cannot find in any of the reports of this case that there was a single suggestion made that the court were precluded from thus awarding a venire de novo by the decision in *R.* v. *Mellor* (9). This is, I think, a positive decision by a court of great authority that the Court for Crown Cases Reserved has jurisdiction where there has been a real mis-trial to award a venire de novo. In the present case what is ordered is not a venire de novo in so many words but a new trial, but where there has been a mis-trial, and relief is demanded as a matter of strict legal right on a point of law, no appeal being made to the discretion of the court, there is little if any difference between the two. Where in the case of a trial for felony an irregularity occurs which is not sufficient to constitute a ground for treating the trial as a mis-trial and the verdict a nullity, it may be that a new trial cannot be granted: *R.* v. *Murphy* (11). B C D E F G

In *R.* v. *Dickman* (12) LORD ALVERSTONE expressed an apparently confident opinion, after *R.* v. *Mellor* (9), *R.* v. *Edmonds* (5), and *R.* v. *Fowler* (6) had been cited to him, that if the defect in the trial complained of was such as to make the trial a mis-trial, the Court of Criminal Appeal would have jurisdiction to annul the verdict and judgment and to award a venire facias de novo. The decision in *R.* v. *Martin* (13) does not appear to me to be to any extent irreconcilable with the decision in *R.* v. *Yeadon and Birch* (10). In *R.* v. *Martin* (13) a jury was permitted to view the locus in quo where the crime was alleged to have been committed. Some of the witnesses accompanying some members of the jury were alleged to have conversed with those members, but this allegation was not inquired into or ascertained by the judge to be true. It was decided that the court could not act on this story, which was mere hearsay, and the conviction was accordingly affirmed. The jurisdiction and authority enjoyed by the Court for Crown Cases Reserved has, in my opinion, been transferred by the Act of 1873 to the Supreme Court of Judicature, and by s. 20 of the Act of 1907 is now vested in the Court of Criminal Appeal. H I

In my view, the Court for Crown Cases Reserved had jurisdiction and authority where a mis-trial occurred to annul and set aside the verdict found and the judgment entered up upon it, and as a necessary result demanded in the interest of justice, to direct that the accused be tried on the indictment found against him. If that be so, there is nothing, I think, in the Act of 1907 to take away or diminish in any way that jurisdiction or authority as now vested in the Court of Criminal Appeal. This results from the special provision of the Act contained in s. 20 (4), to which s. 4 (2) is subject. If this were not so this absurd result would follow—that in the case of a mis-trial, which is actually no trial at all, the Court of Criminal Appeal would be obliged, when they annulled the conviction in such a case, to direct an acquittal of the accused, though they at the same time decided that he never had been tried at all. It is unnecessary in this case to decide whether the provisions of s. 1 (7) empower the Court of Criminal Appeal to grant a new trial in a case in which there has not been a mis-trial. I think the appeal fails. **LORD DUNEDIN** desires me to say that he concurs in the opinion I have just read.

LORD SUMNER.—The statement of counsel who defended the appellant at the trial and appeared for him in the court below, shows that in the belief of all concerned the appellant was tried at Leicester on an indictment which charged him, jointly with David Morton, with the offence for which a conviction was recorded against him. In fact there was no such indictment. The judgment of the Lord Chief Justice shows that the same view of what had occurred was accepted in the Court of Criminal Appeal. So tried, Crane was invalidly tried, and the conviction was without authority. I see no ground for thinking that in reality there was a valid trial, namely, the trial of the appellant on the separate indictment, which had been framed against himself, while at the same time another person, Morton, also separately indicted, was being tried in reality separately, though to all appearances jointly with Crane, both simultaneously undergoing the same procedure before the same jury and sharing in the evidence, the speeches, and the summing-up. How the mistake came about does not now matter, but it is clear that the appellant purported to have been tried and convicted on an indictment which did not exist. It was a mis-trial, and, in truth, no trial at all. All the same, convicted Crane was, and to all appearance convicted on an indictment. I think he was so far "a person convicted on indictment" within s. 3 of the Criminal Appeal Act, 1907, as to be competent to appeal against this conviction to the Court of Criminal Appeal. Were it otherwise, Crane, who has never had a legal trial at all though imprisoned under sentence on the strength of it, would have to serve his time and apparently be without remedy. If so, it must surely follow that his appeal is within the words "any such appeal" in s. 4, and, as there was a miscarriage of justice (for such it is to deprive an accused person of the protection given by essential steps in criminal procedure), the court was bound to allow his appeal, in the sense of quashing a de facto conviction, which was in law a nullity. Therefore, by s. 4 (2), it became the duty of the court having quashed the conviction to order a verdict of acquittal, but this duty was subject to the special provisions of this Act.

What are they? With the view that s. 1 (7) and s. 20 (4) are not included among them, but that they consist solely of the provisions of s. 5, I have found myself unable to agree. What is subject to the special provisions of the Act is the direction which s. 4 (2) gives to the court, if it allows an appeal against conviction. Section 5 provides powers, which the court may exercise in special cases, if it does not allow an appeal against conviction, but does not think fit to dismiss the appeal, viz., to substitute another sentence or another verdict for that actually passed or found, to record a different conclusion from that drawn at the trial from a special verdict, and in cases of insanity to substitute detention in an asylum for criminal lunatics for the sentence of imprisonment passed at the trial. These are not exceptions from or limitations upon the direction to enter a verdict of acquittal,

where an appeal against conviction is allowed, and accordingly the provisions of s. 5 do not satisfy the initial words of s. 4 (2). These "special provisions" are to be sought elsewhere and are, or at least include, s. 1 (7) and s. 20 (4). By s. 1 (7): "The Court of Criminal Appeal . . . shall . . . have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court," and after quashing the conviction described, the court had next to determine the question, how a man who had not been legally tried should now be dealt with. To enter a verdict of acquittal would only be "doing justice," if the jury, in circumstances which made it their duty to render some verdict, had rendered a verdict of Guilty, which ought to have been one of Not Guilty. If the fact be, as it is here, that the appellant should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset, it would not be doing justice to enter a verdict of acquittal in favour of a man who was not entitled to be acquitted under the circumstances. Acquittal implies that a true legal trial has been had. Here there has legally been none at all, but only the semblance of one, a mis-trial, which does not count.

The question then arises what is to be done with the appellant for the purpose of doing justice? He has been duly committed for trial, and ought to be tried, but tried he has not been. Section 1 (7) empowers the court to determine this question, and this is one of the special provisions of the Act, whether it be also an ancillary or incidental provision or not. It is a special power of the court, and the Act specially provides for investing the court with this power. It is true that the subsection does not mention the making of orders, but, apart from the point that the order appealed from might have stopped at the word "annulled," and that the rest of it might be treated as surplusage, and apart from the effect of s. 20 (4) as providing the power to make the actual order required, it seems to me that the power of determining questions which have to be determined is equivalent to power to state what, in accordance with the Act, is the result and effect of the determination. How was this power exercised in this case? It may be that the court might have been content to declare that there had been no true trial, leaving the appellant, as a person in custody under the warrant of a committing magistrate, to take his trial in due course of law. If so, part of the order actually made was surplusage, and gave expression to what would have happened, even if it had not been expressed. It may be that the residue of the order should be regarded as a provision for the benefit of, and probably made at the request of, the appellant, for it allowed him bail and properly fixed the time, place, and purpose of his surrendering. It is not necessary to express any opinion on these points.

Another "special provision" of the Act is s. 20 (4). Its earlier part specially provides for the transference to the Court of Criminal Appeal of the jurisdiction of the Court for Crown Cases Reserved, which had already been vested in the judges of the High Court by the Judicature Act, 1873, s. 47. The Crown Cases Act, 1848, provided for jurisdiction in relation to questions of law arising in criminal trials. The remainder of s. 20 (4) of the Act of 1907 refers to the stating of a Case, and is separate from the earlier part, which alone is here material. In my opinion, this jurisdiction and authority included an authority to provide for just such a case as the present. It is a very necessary authority, which certainly existed before 1907, and for its abandonment without anything to take its place no reason can be assigned. The Court for Crown Cases Reserved was, in matters coming before it, the final tribunal. What it decided, on the construction of the Act which constituted it, even as to its own powers, was subject to no judicial review, and became binding upon the subsequent decisions and procedure of the court. I think it clear, in spite of what is said in *R.* v. *Wakefield* (4), that the court in *R.* v. *Mellor* (9) decided by a majority, that it had power, where there had been a mis-trial, to set aside any conviction obtained upon it, and to order a proper trial to be had, and this decision was given effect to in *R.* v. *Yeadon and Birch* (10). Though a majority of the judges affirmed the conviction in *R.* v. *Mellor* (9), it will

be found that those, who were of opinion that the court could award a venire de novo, were actually six, as against five only who declare that there was no such power. Some doubt on the matter was expressed subsequently in *R.* v. *Martin* (13). It was not necessary to the decision, and was, I think, unnecessary altogether, but I am aware that, after the decision in *R.* v. *Dyson* (14), there was a good deal of difference of opinion in the profession upon the point. In *R.* v. *Dickman* (12) LORD ALVERSTONE, C.J., stated (after examining *R.* v. *Mellor* (9) and *R.* v. *Yeadon and Birch* (10)) that in his opinion this power had been transferred to the Court of Criminal Appeal. Whether the power was to award a venire de novo or only to order a trial to be had seems immaterial now. Differences of expression on the point (for I will not call them differences of opinion) are to be found in *R.* v. *Mellor* (9), but what was ordered in *R.* v. *Yeadon and Birch* (10) was a venire de novo. In the order made in the present case this term is not used. If there be any distinction, it is in favour of affirming the order now appealed from. The "jurisdiction and authority" transferred in 1873 and now enjoyed by the Court of Criminal Appeal is that which then existed and could not then be legally questioned. What opinion your Lordships might now entertain on the accuracy of the reasoning of the different judges who gave opinions in *R.* v. *Mellor* (9) cannot affect the meaning of the Act of 1907, for it transfers an actual authority then legally existing, not such authority, be it less or more, as your Lordships might have held to exist before 1907, if you could then have been consulted upon the matter.

I am, therefore, of opinion that one of the "special provisions" of the Act of 1907 is to give the Court of Criminal Appeal authority to order the appellant to stand his trial, as it did. Section 20 (4) does not merely transfer a power as to procedure. It transfers all jurisdiction and authority under the Act of 1848 with respect to questions of law arising in criminal trials, and, if such jurisdiction and authority lawfully included the making of such an order as that under appeal, I think a "special provision," within the initial words of s. 4 (2), is to be found in s. 20 (4). I also wish to say that I do not agree with the argument for the appellant, that the intention of this Act was to give the Court of Criminal Appeal in an appeal against conviction a choice only between affirmation and acquittal. No satisfactory explanation consistent with such a view can be given of the words "Subject to the special provisions of this Act" in s. 4 (2), nor can I see in what case, on such a construction, any effect can be given to that part of the authority of the Court for Crown Cases Reserved, which consisted in the power laid down and exercised in *R.* v. *Mellor* (9) and *R.* v. *Yeadon and Birch* (10). In effect the argument would reduce the word "all" in s. 20 (4) to "some." On the other hand, though the matter does not strictly arise for decision now, I do not wish it to be supposed that I think that either s. 1 (7) or s. 20 (4) invests the court with power to grant new trials independently of such mis-trials as this case illustrates. I think the appeal fails.

LORD PARMOOR.—The appellant, Crane, was separately indicted for receiving stolen goods, and a man, named Morton, was separately indicted for stealing and receiving the same goods. Owing to some mistake, which was not discovered until the appeal was brought before the Court of Criminal Appeal, Crane and Morton were tried together, as though they had been jointly charged in one indictment. The result is that Crane was not tried on the indictment, on which he had been charged, and the trial is a nullity. I think it is impossible to hold that it is within the competency of any criminal court to try a prisoner on an indictment which, so far as he is concerned, is non-existent. If the facts had been brought to the notice of an assize judge, or a chairman of quarter sessions, before the assize or sessions had terminated, the mistake could have been rectified, and Crane might have been tried on the separate indictment. No plea of former acquittal or former conviction for the same offence could have been effectively

raised by him. A trial, void ab initio, cannot result either in acquittal or conviction, and Crane would have stood in the position of an untried prisoner who has been neither acquitted nor convicted on the particular offence. A

The question to be decided in the appeal is whether, on an appeal to the Court of Criminal Appeal, the order of the court in setting aside and annulling the conviction and judgment on the indictment, and ordering Crane to appear at the next quarter sessions to be holden in and for the city of Leicester, there to take his trial according to law upon the separate indictment, admitting him in the meantime to bail upon his recognisance and the recognisances of two sufficient sureties, is an order which the court has power to make. The case depends upon the construction of the Criminal Appeal Act, 1907. Crane was entitled to appeal under the Act as a person against whom a record of conviction stood at the time when he entered his appeal. It was argued on behalf of Crane that an appeal against conviction necessarily comes within s. 4 of the Act of 1907. Subsection (2) of this section enacts that the court shall, subject to the special provisions of the Act, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered. The effect of this provision is to maintain as a fundamental principle of the criminal law, that no man should be placed in peril twice for the same offence; but, as stated above, Crane has not, in my opinion, been in peril and there has only been a form of trial which is void ab initio. Subsection (1) of the section enacts that the court in an appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside upon the ground of a wrong decision of any question of law, or that on any other ground there was a miscarriage of justice, and in any other case should dismiss the appeal. In a void trial there is neither conviction, verdict, nor judgment. Crane, therefore, fails to bring himself within the protection of s. 4. B C D E

It was argued on behalf of the Crown that sub-s. (7) of s. 1 authorised the court to make the order which they made in this case. It was necessary, in my opinion, for the purpose of doing justice in the case before the court, to determine whether the conviction and judgment should be regarded as a nullity, and, in the event of the court coming to that conclusion, it was their duty so to decide. This covers the first portion of the order. I think that the order would be complete if it stopped at the word annulled, but that a convenient and proper form has been adopted in the direction to the appellant to appear at the next quarter sessions to be holden on and before the city of Leicester, there to take his trial according to law, and that in the meantime he be admitted to bail. The annulling of the conviction and judgment would in itself leave the appellant liable to be tried on the separate indictment, but there is no informality in giving a definite direction. The result of the order of the Court of Appeal is in substance the same as the result, which would have followed, if the mistake had been discovered before the termination of the Leicester Quarter Sessions. F G H

Counsel who argued the case on behalf of Crane dealt exhaustively with the history of criminal law, as affected by writs of error, or a writ of venire de novo. Writs of error have been in terms abolished by the Criminal Appeal Act, 1907. The writ of venire de novo is said to have been preserved under sub-s. (4) of s. 20. If it were necessary to decide this question, I should be prepared to hold that the Court of Criminal Appeal had a power of issuing a writ of venire de novo to the extent that such power had existed in the Crown Cases Act, 1848. Two relevant cases were cited to your Lordships. In *R.* v. *Mellor* (9) there was a close division of judicial opinion; but in the later case of *R.* v. *Yeadon and Birch* (10) a venire de novo was granted, although POLLOCK, C.B., a member of the court, had expressed his opinion adversely to the power of the judges, to grant such a writ under the Crown Cases Act, 1848, in *R.* v. *Mellor* (9). No subsequent case was quoted. I think, however, it is not necessary either to consider the older cases, or to use the I

technical expression of a venire de novo, when a conviction and judgment on an indictment are set aside and annulled by the Court of Criminal Appeal on the ground that all the proceedings at the trial were void ab initio. In my opinion, the appeal should be dismissed.

Solicitors: *H. W. Clarkson*, for *Herbert Simpson & Bennett*, Leicester; *Director of Public Prosecutions.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

GIBAUD *v.* GREAT EASTERN RAIL. CO.

[COURT OF APPEAL (Lord Sterndale, M.R., Scrutton and Younger, L.JJ.), February 17, 1921]

[Reported [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454]

Bailee—Railway company—Negligence of servant—Loss of property bailed—Condition that bailee "will not be in any way responsible in respect of" certain articles—Liability of bailee.

By a condition on a cloak room ticket issued at one of the defendant company's railway stations it was provided: "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds £5 unless" certain conditions were fulfilled.

Held: the words "in any way responsible" were sufficient to protect the defendant company from liability in respect of the loss of an article deposited at the station, although such loss was due to the negligence of one of the company's servants.

Per SCRUTTON, L.J.: The distinction between words which will protect you in the case of negligence and those which will not is a very fine one: *Joseph Travers & Sons, Ltd.* v. *Cooper* (5), [1915] 1 K.B. 73; but substantially it comes to this. Although, if you merely enumerate losses without dealing with causes, a condition may not protect you from the consequences of your own negligence, if you enumerate causes and suggest that you are free from liability for all losses, however caused, that will protect you from your own negligence.

Notes. Referred: *The Cap Palos*, post, p. 249; *Neilson* v. *L. & N.W. Rail.*, [1922] All E.R.Rep. 395; *Nunan* v. *Southern Rail.*, [1923] 2 K.B. 703; *Buerger* v. *Cunard S.S. Co.*, [1925] 2 K.B. 646; *The Refrigerant*, [1925] P. 130; *H. M. F. Humphrey, Ltd.* v. *Baxter, Hoare & Co.*, [1933] All E.R.Rep. 457; *Danneberg* v. *White Sea Timber Trust, Ltd.*, [1935] All E.R.Rep. 328; *Ashby* v. *Tolhurst*, [1937] 2 K.B. 242; *Bontex Knitting Works, Ltd.* v. *St. Johns Garage*, [1943] 2 All E.R. 690.

As to the obligations of a bailee relating to articles put in his custody, see 2 HALSBURY'S LAWS (3rd Edn.) 114 et seq.; and for cases see 3 DIGEST 72 et seq.

Cases referred to:

(1) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, *163.*

(2) *Davis* v. *Garrett* (1830), 6 Bing. 716; L. & Webb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 8 Digest (Repl.) 14, *65.*

(3) *Harris* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 515; 45 L.J.Q.B. 729; 34 L.T. 647; 40 J.P. 628; 3 Digest 83, *192.*

(4) *Handon* v. *Caledonian Rail. Co.* (1880), 7 R. (Ct. of Sess.) 966; 3 Digest 83, *192 i.*

(5) *Joseph Travers & Sons, Ltd.* v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 3 Digest 74, *140*.

(6) *James Morrison & Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.*, [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 32 T.L.R. 712; 61 Sol. Jo. 9; 13 Asp.M.L.C. 504, C.A.; 8 Digest (Repl.) 22, *123*

Also referred to in argument:

Parker v. *South Eastern Rail. Co.* (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 25 W.R. 564, C.A.; 8 Digest (Repl.) 141, *909*.

Hood v. *Anchor Line* (*Henderson Brothers*), [1918] A.C. 837; 87 L.J.P.C. 156; 119 L.T. 684; 34 T.L.R. 550; 62 Sol. Jo. 680, H.L.; 8 Digest (Repl.) 115, *743*.

Richardson, Spence & Co. and Lord Gough S.S. Co. v. *Rowntree*, [1894] A.C. 217; 63 L.J.Q.B. 283; 70 L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp.M.L.C. 482; 6 R. 95, H.L.; 8 Digest (Repl.) 114, *737*.

Van Toll v. *South Eastern Rail. Co.* (1862), 12 C.B.N.S. 75; 31 L.J.C.P. 241; 6 L.T. 244; 8 Jur.N.S. 1213; 10 W.R. 578; 142 E.R. 1071; 8 Digest (Repl.) 141, *903*.

Pratt v. *South Eastern Rail. Co.*, [1897] 1 Q.B. 718; 66 L.J.Q.B. 418; 76 L.T. 465; 45 W.R. 503; 13 T.L.R. 326, D.C.; 8 Digest (Repl.) 141, *905*.

Skipwith v. *Great Western Rail. Co.* (1888), 59 L.T. 520; 4 T.L.R. 589, D.C.; 8 Digest (Repl.) 142, *910*.

Acton v. *Castle Mail Packets Co., Ltd.* (1895), 73 L.T. 158; 11 T.L.R. 518; 8 Asp.M.L.C. 73; 1 Com. Cas. 135; 8 Digest (Repl.) 139, *899*.

Henderson v. *Stevenson* (1875), L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596, H.L.; 8 Digest (Repl.) 139, *898*.

Watkins v. *Rymill* (1883), 10 Q.B.D. 178; 52 L.J.Q.B. 121; 48 L.T. 426; 47 J.P. 357; 31 W.R. 337, D.C.; 3 Digest 85, *198*.

Appeal by the plaintiff from an order of a Divisional Court of the King's Bench Division (Bray and Sankey, JJ.) reversing a decision of the City of London Court.

The facts appear in their Lordships' judgments.

Schwabe, K.C., and *Fortune* for the plaintiff.
Disturnal, K.C., and *Bruce Thomas* for the defendants.

LORD STERNDALE, M.R.—The plaintiff claims in respect of the loss of a bicycle which he took to the Enfield Town station of the defendants' railway. He gave it to a junior clerk, and he asked the junior clerk whether he should take it into the booking office. As at many small stations, the booking office was used as the cloak room of the station. There was no regular cloak room as there is at the big termini in London. The junior clerk said: "No, it does not matter; leave it where it is," and it was left near the booking-office door. From there the bicycle must have been stolen, because when the plaintiff came to apply for it again it was not to be found, and nobody knows anything about it from that day to this. The defendants relied upon a cloak room ticket which was given to the plaintiff when he left the bicycle and which contained this condition:

> "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds £5, unless at the time of deposit the true value and nature of article shall have been declared and 1d. per £1 sterling of declared value be paid for each day or part of a day in addition to the ordinary cloak room charges. For further conditions and scale of charges, see back of this ticket."

There followed a scale of charges for a very large number of things and a great variety of things, and they include articles like ice-cream carts, street organs, street pianos, side-cars, and various other large things which would not naturally go into the ordinary booking office. Then there followed this condition:

A "The company will not be responsible for articles left by passengers at the station unless the same be duly registered, and a ticket given in exchange. Articles will not be given up unless the ticket issued in respect thereof is surrendered to the company or alternatively satisfactory evidence of ownership is adduced and a proper indemnity is signed by the claimant. Delivery of any article shall acquit the company from all further claims in respect of it."

B Another condition runs thus:

"Depositors are not permitted access to any article deposited in the cloak room for the purpose of securing a portion thereof; the article will only be released as a whole and if re-deposited a further charge will be made and a new ticket issued in exchange."

C The plaintiff says that this was a contract to keep in the cloak room—in the present case the booking office—and in that alone. It seems that there was a bicycle shed at the side of the platform where bicycles were kept, but that was probably used chiefly for bicycles left just for the day. The plaintiff's contention is that the contract of bailment was to keep the bicycle in the cloak room, and if it were kept somewhere else, no condition can apply at all because there is a breach of the D contract of bailment.

With the principle that is stated there, of course, I quite agree. That has been laid down in the well-known case of *Lilley* v. *Doubleday* (1), and also in *Davis* v. *Garrett* (2), and a number of other cases, and I shall accept, of course, the proposition that, if a bailee has been acting in breach of his bailment, he cannot rely upon the conditions as intended only to protect him in the fulfilment of his E duty as bailee. The question, however, is whether that was the contract in the present case. The learned judge of the City of London Court and both the judges of the Divisional Court were of opinion that the present case was governed by *Harris* v. *Great Western Rail. Co.* (3). There the majority of the court, MELLOR and BLACKBURN, JJ.—although there was a finding of loss by negligence—held that the company were protected against liability for loss of an article deposited like F this, not in the cloak room, but in another part of the station, and they so held on the ground that there was no contract necessarily to keep the article in the cloak room, but that it was only a contract to keep and take reasonable care to keep safely. We are asked, first, to distinguish that case, and, secondly, if we cannot distinguish it, to overrule it. I think that there is no possibility of distinguishing it in any way in the plaintiff's favour and to say that the contract in G the present case did not contain anything like the expression which, in that case, was held to mean that the contract was not to keep in the cloak room and in the cloak room only. The conditions which I have read seem to contemplate in the case of some articles at any rate which are mentioned on the back that there would be a keeping not in the booking office because it would be impossible to keep such articles there. Also, the second condition speaks of non-liability, not for articles H left in the booking office, but for articles left at the "station," unless a ticket is taken for them. That seems to me to distinguish the present case entirely from the Scottish case which was cited to us of *Handon* v. *Caledonian Rail. Co.* (4), because there the condition expressly applied on the face of it only to articles that were put in the cloak room or in the warehouse, and not to articles which were put not in the cloak room nor in any place that could be called a warehouse.

I Therefore, I do not think that *Harris* v. *Great Western Rail. Co.* (3) is distinguishable in favour of the plaintiff. The question, I repeat, is whether we are prepared to overrule it, and to overrule it in a case where, in my opinion, the contract is very much more favourable to the defendants than it was in that case. I am not prepared to do so. *Harris* v. *Great Western Rail. Co.* (3) has stood for something like forty-five or forty-six years. There is nothing to show that it has ever been considered not to be good law. But as I have observed already, it is enough to say that in the present case the contract is much more favourable to the defendants, and there is much less reason to say that this was a contract to keep

in the cloak room and nowhere else, than there was in *Harris* v. *Great Western Rail. Co.* (3). I think that the contract here was the contract described by BLACKBURN, J., in *Harris* v. *Great Western Rail. Co.* (3), when he said:

> "I read the contract as being to keep safely, that is, with reasonable and proper care, in any way which to the defendants seemed best, and to deliver up the goods on the production of the ticket if brought at the proper office hours to the cloak room. I do not think that depositing the luggage in the vestibule would have been any breach of contract if the defendants had taken reasonable precautions to protect the luggage while placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over it till it was convenient to remove it to a more secure place."

If the defendants had done this, the question, no doubt, would not have arisen because the bicycle would not have disappeared. But it is not an unfair way of testing what the contract was to ask this: Would it have been a breach of contract if the defendants had put a sentry to stand over the bicycle instead of leaving it in the vestibule? If the contract was to deposit the article in the booking office and nowhere else, that would be a breach whether any damage followed from it or not. In my opinion, it clearly would not have been a breach, and, therefore, I think the plaintiff's contention fails on that ground.

But there is another ground. It is said that, however that may be, there is in the present case a finding of the learned judge of the City of London Court that the defendants' servants were negligent in the keeping of the bicycle even in the vestibule. I do not think that there is such a finding. Whether the learned judge would have found it is another matter. It is quite true that he uses the expression:

> "The inference of fact which I draw therefrom is that by reason of lack of due care on the part of company in allowing the bicycle to be in the booking hall it was stolen."

I think that the whole of that rests on the learned judge's view which he expressed that, if not bound by *Harris* v. *Great Western Rail. Co.* (3), he would have held that to be a contract to keep in the booking office, and, therefore, if that was the contract, then there would be a lack of due care in keeping it anywhere else. I do not think that there is any finding that, assuming the contract to be that which I have said it is, in my opinion, and that which was said by BLACKBURN, J., to be the contract in *Harris* v. *Great Western Rail. Co.* (3), the defendants' servants were guilty of negligence. But when this condition is looked at, it is seen that it runs thus: "The company will not be in any way responsible in respect of any article deposited." They could not be liable except for negligence. Therefore, unless this condition protects them from the negligence of their servants it protects them from nothing. That would be of itself a considerable reason for reading it so as to cover any negligence. It seems to me, however, that there are a great many cases in which words like those in the present case have been held to cover any sort of liability. "Howsoever caused" are the words mentioned in *Joseph Travers & Sons, Ltd.* v. *Cooper* (5), to which reference has been made during the argument. The distinction is a thin one. It is so stated by LORD PHILLIMORE in *Joseph Travers & Sons, Ltd.* v. *Cooper* (5). It seems to me that the effect of the words "in any way responsible" is very much the same as "for anything howsoever caused." Therefore, from any point of view, I think that the defendants are protected by this condition and that this appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—The plaintiff took his bicycle to the Enfield Town station of the Great Eastern Railway Co. for deposit and safe custody. He gave it to the clerk in the booking office. The clerk said, "Leave it where it is," and it was left where it was, close to the door of the booking office, and when he went to fetch it away it was not to be found. He thereupon sued the Great Eastern Railway Co.,

who pleaded that they were excused from liability by the conditions on the cloak room ticket. Certain points were argued in the court below, which have not been argued here. An attempt was there made to show that the plaintiff was not bound by the conditions on the ticket or that he was only bound by such conditions on the ticket as were reasonable. These points were not argued here. The point that was argued here was that the plaintiff was not bound by those conditions relieving the company from liability because the company had not kept the bicycle in the place in which they had contracted to keep it.

It is a fairly well-known principle—and *Lilley* v. *Doubleday* (1) is perhaps the best illustration of it—that if you undertake to do a thing in a certain way or to keep a thing in a certain place with certain conditions protecting it, and you have broken the contract by not doing the thing contracted for in the way contracted for or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it. In *Lilley* v. *Doubleday* (1) the defendant contracted to warehouse certain goods at the main warehouse. He warehoused part of them at another place, and, without negligence on his part, they were lost from the other place. It was held that, though he would have been protected if the goods had been lost without negligence in the place where he contracted to keep them, he lost that protection when he warehoused them in a place where he had not contracted to keep them. *Lilley* v. *Doubleday* (1) and *Davis* v. *Garrett* (2), which was also mentioned, were approved by this court in *James Morrison & Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.* (6), when it was said that *Lilley* v. *Doubleday* (1) and *Davis* v. *Garrett* (2) laid down the true principle. As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner was responsible unless he could show that the loss or damage would have occurred if she had been on her proper course for London.

The first question, then, to be decided in the present case is whether there is a contract on this cloak room ticket to keep the bicycle in any named place or is the contract merely to keep it with reasonable care. The contract runs thus: "Received to be delivered to the person presenting this ticket," and though cloak room is mentioned twice in the conditions it is never mentioned in connection with the place where the thing is to be kept. The only mention of place is at the "station." The conditions are described as "conditions upon which articles are accepted for deposit" without stating where. The articles themselves that can be kept are of such a nature that anyone would be very much astonished to find in a cloak room many bass viols, bath-chairs, harps, ice-cream carts, street organs, street pianos, sewing machines, side-cars, washing machines, or articles the length, girth, and width of which exceed 25 ft. You would not be able to put many of them into an ordinary suburban booking office. When one comes to consider the nature of the contract as here expressed, I entirely agree with the view which, in *Harris* v. *Great Western Rail. Co.* (3), BLACKBURN, J., took of a contract which was much more favourable to the owner of the goods. I read the contract as being to take reasonable care of luggage, and to be responsible for any loss occasioned by want of care with in effect a proviso that, inasmuch as the remuneration is very small and the loss may be very great, the railway company will not be in any way responsible for the loss if the goods exceed £5 in value, unless the value is declared and paid for. That appears to me to be an eminently reasonable clause—that if for the small sum of 2d. you are going to put a responsibility on the railway company for keeping an article of considerable value which they are not bound to keep for you, you should say if the value exceeds a certain amount and pay more in respect of it, and if you do not tell them the value and pay for it, they will not be liable.

The last point that is raised—I am not sure that it was raised in the court below, but it has gradually emerged in the course of this appeal—is this. It is said that there may be a clause exempting the railway company, but it is not a

clause exempting them from liability for their own negligence because the courts are slow unless clear words are used to protect a man from the consequences of his own negligence or the negligence of his servants. I do not propose to go through the distinctions which have been stated in this court in *Joseph Travers & Sons, Ltd.* v. *Cooper* (5) because the court said the distinction was a very fine one. But substantially it comes to this. Although, if you merely enumerate losses without dealing with causes, such a clause may not protect you from the consequences of your own negligence, if you enumerate causes and suggest that you are free from liability for all losses, however caused, that will protect you from your own negligence. The words that are held to protect are: "Under any circumstances whatsoever," "In any circumstances," "Under any circumstances," or "Any injury however caused." When I read the clause in the present case, "will not be in any way responsible," and remember that the liability of the railway company was for negligence—that is to say, for not using reasonable care—it seems to me that those words are clearly sufficient to protect the company. Particularly is that so in a case where it is eminently reasonable that they should be protected if the man who deposits property of large value has not taken the trouble to pay the company for the increased value which he is leaving with them. For these reasons I think that this appeal should be dismissed.

YOUNGER, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Henry Boustred & Son*; *Thomas Chew.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re POLEMIS AND FURNESS, WITHY & CO., LTD.

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), July 7, 8, 15, 1921]

[Reported [1921] 3 K.B. 560; 90 L.J.K.B. 1353; 126 L.T. 154; 37 T.L.R. 940; 15 Asp.M.L.C. 398; 27 Com. Cas. 25]

Negligence—Exclusion of liability for—Need of clear words—Damages—Direct consequence of negligent act—Damage not reasonably to be anticipated.

By a clause in a charterparty "loss or damage from fire on board" was mutually excepted from liability. During the currency of the charter the ship was destroyed by a fire which arose when, through the negligence of the charterers' servants while discharging, a board fell from some staging into the hold and there came into contact with some substance with the result that a spark was caused which ignited petrol vapour in the hold.

Held: (i) in the absence of clear words in the exception clause excluding liability for negligence the clause did not protect the charterers against liability for the negligence of their servants; (ii) when once that negligence had been established it was immaterial that a reasonable person would not have anticipated the damage which occurred, and the question whether damages for the loss of the ship were recoverable from the charterers depended only on the answer to the question whether that loss was the direct consequence of the negligent act.

Notes. Considered: *Hambrook* v. *Stokes*, [1924] All E.R. Rep. 110; *Best* v. *Samuel Fox & Co.*, [1950] 2 All E.R. 798; *Jones* v. *Livox Quarries, Ltd.*, [1952] 2

Q.B. 608. Referred to: *Adelaide S.S. Co.* v. *R.*, [1923] 1 K.B. 59; *Harnett* v. *Bond*, [1924] 2 K.B. 517; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1925), 94 L.J.K.B. 858; *Fagan* v. *Green and Edwards*, [1925] All E.R.Rep. 266; *Companiu Mexicana De Petroles El Aguila* v. *Essex Transport and Trading Co.*, [1929] All E.R.Rep. 589; *The Edison*, [1933] All E.R.Rep. 144; *Liesbosch S.S. Owners* v. *Edison S.S. Owners*, [1933] A.C. 449; *Haynes* v. *Harwood & Son*, [1934] All E.R.Rep. 103; *Domine* v. *Grimsdall*, [1937] 2 All E.R. 119; *Hay* (*or Bourhill*) v. *Young*, [1943] A.C. 92; *Duncan* v. *Cammell Laird, Ltd.*, *Craven* v. *Cammell Laird, Ltd.* (1944), 171 L.T. 186; *King* v. *Phillips*, [1952] 2 All E.R. 459.

As to agreements excluding liability and the measure of damages for negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 86, 87 (and cases there cited), 96–106; and for cases see 36 DIGEST (Repl.) 34–38, 199–204.

Cases referred to:

(1) *Rigby* v. *Hewitt* (1850), 5 Exch. 240; 19 L.J.Ex. 291; 155 E.R. 103; 15 L.T.O.S. 185; 36 Digest (Repl.) 33, *151.*

(2) *Greenland* v. *Chaplin* (1850), 5 Exch. 243; 19 L.J.Ex. 293; 15 L.T.O.S. 185; 155 E.R. 104; 36 Digest (Repl.) 33, *155.*

(3) *Smith* v. *London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 19 W.R. 230, Ex. Ch.; 36 Digest (Repl.) 37, *184*

(4) *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.*, [1911] 1 K.B. 114; 80 L.J.K.B. 341; 103 L.T. 649; 27 T.L.R. 18; 55 Sol. Jo. 10; 11 Asp.M.L.C. 499, C.A.; 26 Digest (Repl.) 239, *1830.*

(5) *H.M.S. London*, [1914] P. 72; 83 L.J.P. 74; 109 L.T. 960; 30 T.L.R. 196; 12 Asp.M.L.C. 405; 17 Digest (Repl.) 116, *283.*

(6) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 36 Digest (Repl.) 201, *1064.*

(7) *Burrows* v. *March Gas Co.* (1872), L.R. 7 Exch. 96, Ex. Ch.; 26 L.T. 318; 36 Digest (Repl.) 34, *156.*

(8) *Hill* v. *New River Co.* (1868), 9 B. & S. 303; 18 L.T. 355; 36 Digest (Repl.) 39, *190.*

(9) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, *1.*

(10) *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173.*

(11) *Steinman & Co.* v. *Angier Line*, [1891] 1 Q.B. 619; 60 L.J.Q.B. 425; 64 L.T. 613; 39 W.R. 392; 7 T.L.R. 398; 7 Asp.M.L.C. 46, C.A.; 41 Digest 421, *2639.*

(12) *London Joint Stock Bank* v. *Macmillan and Arthur*, [1918] A.C. 777; 88 L.J.K.B. 55; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650, H.L.; 3 Digest 233, *644.*

Also referred to in argument:

Dunham v. *Clare*, [1902] 2 K.B. 292; 71 L.J.K.B. 683; 86 L.T. 751; 66 J.P. 612; 50 W.R. 596; 18 T.L.R. 645; 4 W.C.C. 102, C.A.; 34 Digest 341, *2759.*

Re London, Tilbury and Southend Rail. Co. and Gower's Walk Schools Trustees (1889), 24 Q.B.D. 326; 62 L.T. 306; 38 W.R. 343; sub nom. *Re Gower's Walk Schools Trustees and London, Tilbury and Southend Rail. Co.*, 59 L.J.Q.B. 162; 6 T.L.R. 120, C.A.; 11 Digest (Repl.) 155, *307.*

Clark v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, *135.*

Scott v. *Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100.*

Baxter's Leather Co. v. *Royal Mail Steam Packet Co.*, [1908] 2 K.B. 626; 77 L.J.K.B. 988; 99 L.T. 286; 24 T.L.R. 537; 11 Asp.M.L.C. 98; 14 Com. Cas. 46, C.A.; 41 Digest 496, *3247.*

Chartered Bank of India, Australia and China v. *British India Steam Navigation Co., Ltd.*, [1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661; 25 T.L.R. 480; 53 Sol. Jo. 446; 11 Asp.M.L.C. 245, P.C.; 41 Digest 538, *3653*.

Appeal by charterers from an order of SANKEY, J., on an award in the form of a Special Case.

By a charterparty of February, 1917, Polemis and Boyazides, the owners, chartered the ship to Furness, Withy & Co., Ltd., for the period of the duration of the war and at charterers' option up to six months afterwards from the day she was placed at the charterers' disposal ready to load in the port of Cardiff. By cl. 3 the owners were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, insurance of the vessel (war risks excepted), and also all the engine room stores, and to maintain her in a thoroughly efficient state in hull and machinery for ordinary cargo service. By cl. 4 the charterers were to provide and pay for the coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. By cl. 5, the charterers were to pay for the use and hire of the vessel at the rate of £9,572 16s. per calendar month commencing on the day of delivery as above with a clean and clear hold,

> "hire to continue from the time specified for commencing the charter until the hour of her re-delivery to owners (unless lost) at a port in the United Kingdom or continent in same good order and condition as when delivered to them fair wear and tear excepted."

By cl. 21:

> "The act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and/or restraint of princes, rulers, and people, collision, any act, neglect, or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and every of the dangers and accidents of the seas, canals, and rivers, and of navigation of whatever nature or kind always mutually excepted."

During the currency of the charterparty the ship was destroyed by fire. The owners contended that the charterers were liable for her loss; that fire caused by negligence was not an excepted peril; and that the ship was lost by the negligence of the stevedores, who were the charterers' servants, in letting a sling strike a board, knocking it into the hold, and thereby causing a spark which set fire to the petrol vapour and destroyed the ship. The charterers contended that fire, however caused, was an excepted peril; that there was no negligence for which they were responsible; and that the danger and/or damage were too remote—i.e., no reasonable man would have foreseen danger and/or damage of this kind resulting from the fall of the board. The arbitrators made the following findings of fact:

> "(a) That the ship was lost by fire. (b) That the fire arose from a spark igniting petrol vapour in the hold. (c) That the spark was caused by the falling board coming into contact with some substance in the hold. (d) That the fall of the board was caused by the negligence of the Arabs (other than the winchman) engaged in the work of discharging. (e) That the said Arabs were employed by the charterers or their agents the Cie Transatlantique on behalf of the charterers, and that the said Arabs were the servants of the charterers. (f) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. (g) There was no evidence before us that the Arabs chosen were known or likely to be negligent. (h) That the damages sustained by the owners through the said accident amount to the sum of £196,165 1s. 11d. as shown in the second column of the schedule thereto."

SANKEY, J., affirmed the award. The charterers appealed.

R. A. Wright, K.C., and *S. L. Porter* for the charterers.

MacKinnon, K.C., and *Dumas* for the shipowners.

July 15. The following judgments were read. *Cur. adv. vult.*

BANKES, L.J.—By a time charterparty, dated Feb. 21, 1917, the respondents chartered their vessel to the appellants. The vessel was employed by the charterers to carry a cargo to Casablanca in Morocco. The cargo included a quantity of benzine or petrol in cases. While discharging at Casablanca a heavy plank fell into the hold in which the petrol was stowed, and caused an explosion, which set fire to the vessel and completely destroyed her. The owners claimed the value of the vessel from the charterers, alleging that the loss of the vessel was due to the negligence of the charterers' servants. The charterers contended that they were protected by the exception of fire contained in cl. 21 of the charterparty, and they also contended that the damages claimed were too remote. The claim was referred to arbitration, and the arbitrators stated a Special Case for the opinion of the court. [His Lordship read the arbitrators' findings and said that they stated the damages as £196,165 1s. 11d.]

These findings are, no doubt, intended to raise the question whether the view taken, or said to have been taken, by POLLOCK, C.B., in *Rigby* v. *Hewitt* (1) (5 Exch. at p. 243) and *Greenland* v. *Chaplin* (2) (5 Exch. at p. 248), or the view taken by CHANNELL, B., and BLACKBURN, J., in *Smith* v. *London and South Western Rail. Co.* (3) (L.R. 6 C.P. at p. 21), is the correct one. The doubt which I have indicated in reference to what POLLOCK, C.B., really said is due to the fact that, as reported in the LAW JOURNAL (19 L.J.Ex. at p. 295), the Chief Baron does not use the words on which reliance is placed and which were quoted with approval by VAUGHAN WILLIAMS, L.J., in *Cory* v. *France* (4) ([1911] 1 K.B. at p. 122). Assuming the Chief Baron to have been correctly reported in the EXCHEQUER REPORTS, the difference between the two views is this. According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act; according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable. SIR F. POLLOCK in his LAW OF TORTS (11th Edn., pp. 39, 40) refers to this difference of view, and calls attention to the fact that the late MR. BEVEN, in his book on NEGLIGENCE, supports the view founded on *Smith* v. *London and South Western Rail. Co.* (3). In two recent judgments dealing with the question, the view taken by the court in *Smith* v. *London and South Western Rail. Co.* (3) has been adopted—namely, by the late President (SIR SAMUEL EVANS) in *H.M.S. London* (5) ([1914] P. at p. 76), and by LORD SUMNER in *Weld-Blundell* v. *Stephens* (6) ([1920] A.C. at p. 983). In the former case the President said:

> "The court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—i.e., the negligence of the defendants, which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability—namely, the foresight or anticipation of the reasonable man. In *Smith* v. *London and South Western Rail. Co.* (3) CHANNELL, B., said:
>
> > 'Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.'
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> And BLACKBURN, J., in the same case said:
>
> > 'What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.' "

After referring to the various phrases used in connection with remoteness of damages he said: A

"But it must be remembered, to use the words of a well-known American author (SEDGWICK), that 'the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one'; B and again, to use the words of an eminent English jurist (SIR F. POLLOCK, 11th Edn., pp. 35, 36), 'In whatever form we state the rule of "natural and probable consequences," we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.' " C

In the latter case—*Weld-Blundell* v. *Stephens* (6)—LORD SUMNER said:

"What are 'natural, probable and necessary' consequences? Everything that happens happens in the order of nature and is therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary,' except in the sense of predestination. To speak of 'probable' consequence is to throw everything upon the jury. It is tautologous to speak of 'effective' cause, or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas and Coke Co.* (7) and *Hill* v. *New River Co.* (8). As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr. Hurst between the respondent and Messrs. Comins and Lowe. Further, no want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional, or wanton breach. This at once makes it possible to lay aside large classes of authorities. What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth* v. *Birmingham Waterworks* (9); *Smith* v. *London and South Western Rail. Co.* (3), per BLACKBURN, J. Again, what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell* (10), unless indeed it be regarded as a decision on negligence or no negligence. At any rate it is not this case." D E F G H I

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. In these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The charterers' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the

A mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negli-
B gence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

The other point relied upon by the charterers was that, the damage having been caused by fire, they were protected by cl. 21 of the charter. To this it was replied that the clause had no application in the case of a fire caused by the negligence of
C the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his
D own negligence. For these reasons I think that the appeal fails.

WARRINGTON, L.J.—A ship owned by the respondents was destroyed by fire while under a time charter to the appellants. The owners claimed as damages the value of the ship and some incidental expenses. The charterers disputed the claim and the matter was referred to arbitrators, who made their award in the form of
E a Special Case in favour of the owners, subject, of course, to the opinion of the court. The only question for the court is whether on the findings of the arbitrators as to facts they were justified in law in making an award in favour of the shipowners. SANKEY, J., has held that they were so justified. The charterers appealed.

The accident happened in the port of Casablanca, in Morocco, to which the ship had been directed by the charterers with a cargo which included cases of benzine
F and/or petrol stored in No. 1 hold. These cases had leaked on the voyage and there was a considerable quantity of petrol vapour in the hold. Arab stevedores employed by the charterers were engaged in shifting certain cargo in the hold, and for the purpose of their work had placed some heavy planks across the forward end of the hatchway. In the course of the work one of the planks came in contact with the sling or the rope by which the sling was worked, was thereby dislodged,
G and fell into the hold. The fall was instantly followed by a rush of flames, and the result was the total destruction of the ship. The charterers contend, first, that they are relieved from liability by the exception clause in the charterparty; and, secondly, that damages for the loss of the ship cannot be recovered, inasmuch as the causing of the spark was something that could not reasonably have been anticipated, and, therefore, the destruction of the ship was not the natural or
H probable consequence of the negligent act, and the damage was too remote. As to the first point, the exception clause does not contain any express exception of loss by fire caused by negligence. The present claim is based on negligence. It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse the shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly
I so framed: CARVER ON CARRIAGE BY SEA (ss. 14, 22); and as to bills of lading per BOWEN, L.J., in *Steinman* v. *Angier Line* (11); and, in my opinion, the same construction must be given to the clause when it is the liability of the charterers which is in question. This defence therefore fails. As to the second point, it is contended that "a person guilty of negligence is not responsible in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated" (5 Ex. 248). We are asked, in effect, to say that the doubt on this point expressed by POLLOCK, C.B., in *Greenland* v. *Chaplin* (2) (5 Exch. at p. 248) is well-founded and that his tentative view set forth in that

case and in *Rigby* v. *Hewitt* (1) (5 Exch. at p. 243) ought to prevail. There is some doubt whether the words of the Chief Baron in *Greenland* v. *Chaplin* (2) are correctly reported in the EXCHEQUER REPORTS, for in the report in the LAW JOURNAL (19 L.J.Ex. at p. 295) the words "guilty of negligence" are omitted, so that in the LAW JOURNAL report the passage reads:

> "I entertain considerable doubt whether a man is responsible in respect of mischief,"

and so on, leaving out the words "guilty of negligence." However this may be, the law on this point is, in my opinion, correctly stated in BEVEN ON NEGLIGENCE, 3rd Edn., vol. i, p. 85. I need not read the passage.

The result may be summarised as follows. The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by *Smith* v. *London and South Western Rail. Co.* (3), in the Exchequer Chamber, and particularly by the judgments of CHANNELL, B., and BLACKBURN, J. CHANNELL, B., says:

> "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by BRAMWELL, B., in his judgment in *Blyth* v. *Birmingham Waterworks Co.* (9) referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

BLACKBURN, J., says:

> "I also agree that what the defendants might reasonably anticipate is, as my BROTHER CHANNELL has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the charterers are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see per LORD SUMNER in *Weld-Blundell* v. *Stephens* (6) ([1920] A.C. at p. 983). On the whole, in my opinion, the appeal must be dismissed with costs.

SCRUTTON, L.J.—The steamship *Thrasyvoulos* was lost by fire while being discharged by workmen employed by the charterers. Experienced arbitrators, by whose findings of fact we are bound, have decided that the fire was caused by a spark igniting petrol vapour in the hold, the vapour coming from leaks from cargo shipped by the charterers, and that the spark was caused by the Arab workmen employed by the charterers negligently knocking a plank out of a temporary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour. On these findings the charterers contend that they are not liable for two reasons: first, that they are protected by an exception of "fire" which in the charter is "mutually excepted"; secondly, that as the arbitrators have found that it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim.

In my opinion, both these grounds of defence fail. An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if he fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted

peril does not prevent him from acting carefully, and he is liable for damages directly flowing from his breach of his obligation to act carefully, though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants. In the same way, though the charterer has an exception of fire in his favour, he will be liable if the fire was directly caused by his servants' negligence, for it was not fire that prevented them from being careful. This disposes of the first defence. The second defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well-known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery: *London Joint Stock Bank* v. *Macmillan* (12); while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell* v. *Stephens* (6). In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact caused sufficiently directly by the negligent act, and not by the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in *Smith* v. *London and South Western Rail. Co.* (3), and by the majority of the court in banc in *Rigby* v. *Hewitt* (1) and *Greenland* v. *Chaplin* (2), and approved recently by LORD SUMNER in *Weld-Blundell* v. *Stephens* (6), and SIR SAMUEL EVANS in *H.M.S. London* (5). In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis*; *Holman, Fenwick & Willan.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

RAINHAM CHEMICAL WORKS, LTD. AND OTHERS *v.* BELVEDERE FISH GUANO CO., LTD.

[House of Lords (Lord Buckmaster, Lord Sumner, Lord Parmoor, Lord Wrenbury and Lord Carson), June 16, 17, 20, July 28, 1921]

B

[Reported [1921] 2 A.C. 465; 90 L.J.K.B. 1252; 126 L.T. 70; 37 T.L.R. 973; 66 Sol. Jo. 7; 19 L.G.R. 657]

Company—Director—Liability for tort of company—Bona fide company for lawful purpose—Company acting as agent of director.

Nuisance—Rylands v. Fletcher doctrine—Explosion—Explosive substance brought on defendant's land—Damage to adjoining premises.

C

By a contract dated Aug. 24, 1915, F. and P. undertook, at their sole risk, to make picric acid for the Minister of Munitions. On Sept. 10, 1915, they obtained from J.C. and J.F. (the landlords) an agreement for the tenancy of certain land, on which factory premises were later built, it being expressly provided that F. and P. were not to assign, underlet, or part with the possession of the premises without the consent of the landlords. On Mar. 17, 1916, a company was incorporated to acquire the business of manufacturing the picric acid from F. and P. who became sole governing directors with "full control of the business of the company." On Mar. 22 an agreement was entered into between F. and P. and the company under which F. and P. agreed to sell to the company the benefit of the tenancy agreement and the buildings erected on the land, to provide materials and money for expenses until the company was in a position to manufacture picric acid commercially, and to allow the company to go into possession of the premises as tenants until the purchase price had been paid, but until that was done the company were to be deemed to be in possession of the premises as their agents. No consent to underlet or assign the premises to the company was obtained by F. and P., and the company never paid them the purchase price under the agreement of Mar. 22. To manufacture picric acid it was necessary that certain explosive material should be brought on the premises, and this was done with the knowledge of F. and P., but neither of them interfered in any way in the manufacture of the picric acid or had any responsibility regarding the place or mode of storage on the premises of the explosive material. On Sept. 14, 1916, an explosion occurred at the factory owing to the presence of this material and damage was caused to adjoining premises owned by the respondents.

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Held: if a company were formed for the express purpose of doing a wrongful act, or if, when formed, the persons in control expressly directed that a wrongful thing be done, those persons as well as the company were responsible for the consequences, but there was no evidence in the present case to establish the liability of F. and P. under either of those heads; nor was it a case where danger must necessarily have arisen within the principle of such authorities as *Harris* v. *James* (1), (1876), 35 L.T. 240; and no liability was incurred by F. and P. from the fact that they occupied the position of governing directors with the control of the business, for directors of a company which had been bona fide established could not be regarded as principals for whom the company acted as agents; yet F. and P. were personally liable under the doctrine of *Rylands* v. *Fletcher* (2), (1868), L.R. 3 H.L. 330, for the damage caused to the respondents' premises since at the material time the company was in occupation of the factory as their agents and not in its own right.

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I

Decision of the Court of Appeal, [1920] 2 K.B. 487, affirmed.

Notes. Considered: *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471. Referred to: *Kennard* v. *Cory*, [1922] 1 Ch. 265; *Scammell* v. *Hurley*, [1929] 1 K.B. 419; *Shiffman* v. *Venerable Order of Hospital of St. John of Jerusalem*, [1936], 1 All E.R. 557; *Mulholland and Tedd, Ltd.* v. *Baker*, [1939] 3 All E.R. 253.

As to the personal liability of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 306 et seq.; and as to the rule in *Rylands* v. *Fletcher* (2), see ibid., vol. 28, pp. 145–149. For cases, see 9 DIGEST (Repl.) 508 et seq. and 36 DIGEST (Repl.) 282 et seq.

Cases referred to:

(1) *Harris* v. *James* (1876), 45 L.J.Q.B. 545; 35 L.T. 240; 40 J.P. 663; 36 Digest (Repl.) 319, *650.*

(2) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

(3) *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243; 24 T.L.R. 478; 52 Sol. Jo. 393; 6 L.G.R. 609, C.A.; 36 Digest (Repl.) 293, *399.*

(4) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 58 Sol. Jo. 577; 12 L.G.R. 807, C.A.; 36 Digest (Repl.) 284, *338.*

(5) *Salomon* v. *Salomon & Co.*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11.*

(6) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 47 Q.B. 72; 47 W.R. 565, C.A.; 34 Digest 161, *1260.*

(7) *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A.C. 381; 71 L.J.P.C. 122; 88 L.T. 457; 50 W.R. 657; 18 T.L.R. 523, P.C.; 36 Digest (Repl.) 284, *336.*

(8) *Midwood & Co.* v. *Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest 50, *288.*

(9) *Rich* v. *Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, *643.*

(10) *Malzy* v. *Eichholz*, [1916] 2 K.B. 308; 85 L.J.K.B. 1132; 115 L.T. 9; 32 T.L.R. 506; 60 Sol. Jo. 511, C.A.; 31 Digest (Repl.) 139, *2769.*

(11) *Harris* v. *Bentley* (1902), unreported; cited in 87 L.T. at p. 694; 47 Sol. Jo. at p. 147, C.A.; 31 Digest (Repl.) 159, *2967.*

(12) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384.*

(13) *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, *1263.*

Appeal by the defendants from an order of the Court of Appeal (reported [1920] 2 K.B. 487), affirming a judgment of SCRUTTON, L.J., sitting as an additional judge of the King's Bench Division.

In the action the plaintiffs, the present respondents, claimed damages against the appellant company, and the appellants Feldman and Partridge, two of its directors, for injury to their property caused by an explosion at the company's chemical works at Rainham, Essex. SCRUTTON, L.J., held that all the appellants were liable for the consequences of carrying on a dangerous trade under the doctrine enunciated in *Rylands* v. *Fletcher* (2). The Court of Appeal (LORD STERNDALE, M.R., ATKIN, and YOUNGER, L.JJ.) held that the appellant company was liable, and the majority (YOUNGER, L.J., dissenting) held further that the appellants Feldman and Partridge could not escape personal liability for bringing dangerous substances upon the premises of the appellant company though they had placed the actual manufacture of the picric acid into the hands of the company, but were in a position analogous to directors who had personally authorised the creation of a nuisance by a servant of the company and were not exonerated from liability because they were acting under statutory powers.

The facts fully appear from the considered opinion of LORD BUCKMASTER.

Sir John Simon, K.C., Montgomery, K.C., Maddocks, K.C., and *Ernest Wetton* for the appellants.

J. B. Matthews, K.C., and *H. H. Joy* for the respondents.

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The House took time for consideration.

July 28, 1921. The following opinions were read.

LORD BUCKMASTER.—On Sept. 14, 1916, a violent explosion occurred at the Range Works, Rainham, in the county of Essex, causing loss of life and serious damage to adjoining property. Some of the premises so damaged were owned by the present respondents, the Belvedere Fish Guano Co., who accordingly instituted proceedings to recover compensation for their loss. They originally made as defendants to the action a limited company known as the Rainham Chemical Works, Ltd., and sought to establish liability against them upon the ground that they were in occupation of the works and had brought upon their land quantities of dangerous substances. The plaintiffs subsequently amended their writ, and added as further defendants, Messrs. Feldman and Partridge, who, together with the company, are the present appellants, alleging that they, together with other persons and the defendant company, were in occupation of the land, or that the company was in occupation on their behalf. The answer put in was that the company were employed as servants or agents of the Ministry of Munitions, that there was no negligence, and that the materials which caused the explosion were not in themselves dangerous. There was no attempt to sever as between one set of defendants and the other; there was, in fact, no denial that the company occupied on behalf of the other defendants, and there was no attempt to obtain separate representation at the hearing, so that the case came on for trial with the main issue defined by the pleadings as being whether or no the work done was as agents for the Ministry of Munitions or whether the acts in themselves were actionable.

The foundation of the action was a claim based upon the familiar doctrine established by *Rylands* v. *Fletcher* (2), which depends upon this—that, even apart from negligence, the use of land by one person in an exceptional manner that causes damage to another, not necessarily an adjacent owner, is actionable: *West* v. *Bristol Tramways Co.* (3); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4). In the present case the use complained of was that for the purpose of making munitions, which was certainly not the common and ordinary use of the land, two substances, namely, nitrate of soda and dinitrophenol—were stored in close proximity, with the result that on a fire breaking out they exploded with terrific violence. It may be accepted that it was not known to either of the personal appellants that this danger existed, but that in itself affords no excuse, and the result is that the plaintiffs' cause of action is well founded, and the only matter for determination is against whom the action should be brought. SCRUTTON, L.J., before whom the case was originally heard, regarded both sets of defendants as responsible, and entered judgment against them accordingly. The Court of Appeal were unanimous in the view that the company was liable, but YOUNGER, L.J., dissented from his colleagues on the question of the liability of the two remaining defendants, whom he regarded as free from responsibility.

In order that the grounds of these decisions may be examined and compared, it is necessary to show the circumstances in which the premises were being used for the manufacture of explosives at the time of the accident. It appears that in 1915 the two appellants, Feldman and Partridge, became aware of a process, invented by two foreign chemists named David Maron and George Wyss, whereby picric acid could be manufactured from dinitrophenol and nitrate of soda. The then well-established method of manufacture involved the use of nitric acid, and, owing to the shortage of this substance [due to the 1914–18 war], the new process appeared to be one of great national value. Messrs. Feldman and Partridge, together with one Oliver de Gerde, accordingly obtained the benefit of an agreement, dated July 14, 1915, with Messrs. Maron and Wyss for the benefit of their services and the rights of patents and inventions held in connection with the process, and armed with this agreement, they secured on Aug. 24, 1915, from the Ministry of Munitions, a contract whereby they were, at their sole risk and on their sole

responsibility, to make into picric acid quantities of D.N.P. delivered to them for the purpose by the Minister. They were to be paid 2d. a pound for their services and such further profits as they might make by the sale to the Minister of the picric acid at a price not exceeding 3d. a pound for sale to Russia, Italy, and France; they were to be at liberty to manufacture on their own account. There was an express provision that Messrs. Feldman and Partridge were to keep separate books of account, store books, and other records for the purpose of recording all transactions relating to the agreement, and the conditions of contracts for the supply of army stores were made applicable to the bargain, the most important of these conditions being one that prohibited the transferring or assigning, directly or indirectly, of any portion of the contract without the permission of the Ministry. Messrs. Feldman and Partridge then obtained a tenancy agreement of the land on which the factory was to be established from J. C. and J. Field, Ltd., and this they effected on Sept. 10, 1915, the term being one year from Sept. 1, 1915, and thenceforward until six months after the declaration of peace, with power of termination which is immaterial. In this agreement there was an express provision that the tenants were not to assign, underlet or part with possession of the premises or any part thereof without the consent of the landlords, excepting to a government department. Messrs. Feldman and Partridge then executed the necessary work upon the premises. These they divided into two parts—one called the Range Works, where the picric acid was to be manufactured for the government, and the other called the Rainham Works, for the manufacture of picric acid which they were at liberty to export. De Gerde, whose name has been mentioned, retired on Sept. 23, 1915, from any active participation in the work, and no further reference need be made to him, though his name appears in all of the agreements to which attention must be directed.

On March 17, 1916, the appellant company was incorporated, with a share capital of £5,000, divided into 100,000 shares of 1s. each, its object being to acquire and establish the business of manufacturers of picric acid and explosives and other general businesses, and by its articles it was provided that they should adopt and carry out two agreements therein referred to. Articles 12, 13, and 14 established the appellants, Messrs. Feldman and Partridge, as the sole governing directors of the company, without remuneration, and vested in them "full control of the business of the company," including power to appoint or remove directors, but there is nothing to show whether this power was ever exercised. The agreements mentioned in the articles were duly executed on March 22, 1916, and were made, in the one instance, between Messrs. Feldman and Partridge and the company (and this agreement I will refer to as "the first agreement"), and the other between Messrs. Maron and Wyss, Bertrand, de Gerde and Feldman and Partridge, of the one part, and the company, of the other part (which I will call "the second agreement"). The first agreement provided for the sale to the company of the benefit of the tenancy agreement and the buildings erected by the vendors, the consideration being a sum of cash calculated in a manner which it is unnecessary to examine. Completion was to take place when the amount in cash had been ascertained and paid, and this apparently was never done. The vendors agreed to provide capital for all materials and expenses until such time as the company was in a position to commence the manufacture of picric acid commercially. They also agreed to allow the company to go into occupation of the premises and remain in such occupation as tenants until the purchase consideration had been paid, but until payment it was expressly stated that the company should be deemed to be in possession of the premises, machinery and plant, as the agents of the vendors. The second agreement, which recited that the company had been formed for the purpose of defining in shares the respective interests of the different parties, provided for the sale to the company of the rights acquired under the agreement of July 14, 1915, and Aug. 24, 1915, the consideration for the sale being £5,000 payable as to 2s. in cash and the balance by the allotment of fully paid shares to the different parties in the proportions specified in the schedule.

What subsequently happened has never been clearly established. The company undoubtedly made agreements for the appointment of a manager and other servants, they effected assurances of the property, they appear also to have been placed as occupiers of the premises on the rate book and they entered directly into communication with the Ministry of Munitions, but it is quite clear that the Ministry of Munitions never accepted their liability in place of Messrs. Feldman and Partridge, or gave any assent whatever to the assignment of the contract. As to what books were kept by the company, what the directors did, or what was the nature or the position of their banking account, no information has been afforded. It may, however, I think be accepted that in some sense the company was in occupation, and it is said on behalf of Messrs. Feldman and Partridge that the circumstances I have mentioned are sufficient to show that the occupation was exclusive and independent, and that the company, in fact, carried on the business entirely on their own account and were therefore alone responsible for what ensued. SCRUTTON, L.J., in trying the case, rejected this argument upon the ground that the agreements were paper shams and made no difference to the reality. I cannot accept that view; the agreements were real agreements, entered into with an independent entity, and were not shams. It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully paid shares and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has been incorporated and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. In *Salomon* v. *Salomon and Co.* (5) parties who sought to disregard the existence of the company on these grounds were unable to establish this fact, and they accordingly failed; but the present respondents urge that the position is quite plain. It seems to have been so regarded by SCRUTTON, L.J., the Master of the Rolls thought the same result was reached by considering that the company was in fact under the sole control of Messrs. Feldman and Partridge as governing directors, and ATKIN, L.J., by the analogy of cases such as *Penny* v. *Wimbledon Urban Council* (6).

I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads. Nor is this a case where danger must necessarily have arisen within the principle of such authorities as that of *Harris* v. *James* (1).

The grounds of ATKIN, L.J.'s judgment gave rise to a different problem, which is not resolved by *Penny* v. *Wimbledon Urban Council* (6), to which he refers. There a local authority had, in pursuance of their powers, taken upon themselves the duty of making up a road. They entered into a contract for the work with an independent contractor. He left heaps of soil upon the road, unfenced and unlighted, and the plaintiff suffered injury by falling over them. The ground of the decision was that the council had control of the work, and were consequently liable for the negligent act of their contractor, and, as A. L. SMITH, L.J., says, "the position then is that the council are found to be liable as principals for the negli-

A gence of their agents." The substance of Vaughan Williams, L.J.'s judgment is expressed in these words:

> "In cases like the present, where a local authority has power to do something to a road which involves stoppage, or to do something to it which makes it dangerous while it is being done, there is a duty cast upon them to take
B care that the Queen's subjects are not injured by any negligence in the doing of that which has to be done, and that duty being once established they cannot escape from it by the mere employment of an independent contractor."

The case, therefore, depends either upon the principle that the local authority controlled the work as principals or that they had a duty to perform which they
C neglected. The first of these grounds is in issue in the present case; and as to the second, the mere fact of entering into a contract to make munitions does not, in my opinion, impose any general duty on the contractors. The circumstances in which an employer is liable for a contractor's act may not be capable of a definition which can be applied to test every variety of circumstance, but I do not think such circumstances are proved to exist in the present case.

D Messrs. Feldman and Partridge having contracted for the manufacture of munitions, which in itself involves the possibility of explosion, it does not appear to me certain that liability could not be displaced by the introduction of an independent contractor. If, for example, there had been no restriction placed upon Messrs. Feldman and Partridge's power to enter into sub-contracts, and they had contracted with a well-known firm of munition makers to execute the order in whole
E or in part upon their premises, it would, I think, be difficult to say that an explosion that took place on those works would be an explosion for which Messrs. Feldman and Partridge would have been responsible, and, for the purpose of testing liability, it does not appear to me that the restriction to which they were subject is a relevant matter. This, I think, is accurately expressed by Younger, L.J., in his judgment, but I do not share the conclusions at which he arrives, because, in
F my opinion, the liability depends upon other considerations.

It depends upon the foundation of the suit which charges the defendants as occupiers of the land. Were Messrs. Feldman and Partridge in occupation? That they were so originally is, of course, beyond dispute. They were the tenants from Messrs. Field, and as such tenants they entered on the premises and there proceeded to effect alterations and do the necessary work. They also employed
G Mr. Pettit, under whose superintendence the work was continued, and though he continued his services after the formation of the company they were sued by him for his fees and paid his bill for the whole period of his work. Not only were they originally in occupation, but they were prevented by the very terms of their contract not merely from assigning or underletting, but from parting with the possession of the premises themselves. What then was the character of the occupation
H by the company? It is, I think, to be found defined in the language of the first agreement by which they sold their rights to the company. They were there as agents for the vendors, and unless Messrs. Feldman and Partridge were able either to establish that position or to show that they had never in fact parted with possession at all they would have forfeited the lease and been unable either to obtain any relief against the forfeiture or any compensation for the work they had
I done. It was essential in relation to their landlords that they should not give up possession of the property. The landlords had themselves thought that the property had been dealt with and had received an express assurance on behalf of Messrs. Feldman and Partridge that it had not in fact been assigned or underlet. Permission to assign was asked for, but was never granted. In those circumstances I cannot satisfy myself that Messrs. Feldman and Partridge ever so divested themselves of occupation of the property, which they undoubtedly held, as to substitute the occupation of the company in the place of their own. I should have come to that conclusion apart from the position which the history of the case discloses, but

I find confirmation of it in the fact that when the claim was first brought against them, a claim of the greatest magnitude, and, I fear, of the gravest consequence, they never attempted to dissociate themselves from the company nor assert that they were not in occupation, though it was specifically alleged; neither by pleading nor by separate representation did they sever in their case, though indeed it was done in argument both here and in the courts below, where counsel have been called upon to perform the impossible feat of appearing for two clients who, according to their contention, possess divers and conflicting interests. For these reasons I think this appeal should be dismissed.

LORD SUMNER.—When stored in large quantities dinitrophenol is a dangerous explosive. A hot flame is needed to explode it, but this is provided by the ignition of substances, which, like nitrate of soda, give off large quantities of oxygen. The Rainham Chemical Works, Ltd., by the hands of its employees, for whom it is responsible as their employer, brought into the Range site at Rainham dinitrophenol in large quantities, the Range site being one from which opportunities of ignition as above mentioned are not excluded. The explosive, to which in this case the rule in *Rylands* v. *Fletcher* (2) has to be applied, is not a combination of dinitrophenol with old boxes or bags, which had contained nitrate of soda. These are only one of the conditions of explosion. What is material is the explosive itself. The dinitrophenol was lawfully brought on to the Range site and stored there by the company. They cannot escape any liability, which otherwise attaches to them by storing it there, merely because they have no tenancy or independent occupation of the land, but use it thus by permission of the tenants or occupiers: *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (7), [1902] A.C. at p. 392; *Midwood* v. *Manchester Corpn.* (8); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4). Accordingly, I think the appeal of the company fails.

The other appellants, Messrs. Feldman and Partridge, clearly assented to the introduction and storing of the dinitrophenol, and, until repayment of their advances to the company they alone would benefit pecuniarily by the manufacture of picric acid from it. Furthermore, they were personally bound to the Minister of Munitions to receive his dinitrophenol at Rainham and use it in manufacturing picric acid, an obligation which, rightly or wrongly, they procured the Rainham company to discharge in lieu of themselves. If, then, they were occupiers of the Range site, I think they, too, would be liable on the principle of *Rylands* v. *Fletcher* (2). As occupiers they would be under a personal obligation to their neighbours not to let this non-natural user of the land, which they occupied, become a source of damage to them. This obligation it was for them to discharge and, whether they employed agents or independent contractors in connection with the matter, their own obligation persisted. Even if they actually employed nobody, but simply suffered others to manufacture upon the site which they nevertheless continued to occupy, I think they are still under liability to third parties, if what is thus allowed by them upon the land which they occupy causes damage. Before March 22, 1916, it was these appellants who were in occupation of the range site. Is it proved that they ever ceased to be in occupation? The physical presence and activity of company's servants, the visits of the two appellants when holding office as the company's directors, and the continuous absence of any person shown to have been acting for or as these appellants and not for or as the company are facts of importance, but are not conclusive. Is it proved, is there any evidence to prove, that the occupation of the company, if any, was exclusive of a continuing occupation by these appellants? I leave out M. de Gerde and all others than Messrs. Feldman and Partridge. We are told that they "dropped out," and so it seems to be, for it is Messrs. Feldman and Partridge alone who are "vendors" to the company of the tenancy of the site, and, as we do not know that these other parties had any interest outstanding or, if any, what it was, we can say nothing about it. If their position was the same as that of Messrs. Feldman

A and Partridge, what I have to say of the latter would apply equally to them. If it is not, it need not be considered, and in either case, they are not before your Lordships. The defence pleads that the site was in the occupation of the Ministry of Munitions. Messrs. Feldman and Partridge swore in their answers to interrogatories (which have been referred to at the Bar and I assume were put in at the trial) that the Range works were at the time of the explosion in the occupation of B that Ministry. This is not true in fact. The answer seems to be an argumentative one founded on the agreement of Aug. 24, 1915, which does not support it. Mr Feldman, when called, did not say that any change was made in the occupation of the premises, nor did he say what persons were in occupation at the time of the explosion. He left all this part of the case to be inferred from the agreements and from the evidence of what was done upon the site.

C It was proved, indeed, that the company was assessed to the poor rate and that, on proceedings being taken, it was ordered to pay. Whether its liability was questioned and whether the proceedings took place before or after the explosion we do not know. In the latter case, which, upon the dates, is much the more probable, the acceptance of liability by the company may have been only a step towards negativing liability in the other appellants. The fact that the company D was rated in the rate book only shows that the overseers were told, or surmised, that it was in occupation. It is of little value, since we know nothing of their information and they knew nothing of themselves but what they could see on the site. On the other hand, it appears that, after the company was incorporated, no fresh licence under the Explosives Act was taken out in its name, nor was notice given under the Act that the licence which had been taken out in the name of E Messrs. Feldman and Partridge had now been transferred to the company. Accordingly, as far as proof goes of a change of occupation from that of Messrs. Feldman and Partridge to that of the company, exclusively of them, I think there is none fit to be acted on. I come, therefore, to the agreements.

By that of March 22, 1916, Messrs. Feldman and Partridge purported to sell to the company the benefit of their agreement for the tenancy of the premises from F Messrs. Field, and agreed to permit the company to go into occupation forthwith and to remain in occupation as their tenants "until the whole of the purchase consideration has been paid in cash"—a phrase which seems obscure—"and during such occupation the company hereby agrees to perform all the obligations of the tenants" under the agreement with Messrs. Field, "and from time to time, until payment of the whole of the said purchase consideration, the company shall G be deemed to be retaining possession of the said premises . . . as the agent of the vendors." Whatever else this clause may mean, the presence of the company's servants on the premises, pending a cash payment of the consideration, was not an occupation of the premises by the company to the exclusion of the vendors Messrs. Feldman and Partridge. The agreed permission of the vendors availed the purchasers nothing unless the purchasers availed themselves of it, and the agreement H that the company "shall forthwith go into occupation" was itself limited by the agreement that nevertheless, until a remote event, its possession was only to be the possession of Messrs. Feldman and Partridge, whose agents it was to be deemed to be. The appellant company argues cynically that, as it was "deemed" to be an agent, it follows necessarily that it was not really an agent in fact, or there would have been no deeming about it, but it overlooks the real point, which I is that, unless this clause made it agent only and kept Messrs. Feldman and Partridge in possession, it was no use at all for the purpose for which it was chiefly intended. The tenants, under the agreement with Messrs. Field, covenanted not to assign, underlet, or part with possession without consent, and Messrs. Field's right to re-enter and to determine the tenancy on any breach of this covenant jeopardised the whole of this speculation, if, as part of the arrangements with the company, the latter should go into occupation, and the appellants, Messrs. Feldman and Partridge, should give it up. Messrs. Field were on the alert. To their inquiry the appellants' solicitor, with the agreement of March 22, 1916, already

signed, cautiously answered that nothing had been done as regards assignment or sub-letting. He said nothing about occupation. Messrs. Field, equally cautiously, ignored his application for permission to do either. Plainly, they stood upon their rights, which were valuable. It was to provide for such a contingency that the curious clause above quoted was framed. The company was to make the picric acid out of the dinitrophenol and so had to be on the site, but the foundation of the whole manufacture would be precarious, and the money advanced by Messrs. Feldman and Partridge would be in jeopardy, unless the company could somehow be on the site and yet not be in independent possession of it. No position will satisfy this condition except the presence of the company as agents for the vendors. It may be arguable that the company did not manufacture picric acid, and perhaps did not take in the Minister's explosives except on its own behalf, but how can it be argued that its possession of the site was anything but the possession, in whole or in part, of Messrs. Feldman and Partridge? Certainly I do not see how the appellants can argue it contrary to their answers to interrogatories, and merely to escape liability for an explosion in the course of a business in which no one was nearly so much interested as themselves. I have no doubt that they meant to escape liability for explosions if they occurred, and by means of an expedient, ignoble but not unlawful, they hoped that they had done so. They steered betwixt Scylla and Charybdis. If all went well, they would get back their outlay as vendors to the company, and thereafter make a fortune as its principal shareholders. If the process was a failure, as on a commercial scale it might prove to be, they would lose their outlay, but at least not be liable for the company's debts if anyone had been foolish enough to give it credit. If the dinitrophenol exploded and blew up not only the enterprise but its neighbours, they hoped to find in the company a buffer between themselves and the rule in *Rylands* v. *Fletcher* (2). This was a nice course to hold. It was excellent if it could be made good, but unfortunately it required that Messrs. Feldman and Partridge should be at the same time occupiers and not occupiers of the premises they demised, which was absurd. They took their chance. Perhaps Messrs. Field would relent and for a consideration would consent to the assignment; perhaps the consideration might not be such as they would recoil from paying; perhaps there might be no explosion; perhaps, if it came to litigation, the clause might hold water. After all, if the explosive blew up before Messrs. Field re-entered, immunity in the subsequent action would be cheaply bought at the loss of the tenancy, for the process would be too hazardous to be continued. They took advice and took the risk. The opinion of YOUNGER, L.J., shows that they might hope to succeed, but, in my view, the judgments below rightly held that they have failed.

LORD PARMOOR.—The question raised in this appeal is whether the appellants, Messrs. Feldman and Partridge, are liable for the damage done, to the properties of the respondents, through an explosion at the Rainham Chemical Works on Sept. 14, 1916. The case is one of great difficulty, but it depends mainly on the construction of the second agreement of March 22, 1916, especially of the words in cl. 6, which provide that, until the payment of the whole of the purchase consideration, the Rainham Chemical Works Co. shall be deemed to be retaining possession of the premises as agent of the vendors. It is notorious that in 1915 it was of great importance to obtain an adequate supply of high explosives, and that Lord Moulton, as director-general of explosive supply to the Ministry of Munitions, was engaged in the difficult and anxious task of ensuring a sufficient output. At that time there was a serious shortage of nitric acid. Early in the year the appellants verbally informed Lord Moulton of a process invented by two foreign chemists, named David Maron and George Wyss, whereby picric acid could be manufactured from dinitrophenol (hereinafter referred to as D.N.P.) and nitrate of soda. D.N.P. had been used mainly for the manufacture of dyes, and is a stable compound, which does not explode easily. It is in itself not dangerous. Nitrate of soda is not an explosive, but wood or bags impregnated with moist

A nitrate of soda will, when dry, burn fiercely if once ignited. Therefore, while neither D.N.P. nor nitrate of soda is, in itself, dangerous, they become a source of danger if stored in close proximity to one another. It is proved that it was due to this cause that the explosion took place. The result of the evidence on this point is that the manufacture of picric acid from D.N.P. and nitrate of soda may or may not be dangerous in its character, but that in the present instance it was B being manufactured under dangerous conditions, and that these dangerous conditions caused the explosion. The principle, therefore, of *Rylands* v. *Fletcher* (2) becomes applicable. The appellants contend that the premises on which the explosion occurred were at the date of the explosion in the occupation of the company, and that the company carried on the manufacture as independent manufacturers and neither on their behalf nor under their control.

C On July 14, 1915, the appellants, together with one De Gerde, entered into an agreement with the two chemists, that, for the considerations named, the chemists should develop and operate a method discovered by them for the production of picric acid from D.N.P. On Aug. 24, 1915, an agreement was made between the Minister of Munitions, of the one part, and six persons, including the appellants and the chemists, of the other part, for the manufacture of picric acid from D.N.P. D It was thereby provided that the contractors, as agents of the Minister, should erect and adapt at their works at Rainham, suitable buildings, plant and machinery, and should then, on their sole responsibility and at their own risk, operate, manage, and work the same. It was further provided that the D.N.P. should be supplied by the Minister, and that the buildings, plant and machinery should remain his property. At this date the appellants had not obtained the E lease of the premises at Rainham on which the explosion subsequently took place. This lease was obtained on Sept. 10, 1915, and contained a covenant on the part of the lessees to insure and not to assign or underlet or part with the possession of the said premises, or any part thereof, without the previous consent in writing of the lessees, except to a Department of His Majesty's government. Arrangements were made for the erection of the factory and plant upon the Rainham site, F but, apart from experimental work, manufacture for the Ministry did not commence until after March 22, 1916. There may be some doubt as to this date, but I think this is the correct conclusion. On March 17 the appellants caused the Rainham Chemical Works Co., Ltd., to be registered as a private company. The capital was £5,000 in 100,000 shares of 1s. each. Five shillings only were paid up, the shares being distributed between the persons concerned according to G their respective interests. Each of the appellants, Feldman and Partridge, received 28½ per cent. of the shares. By art. 2 the company was forthwith to adopt and carry into effect the two agreements of March 22, 1916, of which the draft had already been prepared, and to which reference will be made. The appellants, as governing directors, were to have full control of the business of the company. The company was honestly promoted and for a legitimate purpose. H There is no reason why the appellants should not have sought to limit their future liability by the formation of a limited company. Their conduct was bona fide and straightforward, and all the arrangements in connection with the formation of the company were brought to the knowledge of Lord Moulton, as representing the Ministry. If the appellants in fact transferred the occupation of the premises to the company, and further transferred to them the sole responsibility for the manu- I facture of the picric acid, they would, in my opinion, have freed themselves from the risk of subsequent liability to the respondents. No liability is incurred by the appellants from the fact they occupied the position of governing directors with the control of the business of the company conferred on them by arts. 12, 13, and 14 of the articles of association.

By the first of the agreements of March 22, 1916, the appellants agreed to permit the company to, and that the company should forthwith, go into occupation of the buildings, machinery, and plant, and remain in such occupation as tenants of the vendors until the whole of the purchase considerations had been paid in

cash, paying rent and keeping the buildings, plant, and machinery insured against all risks that are capable of being insured against. If there had been no further provision as to the occupation of the premises, the conclusion to be drawn would be that the appellants had placed the company in a position forthwith to go into exclusive occupation of the buildings, machinery, and plant, and to remain there as tenant subject to any steps which might be taken by the head landlords, Messrs. Field. As a fact, the company did go into occupation and remain in occupation up to the date of the explosion. There is, however, a further provision. The words are, "that until payment of the whole of the net purchase the company shall be deemed to be retaining possession of the said machinery and plant as the agent of the vendors." Is the effect of these words to substitute a relationship of agency for a relationship of tenancy during the period before payment of the purchase money? By the second agreement of March 22, 1916, the appellants, with the other contractors, purported to transfer to the company the benefit of the agreements of July 14 and Aug. 24, 1915. These agreements were of a personal character, and not capable of assignment, and there was no novation by which the Ministry consented to accept the company in place of the existing obligees. On the other hand, Lord Moulton, as representative of the Ministry of Munitions, was cognisant of all the conditions, and it did not matter by whom the actual manufacture was carried on so long as there was an assurance that the knowledge and experience of the chemists would be retained. It may be assumed that Lord Moulton was prepared to expedite any arrangement under which, at a critical time, a supply of picric acid might be obtained from D.N.P., under the new process. There is no evidence that the appellants interfered in any way in the manufacture of the picric acid, or that they had any responsibility for the placing of D.N.P., and the bags and boxes which contained nitrate of soda, in close proximity. I agree with YOUNGER, L.J., that the company was not at the date of the explosion carrying on the manufacture of picric acid as the agent of the appellants, and that in respect of the contract with the Ministry, the company did not act as the agent of the appellants. There was none of the indicia from which the relationship of agency would ordinarily be implied. If this agency could be established it would follow that the appellants are liable in the action, but, in my opinion, it has not been established.

In order to determine whether, under the above conditions, the appellants are liable, it is essential that there should be no confusion of the grounds on which liability has been suggested. In the first place, I think that the appellants cannot be held liable, either directly or indirectly, as governing directors of the company, and to hold them to be so liable would be inconsistent with established principles. The appellants as governing directors incurred no personal liability. Directors of a company which has been bona fide established cannot be regarded as principals for whom the company act as agents. Whatever may be the true meaning of the passages in the judgment of SCRUTTON, L.J., to which reference has been made, there is no evidence that the company was a sham, or that the relationship between the directors and the company was either abnormal, or based on a sham procedure. In the second place, there is no evidence of negligence on the part of the appellants such as would make them liable. The manufacture of picric acid was carried on by competent experts and employees in the service of the company and subject to the supervision of the Ministry. The only ground on which, in my opinion, the appellants can be held to be liable is that they had not transferred to the company the exclusive occupation of the premises on which the explosion occurred. That they became tenants of these premises as lessees of Messrs. Field is unquestioned, but were they in any sense in joint occupation of the Range Works on Sept 14, 1916, when the explosion occurred? The answer to this question depends on the terms of the first agreement of March, 1916, and of the conduct of the parties thereunder. If the company became tenants in exclusive occupation of the Range Works, the appellants would not be liable on the ground that they had demised to the company premises and plant capable of being so used as to

A create a nuisance although the tenant has so used it: *Rich* v. *Basterfield* (9). The same principle has been re-stated in *Malzy* v. *Eichholz* (10). The Master of the Rolls, Lord Cozens-Hardy, says: "It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person does carry on that B business in such a manner as to create a nuisance. It would be different, of course, if it were let for a purpose which necessarily involved a nuisance, but this letting did not necessarily involve a nuisance." In the present case the manufacture of picric acid did not necessarily involve a nuisance, and the appellants could not, as lessors, be rendered liable merely because the company did in fact carry on the business in such a manner as to create a nuisance. In his judgment C the Master of the Rolls refers to an unreported case of *Harris* v. *Bentley* (11), in which Lord Collins said: "If the evidence showed acquiescence by the landlord carried to such a point as to found an inference that the landlord actively participated in the use of the flats for immoral purposes, possibly there might be a breach of the contract." There is no evidence of such acquiescence by the appellants. The cases in which a landlord has been held liable, although employing indepen- D dent contractors, are either where a nuisance was in existence at the date of the letting or where there was an antecedent duty which could not be transferred to another person. These cases are not applicable to the conditions in the present case.

In *Pickard* v. *Smith* (12) the defendant occupied a refreshment room and coal cellar at a railway station, the trap of the coal cellar being in the platform of the E station. The plaintiff, a passenger by the railway, fell down the opening while the trap door was raised for the purpose of a coal merchant discharging coal into the cellar, and was under the coal merchant's control. The defendant was held liable as the occupier of the cellar, and Vaughan-Williams, J., after referring to the rule which exempts the employer from liability for the negligence of an independent contractor employed by him to do a lawful act, says, "This rule, however, is F not applicable to cases in which the act which occasions the injury is one which a contractor was employed to do; nor by parity of reason to cases in which a contractor is entrusted with the performance of a duty incumbent on its employer, and neglects its fulfilments, whereby an injury is occasioned." In the present instance it cannot be said that the company was employed to carry out the manufacture of picric acid in a dangerous manner, or that it was entrusted with the G performance of a duty incumbent on the appellants. In *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (13) the contractor had built a bridge so as to obstruct the navigation, and not in conformity with the restrictions imposed by Parliament. In such a case an employing company cannot avoid the responsibility of compliance with statutory restrictions by employing some other person to do the work, but in the present case no such question arises for decision. In the *Wimbledon Case* (6) H the duty on the defendants on which their liability was based, was not to make a hole in the highway without guarding it. A common factor in all these cases was some antecedent duty towards the plaintiff which could not be displaced by the employment of an independent contractor, but I agree with Younger, L.J., that the appellants individually owed no duty to the plaintiffs in respect of the care of the D.N.P. after deposit, assuming that the company were independent con- I tractors, and that by reasonable care on their behalf danger might have been avoided.

The only way in which the appellants can be held to be liable is that they had not parted with the premises and plant to the company so as to divest themselves of their occupation and occupation rights. I do not doubt that the company were in actual physical possession of the Range Works when the explosion occurred, but I am not satisfied the appellants had not certain rights of joint occupation. The sale contemplated under the agreement of March 22, 1916, had not been carried out at the date of the explosion. Paragraph 6 of the agreement has already been

quoted. There is on the face of it an inconsistency between the company going into occupation as tenants of the appellants and the company being deemed to be in possession as agents of the tenants, and, on the whole, it appears to be an arrangement under which the appellants did retain some occupation interest in the premises and plant. It is on this ground that I do not dissent from the opinions which have been expressed to your Lordships, although on all other points I am in agreement with the judgment of YOUNGER, L.J., in favour of the respondents.

LORD WRENBURY.—I concur in the appeal being dismissed.

LORD CARSON.—It was not seriously argued before us that the appellant company was not liable for the damage caused by the explosion which occurred at the Range Works, Rainham, on Sept. 14, 1916, and the real point to be determined is as to the liability of the appellants, Feldman and Partridge. One cannot help noticing at the outset that the company and these appellants filed a joint defence to the claim made on them by the respondents and have at no time attempted to sever that defence, nor indeed, so far as I can understand the pleadings in the action, is there any discrimination attempted as to the liabilities of each set of defendants. They both relied upon the occupation as being that of the Ministry of Munitions, and I do not find anywhere any direct traverse of the statement made in the amended statement of claim that the appellants Feldman and Partridge at the date of the explosion occupied the land and premises in question and there carried on the manufacture of picric acid from dinitrophenol. In the fifth paragraph of the amended defence it is stated as follows "in the alternative the defendants will contend that the said explosion occurred in the course of and by reason of the performance by the defendants as agents for the Ministry of Munitions, &c." I do not desire to attach undue importance to the case as presented upon the pleading, though I think at times too little regard is paid to the case formulated by the parties themselves, and in a serious case of this kind, where the difficulty is in ascertaining the question of the occupation of both classes of defendants at the time of the explosion, one cannot but give some weight to the views the parties themselves took as to what was to be taken as the state of facts existing when their liability was challenged in a matter of such immense importance. With a great deal of the very able judgment of YOUNGER, L.J., I am in entire agreement, and I am prepared, as he is, to give the fullest effect to the incorporation of the appellant company on March 17, 1916, as a separate entity the existence of which cannot be challenged by alleging that it was a sham or that there was anything improper in the incorporation of it for the purpose of limiting the liability of the other defendants. Where I differ from the learned lord justice is that I am not satisfied that Feldman and Partridge had ever ceased to be in occupation, notwithstanding the existence of the company, having regard to the various agreements which were entered into at its incorporation and regulated the interests of the company. There is no doubt that before the formation of the company Feldman and Partridge were in occupation of the Range site for the purpose of arranging to carry on under an agreement with the Ministry of Munitions the manufacture of picric acid from dinitrophenol and nitrate of soda, and the difficulty I have felt is that I cannot find anything in the facts proved and having regard to the terms of the agreements which shows such a fundamental change as to lead me to the conclusion that these appellants ever ceased to be in occupation. Clause 6 of the agreement of March 22, 1916, for the sale to the company of the premises, &c., while it states that the company shall forthwith go into occupation, provides that it shall remain in such occupation as tenants of the vendors until the whole of the purchase consideration has been paid in cash, and adds that until the same event the company shall be deemed to be retaining possession of the said premises, &c., as the agents of the vendors, that is Feldman and Partridge. It is unnecessary after the judgments which have been already delivered to deal with the agreements at length or to examine further the position of these appellants in

relation (i) to the Ministry of Munitions, with whom it is enough to say they continued to have a personal contract for the manufacture of the explosives; or (ii) to their landlords, with whom they had a contract not to assign or underlet or part with the possession of the premises without the consent of the landlords, which, though applied for, had never been obtained. In these circumstances, while there is no doubt that the company was in occupation and actively engaged in the manufacture of explosives, I find it impossible to come to the conclusion that the personal appellants ever ceased to occupy the premises prior to the date of the explosion. Coming to that conclusion they are, in my opinion, equally liable with the company for a claim based upon the doctrine established by *Rylands* v. *Fletcher* (2). I think, therefore, that this appeal should be dismissed.

Solicitors: *Rhys Roberts & Co.*; *Savory, Pryor & Blagdon.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

SHEPPARD *v.* GLOSSOP CORPORATION

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), April 6, 1921]

[Reported [1921] 3 K.B. 132; 90 L.J.K.B. 994; 125 L.T. 520; 85 J.P. 205; 37 T.L.R. 604; 65 Sol. Jo. 472; 19 L.G.R. 357]

Highway—Lighting—Power of local authority—Discretion—Liability to light danger on highway not caused by the authority—Need for care in placing lamps and appliances and preventing escape of gas and electricity—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *s.* 161.

By s. 161 of the Public Health Act, 1875: "Any urban authority may contract with any person for the supply of gas, or other means of lighting the streets . . . in their district, and may provide such lamps, lamp posts, and other materials and apparatus as they may think necessary for lighting the same."

Held: the section empowered an authority to light their district, but it created no obligation on them to do so; it gave the authority a discretion whether they should light the whole of their district or only some, and what, portion of it, and a discretion as to the times during which lamps should be kept alight in any portion of their district which they elected to light; except where they had themselves created a danger, they were under no duty to light all dangerous places or any particular dangerous place, and, if they did so, they were under no duty to light it for all the time; on the other hand, if they decided to light a particular area, their lamps and other appliances must be placed and maintained with reasonable care so as to avoid danger to wayfarers and the owners or occupiers of adjacent property, and reasonable care must be taken to prevent the escape of gas or electricity and resultant damage.

Dictum of Lord Esher, M.R., in *Lamley* v. *East Retford Corpn.* (1) (1891), 55 J.P. 133, disapproved.

Per Scrutton, L.J.: A local authority would be liable if they put an obstruction—a post, or refuge, or something which might cause damage in the dark to persons using the highway—unless notice were given of its presence by lighting or other proper warning. It may also be that, if they had so made the highway that it was dangerous—e.g., if they had made it along the edge of a precipice—they would then have the duty to give notice, by warning or lighting or other means, that adjacent to the highway there was a danger into which people using the highway might fall.

Notes. Applied: *Fisher* v. *Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458. Referred to: *Oldham* v. *Sheffield Corpn.* (1927), **186 L.T.** 681; *Woodhouse* v. *Levy*

(1940), 104 J.P. 306; *Lyus* v. *Stepney B.C.*, [1940] 4 All E.R. 463; *Knight* v. *Sheffield Corpn.*, [1942] 2 All E.R. 411; *Wilson* v. *Kingston-upon-Thames Corpn.*, [1948] 2 All E.R. 780; *Law* v. *Railway Executive* (1949), 65 T.L.R. 288. A

As to the lighting of highways, see 19 HALSBURY'S LAWS (3rd Edn.) 232–239; and for cases see 26 DIGEST (Repl.) 456–463. For Public Health Act, 1875, see 19 HALSBURY'S STATUTES (2nd Edn.) 56.

Cases referred to: B

(1) *Lamley* v. *East Retford Corpn.* (1891), 55 J.P. 133, C.A.; 26 Digest (Repl.) 283, *105.*

(2) *Harris* v. *Baker* (1815), 4 M. & S. 27; 105 E.R. 745; 26 Digest (Repl.) 456, *1513.*

(3) *Mellor* v. *Heywood Corpn.* (1884), 48 J.P.Jo. 148; 26 Digest (Repl.) 456, *1514.* C

(4) *Young* v. *St. Mary's, Islington, Vestry* (1896), 60 J.P. 821, D.C.; 26 Digest (Repl.) 459, *1533.*

(5) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209; 26 Digest (Repl.) 428, *1313.*

(6) *Morrison* v. *Sheffield Corpn.*, [1917] 2 K.B. 866; 86 L.J.K.B. 1456; 117 L.T. 520; 81 J.P. 277; 33 T.L.R. 492; 61 Sol. Jo. 611; 15 L.G.R. 667, C.A.; 26 Digest (Repl.) 533, *2086.* D

(7) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest 25, *137.*

(8) *Great Central Rail. Co.* v. *Hewlett*, [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 80 J.P. 365; 32 T.L.R. 707; 60 Sol. Jo. 678; 14 L.G.R. 1015, H.L.; 26 Digest (Repl.) 474, *1621.* E

(9) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502; 120 L.T. 470; 83 J.P. 98; 35 T.L.R. 188; 17 L.G.R. 190, C.A.; 26 Digest (Repl.) 456, *1516.*

(10) *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K.B. 195; 89 L.J.K.B. 554; 123 L.T. 299; 84 J.P. 107; 64 Sol. Jo. 426; 18 L.G.R. 370; 38 Digest 40, *235.* F

(11) *Boynton* v. *Ancholme Drainage and Navigation Comrs.*, [1921] 2 K.B. 213; 90 L.J.K.B. 75; 124 L.T. 54; 85 J.P. 33; 18 L.G.R. 610, C.A.; 38 Digest 37, *221.*

Also referred to in argument: G

Cowley v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290.*

Appeal by the defendants from a decision of GREER, J., in a case tried by him without a jury at Manchester Assizes.

The plaintiff, a carter, sued the defendants, the highway authority, who had undertaken to supply gas for lighting the streets of their district under s. 161 of the Public Health Act, 1875, alleging that he had suffered injury by reason of their negligence in the performance of the duty so undertaken. In particular, he alleged that the defendants owned a lamp on a path named Old Quarry Road, and that they had neglected to keep it alight, by reason of which negligence he fell over a retaining wall between Old Quarry Road and Dun Lane. GREER, J., found that Old Quarry Road had not been adopted or become repairable by the defendants. H I

The plaintiff was visiting a friend in the immediate neighbourhood of Dun Lane, and late on Christmas night he left his friend's house intending to proceed to Dun Lane. Instead of striking the entrance to Dun Lane he got upon the higher ground above Dun Lane, fell over a retaining wall into Dun Lane, and was injured. There was close to the spot where he fell a gas lamp erected by the corporation under their statutory powers, supplied with gas by the corporation, and lighted by one of their servants. On the particular night in question the lamp was extinguished about 9 p.m. by the order of the corporation. It was said that, with a

A view to economy, they had issued a general order that all the public lamps in the district should be extinguished at nine o'clock, and, accordingly, this lamp was put out at that time, and, consequently, the place was in darkness when the plaintiff left his friend's house and endeavoured to get into Dun Lane. GREER, J., found that the place where the plaintiff fell was reasonably safe for foot passengers during the day, and at night when the lamp was lit, but that on a dark night when B the lamp was not lit it was dangerous, and the accident would not have happened if the lamp had been lighted. He gave judgment for the plaintiff for £279 10s.

By the Public Health Act, 1875, s. 161:

"Any urban authority may contract with any person for the supply of gas, or other means of lighting the streets, markets, and public buildings in their district, and may provide such lamps, lamp posts and other materials and C apparatus as they may think necessary for lighting the same. [Where there is not any company or person (other than the urban authority) authorised by or in pursuance of any Act of Parliament, or any order confirmed by Parliament, to supply gas for public and private purposes, supplying gas within any part of the district of such authority, such authority may themselves undertake to supply gas for such purposes or any of them throughout the whole or D any part of their district; and if there is any such company or person so supplying gas, but the limits of supply of such company or person include part only of the district, then the urban authority may themselves undertake to supply gas throughout any part of the district not included within such limits of supply. . . .]" (The words in square brackets were repealed by the Gas Act, 1948, Sched. 4.)

E

Barrington-Ward, K.C., and *D. N. Pritt* for the defendants.

T. Eastham for the plaintiff.

BANKES, L.J.—This case raises a question important to local authorities. The plaintiff in his action alleged that the defendants, the Glossop Corporation, were liable to him in damages for personal injuries which he had sustained owing F to their failure to keep a lamp alight at a dangerous spot within their area. GREER, J., decided the case in the plaintiff's favour and awarded him damages, founding himself upon a decision in *Lamley* v. *East Retford Corpn.* (1), and it becomes necessary to consider whether that case was in all points rightly decided, whether it has been rightly appreciated, and how far it bears upon the present action. The learned judge has found that, had the lamp been alight, the accident would not G have happened, and counsel for the plaintiff has laid great stress upon that finding.

In my opinion, the first thing we have to consider is: What is the statutory duty of the corporation in regard to this lamp? It is agreed that their statutory authority for lighting the district is to be found in s. 161 of the Public Health Act, 1875, and the first material point for consideration is: What is the true effect of that section? In my view, the true effect is that it gives the defendant corporation H authority to light their district, but creates no obligation upon them to light it, and gives them a discretion whether they shall light the whole of their district or only some portion of it. I think it also gives them a full discretion as to the times during which the lamps shall be kept alight in any portion of their district which they elect to light, and that there is a very great distinction to be drawn between the power given to a local authority under the section and the powers I given under s. 130 of the Metropolis Management Act, 1855, where not only is the local authority given power to light the streets, but they are placed under a distinct statutory obligation to light them.

If that is the true construction of s. 161 of the Public Health Act, the first and very material point to consider is how far a dictum of LORD ESHER in *Lamley* v. *East Retford Corpn.* (1) is justified. Counsel for the plaintiff lays great stress upon that dictum, and he says that GREER, J., founded his judgment upon it. It does not so appear from GREER, J.'s judgment, but it may be that counsel's comment is correct. In *Lamley's Case* (1) the question arose whether or not the

defendants were liable for failing to light a part of their district in which they had placed a post in the middle of the public highway. The question, therefore, as to the liability of the defendants in that case did not depend merely upon whether they lighted a part of their district efficiently or not, but upon whether they had themselves placed something which, unless lighted, was a source of danger to passers by. Therefore, it was not material to express any opinion as to the general obligation of the local authority to light their whole district. But LORD ESHER, M.R., does undoubtedly say this as to the other points:

"The corporation had undertaken to light the town, and they were the owners of the gasworks, and they must light the town reasonably and sufficiently."

If the learned judge is correctly reported there, and intended to lay it down as a matter of law that under this or any other section of the Public Health Act, the local authority were under an obligation to light the whole town reasonably and sufficiently, I am not able to agree with the view thus expressed. It is quite true that the decision there was a decision of the Court of Appeal, but the case is not fully reported. The judgments of BOWEN and FRY, L.JJ., are not reported, and this dictum of the Master of the Rolls, if it is correctly reported, was not necessary for the decision of that case. I come to the conclusion, therefore, that there is no authority to support the proposition that s. 161 of the Public Health Act creates any obligation upon the local authority to light any part of their district.

We have been referred to a number of decisions some of which bear directly or indirectly on the present case, but in every case, I think, to which reference has been made and in which the only cause of action alleged was an omission to exercise to the full their statutory powers of lighting a district, the courts have decided that such a complaint as that gives no cause of action. Without going through the cases one by one, I would mention that I think that *Harris* v. *Baker* (2), *Mellor* v. *Heywood Corpn.* (3), and *Young* v. *St. Mary's, Islington, Vestry* (4) are all illustrations of the rule to which I have just referred. In all those cases it was held that the plaintiff had failed to establish any duty on the part of the defendants towards him arising out of their mere failure to light a particular part of the defendants' district. The cases in which a plaintiff has succeeded in establishing a liability arising from the failure to light a portion of their district are all cases, as it seems to me, in which the plaintiff established that he had a cause of action against the defendants arising out of the fact that they themselves had placed or caused to be placed in a public highway something which was an obstruction and dangerous unless sufficiently lighted, and that the cause of action in respect of which the plaintiff succeeded was not merely a failure to light part of the district, but was the keeping on a public highway something which was dangerous unless it was sufficiently lighted. The cases which I think are all illustrations of that principle are *Lamley's Case* (1) and *McClelland* v. *Manchester Corpn.* (5).

McClelland's Case (5), which was decided by LUSH, J., is decided on the same principle as *Lamley's Case* (1). The facts there were that the defendants had taken over an existing highway at the end of which there was a kind of ravine; they had made up a road leading up to the ravine, and had placed lights in it. There was, at the other side of this ravine, another street which they had also made up, and they had placed lights in that street, and apparently the jury came to the conclusion that by making up the road in the way they had and lighting it they had created a sort of hidden trap for the passer-by, and that the placing of the lights in the street the other side of the ravine increased the danger and made the trap more dangerous. It was a kind of invitation to persons to proceed and assume that there was no intervening danger between the lights in the one street and the lights in the other street, and LUSH, J., left these questions to the jury: "Was the road as made up and constructed a danger to the persons lawfully using it." Answer: "Yes." That answer alone puts the case in the same category, it seems to me, as *Lamley's Case* (1). They had done something which made the

road dangerous. Then: "Was the ravine which was unfenced a hidden trap for persons using the road?" Answer: "Yes." "Did the defendants in opening the road to the public after making it up and in maintaining it take all proper care to warn the public of the existence of the danger?" Answer: "No." "Were the public invited, by what the defendants had done, to pass along the whole of the road as being a proper highway?" Answer: "Yes." In reference to those findings LUSH, J., said:

> "The defendants, therefore, having exercised their powers, as the jury thought, negligently in such a way as to leave a hidden trap for persons who went along that road at night, exposing them to unnecessary and avoidable danger, are liable to the plaintiff, who suffered damage by reason of this negligence."

I take it, therefore, that the learned judge was treating this case on exactly the same principles as in *Lamley's Case* (1)—down to that point; but then a special point was made with reference to the absence of light, and in reference to that, LUSH, J., says:

> "Mr. Langdon contended that if the defendants undertook to light and did light a street which they knew to be dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cited the case of *Lamley* v. *East Retford Corpn.* (1) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground."

In other words, as it seems to me, the learned judge says, having made that road dangerous it was then their duty sufficiently to light a danger which they themselves had created. But that does not appear quite clearly from the headnote, in which it is stated that the effect of the findings of the jury was that the defendants, in taking over and making up the street and leaving it in a dangerous condition, were guilty of misfeasance, and also that they had acted negligently in their statutory duties with regard to maintaining and lighting the street, and the plaintiff was, therefore, entitled to judgment. That might lead to the impression that the learned judge had held that the mere neglect to light the street was a sufficient cause of action, but it does not appear to me that that was the effect of the learned judge's judgment.

There is only one other case I want to refer to and that is *Morrison* v. *Sheffield Corpn.* (6), which I think very clearly explained the distinction between the two classes of cases which I have been endeavouring to draw. The plaintiff brought his action for damages for personal injuries owing to the defendants having insufficiently lighted certain protecting fences which they had placed round trees which they themselves had planted. LORD READING pointed out that the plaintiff's cause of action was not merely for insufficiently lighting the fences, but was for having placed fences there which were in themselves dangerous unless lighted. He says:

> "I have come to the conclusion that the duty was continuing; that the degree of care required was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection; and that the duty continued to so keep them as not to be dangerous to the public using the highway."

PICKFORD, L.J., said:

> "It is said that our decision will involve a hardship on local authorities and will impose on them an obligation to guard or to paint every post and kerb, but in truth it only imposes an obligation to take reasonable care that what they have put in the roadway shall not become a nuisance and a danger under altered conditions."

Counsel for the plaintiff, however, argues that the present case, on its particular facts, is independent of these authorities, and, as I understand his argument, it is

founded partly upon the dictum of LORD ESHER to which I have referred and partly upon an endeavour to apply LORD BLACKBURN'S dictum in *Geddis* v. *Bann Reservoir* (7) to the facts of this case. What LORD BLACKBURN said in that case was this : A

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised if it is done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently." B

That is the rule as he lays it down, and then I think what follows is his view of the application of that rule to the particular case.

> "I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." C

The rule, as I understand, that he lays down, is that an action does lie for doing that which the legislature has authorised, if it be done negligently. What is it that the legislature has authorised in this particular case? It is the supply of gas D to and the lighting of this district. That is what the defendants are authorised to do, and, of course, if in the doing of that they were to act negligently, they would come within the rule—if, for instance, they erected a lamp post in the middle of a highway, or so near a highway as to be a source of danger to persons passing along unless it was properly lighted, or if they laid a gas main in such a way or so negligently that gas escaped into someone's house. Those would be negligent E acts in the course of doing that which the legislature had authorised them to do. But, in my opinion, that rule is not applicable to the exercise of a discretion by the local authority as to how long they shall allow lamps to be kept alight within their district, or whether, having erected a lamp post in a particular district, they shall afterwards take it away, or whether they shall cut off a supply of gas in their district to some lamps and allow it to continue to others. Those acts are not in F exercise of the statutory powers within the meaning of LORD BLACKBURN'S decision; they are done in the exercise of the local authority's discretion, the authority having assumed to act under the statute and to become the lighting authority for the district. It seems to me impossible to contend that the defendants were under an obligation to place a lamp post at this spot. If they were under no obligation to place a lamp post at that spot, they could be under no liability if they took it G away, having placed it there, and if they are under no liability for taking it away when they have placed it there, it seems to me they can be under no liability either for shutting off the supply of gas to the lamp post or for causing the lights to be extinguished at a particular hour. I have given careful consideration to counsel's arguments, but, in my opinion, he has failed to establish that the defendants were under any liability or duty to his client to keep this lamp alight. In H these circumstances, with respect to the learned judge, I am unable to come to the same conclusion as that at which he arrived, and I do not think that, properly understood, *Lamley's Case* (1) is an authority in the plaintiff's favour. I think the appeal must be allowed and judgment must be entered for the defendants.

SCRUTTON, L.J.—This is a case of considerable importance to all local I authorities outside the metropolitan district, and also one of considerable difficulty, because the previous authorities on the subject which the learned judge of the court below has considered are a little difficult to understand, and in parts are not very consistent with each other. I am not surprised that the learned judge felt considerable difficulty and doubt as to his decision. Having listened with the greatest attention to the very able arguments addressed to us by counsel on both sides, I have come to the clear conclusion that the learned judge below was wrong in the decision that he came to in this case.

A The corporation of Glossop apparently controls a hilly district, and at a certain part of their district a road comes down Castle Hill and continues down Dun Lane. On the left-hand side as you come down that line of street there is some waste land, not separated from the highway by any fence, over which, on a rough sort of farm road, there is a public right of way to a workhouse. On each side of that public right of way there is waste land, private property apparently, over which B the public has not any right of walking, though no doubt nobody would stop them walking about it if they wanted to. If you turn off on to that waste land you may find yourself looking down into Dun Lane, down a retaining wall about 5 ft. high, and in the dark you may suddenly drop 5 ft. into the Dun Lane highway. It will be noticed that this is not one of those cases where a road is made with a drop from it on to land, and it can be said to the local authority: "If you allow people C to walk along your road you must protect them from tumbling off into a pit." This is a case where people are walking where they have no business to be, above the highway. It is suggested that the local authority has some duty to protect them from tumbling into the highway from a place where they have no business to be. Another thing to notice is that the local authority did not make Dun Lane; they took it over when made. They did not make the retaining wall, or the drop; that D was there before they took it over. They have not put anything into the highway which is a danger. They have put a lamp on the top of the retaining wall. They have apparently put it in that place because the juvenile population of Glossop, if the lamp were put in the road, would use the retaining wall to play tricks with the lamp, which would be about on their level. So they have put the lamp on the top of the retaining wall and not on the road, and, having done that, for very E laudable purposes of economy, they have come to the decision that all lamps in Glossop shall be turned out at nine o'clock in the evening. The plaintiff, on Christmas night, about half-past eleven, coming down from a house on Castle Hill and meaning to go down Dun Lane, without negligence, found his way on to the waste land near the quarry land. He apparently saw the lamp post, forgot where it was, did not use it as a guide, and dropped over into Dun Lane, with serious F results. He sues the corporation, and the learned judge has given judgment in his favour.

This is not a case under the Metropolis Management Act, and, therefore, nothing said by me has any importance with regard to any subsequent case under that statute, where a different standard of liability is put upon the local authorities in the metropolis. The liability in this case arises under s. 161 of the Public Health G Act, 1875, which says:

> "Any urban authority may contract with any person for the supply of gas or other means of lighting the streets, markets, and public buildings in their district, and may provide such lamps, lamp posts, and other materials and apparatus as they may think necessary for lighting the same. . . ."

H Counsel for the plaintiff admits that if the corporation of Glossop had chosen not to light Glossop at all and to have no lamps, they would in this case have been under no liability whatever. It is quite clear that, in certain circumstances, they would have had a liability if they had in the highway put an obstruction—a post, a refuge, or something that might cause damage in the dark to people ordinarily using the highway—unless notice were given of its presence. They would have I been required, either by lighting or other proper warning, to give notice of the obstruction that they had put in the highway. It may be also that, if they had made the highway so as to be dangerous, as, for instance, if they had made it along the edge of a precipice, they would then have the duty to give notice by warning or lighting, or some other means, that adjacent to their highway there was a danger which people using the highway might fall into. But I am not at all clear that that could apply to an obligation to warn people above the highway on private land, that there was a highway into which they might fall, which is this case. Counsel argued that there was no original obligation to light at all. The

next question put to him was: Supposing having lighted once they had entirely discontinued, is there any obligation? As I understood counsel, though I think he recognised he was up against a somewhat difficult fence, he replied that, if they did once start lighting, they were bound to continue. I am unable to agree with that view. It appears to me that, having a discretion to light or not to light so that they need not light at all, if for a time they light, they may discontinue lighting, either wholly or partially as to space, or partially as to time, without being under any legal liability. That is subject to this, that if the case is: "You put an obstruction in the highway," you get then the obligation to give warning of the obstruction, quite irrespective of the general question of obligation to light or power to discontinue the obstruction or danger in the highway that you have made. You must warn people by proper means—whether by lighting or watchman or fences, or such reasonable means as would guard against the danger that you yourself have created.

As I understand counsel for the plaintiff, he based his argument on the well-known language of LORD BLACKBURN in *Geddis* v. *Bann Reservoir Proprietors* (7), where LORD BLACKBURN says:

> "For I take it without citing cases that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised if it is done without negligence, although it does occasion damage to anyone, but an action does lie for doing that which the legislature has authorised if it be done negligently."

Counsel says, with great respect to him, following the letter, but not paying sufficient attention to the spirit of the remark: "You are doing what the legislature has authorised—you are lighting—but you have done it negligently, for you have turned out your light in a dangerous place." I think that argument leaves LORD BLACKBURN'S remark as if it were "not only will an action lie for doing negligently that which the legislature has authorised, but an action will lie for not doing that which the legislature has given power to do, if that be done negligently." You do not negligently abstain from doing what the legislature has authorised you to do, unless there is some duty on you to do it, and to read that sentence in the way in which counsel desires to read it, seems to me to assume that there is a duty to light. If there is no duty to light, you do not negligently abstain from lighting if you do not light because there is no duty on you to do it. LORD BLACKBURN'S remark seems to me to be addressed to negligence in directly doing acts which you are empowered to do. If, for instance, you propose to light by electricity and you put in a faulty wire so that, as has happened in several cases in London, electricity gets into the gas, and there is an explosion, you may be using your power negligently. In the same way, if you put refuges in the street and do not light them properly you may be using your powers negligently, but it would be going well beyond LORD BLACKBURN'S dictum to say that where you have an optional power which if used negligently would render you liable, that, therefore, if you do not use it at all you can be held liable. That, I think, is the fallacy in the able argument of counsel for the plaintiff. Those are my views on the general questions, and I have expressed them at some length because it is an important matter.

With regard to the authorities, I am bound to say, I think they are extraordinarily unsatisfactory. In *Harris* v. *Baker* (2) the trustees, who had power to light and maintain a road, had left heaps in the road and had not lighted them, and LORD BLACKBURN held that they were not liable. I should have thought myself that they had made a danger in the road by leaving heaps there, the question being whether they had taken proper precautions to guard persons using the road. That case seems to me to come within the clear principle I have stated, that, if a highway authority put a danger in the road, they must properly guard it. The next case, *Mellor* v. *Heywood Corpn.* (3), seems to be open to the same criticism. The defendant corporation put a lamp in the road, and a gentleman who was coming to dine with the mayor drove into the lamp post because the lamp

was not lighted. I should have thought that there was something there put upon the road which ought to have been properly lighted, and that the decision could very well have been given the other way. But that case is so extremely shortly reported that it does not even say who decided it, and probably it is not very safe to rely upon it one way or the other. Then there comes the case which the learned judge has followed, *Lamley* v. *East Retford Corpn.* (1). The report does not say anything about the opinions expressed by the second and third members of the Court of Appeal. My impression is that LORD ESHER said a great deal more than appears from the twelve lines to which the judgment in the report is confined. One ground of the decision as reported, however, seems to come within the principles I have stated. It was a case that came within the Public Health Act, 1875, and LORD ESHER is reported to have said:

> "This corporation had undertaken to light the town, and they were the owners of the gasworks. They must light the town reasonably and sufficiently."

Counsel agrees that they were not bound to light the town at all, and, unless it can be said that, having lighted part of the town, they are bound to light every part of the town, it is difficult to understand what LORD ESHER can have meant by that sentence. There is quite sufficient ground for supporting the judgment, by which, of course, we are bound, and the fact that a post was put in the highway without any warning seems to me to be the correct ground on which the decision was placed. I strongly suspect that, if we had had the judgments of BOWEN and FRY, L.JJ., we should have found that that was the ground on which they put it, but those three lines in LORD ESHER'S judgment I personally am quite unable to agree with, because they seem to me to be quite inconsistent with the true meaning of s. 161 of the Public Health Act, 1875, and are not good law. *Young* v. *St. Mary's, Islington, Vestry* (4) was a case under the Metropolis Management Act, and, therefore, I say nothing about it.

Then there is the decision of LUSH, J., in *McClelland* v. *Manchester Corpn.* (5). The exact terms of the local Act are not given, but they are said to be similar to those of the Public Health Act, 1875, and I so treat them. I have, I confess, considerable difficulty in following parts of that case. There was there a road which stopped abruptly on the edge of a ravine, and there was undoubtedly a danger in this sense, that if you went there in the dark the road suddenly ended and you might fall over into the ravine. Fourteen years after the road had been dedicated to the public, the Manchester Corporation took it over and made it up. I am not at all clear how it can be said they had made any danger in those circumstances. The danger was there in the road dedicated to the public before they took it over, but in some way the jury answered "Yes" to the question: "Was the road as made up and constructed a danger to persons lawfully using it?" I do not see what there was in the making-up or constructing that made any danger which was not there previously, when the road was dedicated to the public by its owner. But some little time afterwards the corporation did a thing which does seem to me to have made a regular trap. On the other side of the ravine, in a parallel line, there was another road, and they put lights on the two roads so that when one came into the first road at night, not knowing anything about it, it looked as though there was a continuous road with continuous lights about the same distance apart, and a motor car turning into the road, and the driver seeing apparently a continuous road with continuous lights, went ahead, and went into the ravine. That seems to me to be uncommonly like a lighting trap, and might be a sufficient ground for deciding the case, but some parts of the learned judge's judgment I find very difficult to follow. He says:

> "Mr. Langdon contended that if the defendants undertook to light and did light a street which they knew to be dangerous, they would be liable for an accident caused by insufficient and improper lighting, and he cited *Lamley's Case* (1) as an authority for this contention. I think that the principle of that

case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground."

If the facts in that case show that the corporation had done something which made a danger, then I can follow the decision, though I have a difficulty in seeing what they had done which made the danger, except the lighting of the street on the other side of the ravine, which the learned judge was not considering at that time. If the judge was saying: "Though the defendants did not make a danger, they have a duty adequately to light a street which they took over, in which there is a danger," then it seems to me to be subject to the same criticism as I have given to the statement of LORD ESHER in *Lamley's Case* (1), and I am not at all clear that, if that is his view of the facts, I can agree with that part of the judgment. It is, however, I think, quite sufficient to support it that the condition of the lighting of the street on the other side of the ravine, put there by the defendants themselves, did make a dangerous trap out of what, in the absence of lighting on the other side of the ravine, would not have been such a trap.

We were also referred to *Great Central Rail. Co.* v. *Hewlett* (8), which only shows that where there is authority given by statute to put up a particular thing in a highway there is no obligation to take any further precautions. Parliament having, rightly or wrongly, authorised its erection, the owner is under no obligation to light it. *Morrison* v. *Sheffield Corpn.* (6) is also a case of putting a danger in a street. The corporation of Sheffield, with a view of improving the amenities of the town, planted trees in their streets, but, suffering from small boys who climbed up them, they put railings round, turning outwards at the top to stop the boys climbing up. During the period of the Zeppelin raids, on a dark night, the plaintiff injured his eye by running into contact with the fencing round one of the trees. That is the case of a danger put in the street by the local authority, and they were held liable to the plaintiff. *Baldock* v. *Westminster City Council* (9) was a case under the Metropolis Management Act, and referred to the putting in the street of a refuge with insufficient warning. Again, *Carpenter* v. *Finsbury Borough Council* (10), tried before SHEARMAN, J., was also a case under the Metropolis Management Act, and does not seem to conflict with the principles that I have laid down. *Boynton* v. *Ancholme Drainage Comrs.* (11) is a case the memory of which I cannot help thinking was in the mind of the learned judge although the judgment was not before him, but I do not think he had in his mind the terms of the decision. In that case, there was a statute giving the commissioners a discretion to drain the level and requiring them to maintain it. They made a particular drain, but allowed it to become choked, so that the land was damaged by flood. The same learned judge as in this case took the view that the statute was discretionary, and no action would lie against the commissioners for not maintaining the drain, which they had discretion to make or not to make. This court took the view, though they declined to decide whether an action would lie for not making a drain, that, if a drain were made and then allowed to become inefficient, an action would lie. If the learned judge had had the terms of that decision before him I think he would have seen the distinction between that case and the present, and would have seen that the principle of *Geddis* v. *Bann Reservoir Proprietors* (7), as there explained, did not apply to this case.

Those are the authorities, and I do not think they are at all satisfactory, but, in my view, the principle comes back to this—that under s. 161 of the Public Health Act, 1875, the local authority is under no obligation to light—that matter is in its discretion—and it is under no obligation to continue lighting either the whole or in part. It is discretionary; but, if it does light, it will be liable for damages for negligence in lighting—negligence in the escape of electric current or gas, negligence in putting posts in the highway, or making traps and dangers in the street, without lighting them, but it is not liable merely for exercising its discretion not to light or exercising its discretion to discontinue lighting, nor for

dangers which it itself did not create. For these reasons I agree with my lord that the appeal should be allowed.

ATKIN, L.J.—I agree. I only give a separate judgment as I am differing from the learned judge, for whose opinion I have the greatest possible respect, and I give my judgment with reluctance. But this is a matter of considerable importance to local authorities who are given statutory powers, and I propose to state quite shortly what, in my judgment, are the rights and obligations of such authorities in respect of those powers.

It appears to me that if a local authority having statutory powers decides to exercise those powers, then in doing that which it so decides to do it is under a duty to persons interested to take reasonable care not to cause damage so far as the avoidance of damage is consistent with the exercise of the statutory powers. On the other hand, it is under no legal duty to act reasonably in deciding whether it shall exercise its statutory powers or not, or in deciding to what extent those powers shall be exercised—for example, over what area or for what time. Thus, it appears to me that, if it decides to light any area, its lamps and appliances must be placed and maintained with reasonable care so as to avoid danger to wayfarers or owners or occupiers of adjoining property. If gas or electricity is conducted to the lamps, reasonable care must be taken that the gas or electricity do not escape so as to cause damage. There is no duty to exercise the power of lighting at all, nor, if the local authorities do light, are they obliged to light the whole of their urban district or any particular part of it. They are under no duty to light all dangerous places or any dangerous particular place, and, if they do light a dangerous place for some of the time, they are under no duty to light it for all the time. In the present case the local authority did not cause the danger. The danger was in existence, because there was a steep place adjoining a highway over which a wayfarer at night might easily fall in the dark. The real complaint of the plaintiff is not that the local authority caused the danger, but that, the danger being there, if they had lighted the place, he would have seen the danger and avoided it. As I have said, in my opinion, there was no duty upon the local authority to light that dangerous place. Putting it in another way, during the hours from 6 to 9 p.m., while, in pursuance with their decision, they were lighting the entrance to Dun Lane, they were under a duty to exercise reasonable care in the way I have mentioned; but after nine o'clock, when they had decided not to light the place, they were under no duty to light it at all. The authorities have been reviewed by my lord and my brother SCRUTTON, and with their criticisms on the cases I am substantially in accord. I only desire to add that the dictum of LORD ESHER, M.R., in *Lamley* v. *East Retford Corpn.* (1), if it is correctly reported, appears to me, as it appears to my two brothers, to be much too wide. It was unnecessary for the decision of the case, and it would impose upon urban authorities a burden which the Public Health Act, 1875, never intended to impose upon them. All the cases in which liability for not lighting has been established against corporations regulated by that Act can be explained upon the footing that the corporation in question created the danger by which the plaintiff was injured. That was not so in the present case.

Appeal allowed.

Solicitors: *Few & Co.*, for *G. H. Lea*, Glossop; *Blyth, Dutton & Co.*, for *Charles Davis & Son*, Glossop.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* ARD COASTERS, LTD. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. *v.* MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA

B

[House of Lords (Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor and Lord Wrenbury), May 3, 5, 1921]

[Reported [1921] 2 A.C. 141; 91 L.J.K.B. 31; 125 L.T. 548; 37 T.L.R. 692; 15 Asp.M.L.C. 353; 26 Com. Cas. 352]

C

Insurance—Marine insurance—War risk—"Warlike operation"—Charterparty T. 99—Warship on patrol—Collision with requisitioned ship.

A steamship, which had been requisitioned by the British government during the 1914–18 war on the terms of the charterparty T. 99 (under cl. 19 of which the Admiralty took those war risks which would be excluded from an ordinary policy of marine insurance by an f.c. and s. clause in the usual form), was damaged in a collision with a warship of the Royal Navy then engaged in patrolling between two points in the North Sea on the look-out for enemy craft, neither vessel being to blame.

D

Held: at the time of the collision the warship was conducting a warlike operation, the steamship was damaged as a consequence of that operation, and, therefore, the Admiralty was liable in respect of the damage suffered by her.

E

Insurance—Marine insurance—War risk—"Warlike operation"—Warship proceeding to place to begin warlike operation—Proceeding to pick up convoy.

A steamship, which was insured against war risks under a policy in which those risks were expressed to include "all consequences of hostilities or warlike operations by or against the King's enemies," was damaged during the 1914–18 war in a collision with a warship of the Royal Navy which was sailing under orders to go to a certain place there to pick up a convoy of merchant vessels and thereafter protect them on their voyage.

F

Held: protecting convoys during war was a warlike operation and proceeding to the place where that duty was to be begun was equally a warlike operation, the steamship was damaged as a result of that operation, and, therefore, the insurers were liable in respect of the damage suffered by her.

G

Per Lord Finlay: It seems to me perfectly plain that when a war vessel is actually at sea and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done.

H

Notes. Distinguished: *Admiralty Comrs.* v. *Brynawell S.S. Co.* (1923), 40 T.L.R. 78. Considered: *Clan Line Steamers* v. *Board of Trade* (1928), 140 L.T. 33; *The Clan Matheson*, [1929] All E.R.Rep. 17. Distinguished: *Wharton (Shipping), Ltd.* v. *Mortleman*, [1941] 1 All E.R. 175. Referred to: *S.S. Larchgrove* v. *R.* (1919), 36 T.L.R. 108; *Charente S.S. Co.* v. *Transports Director* (1921), 38 T.L.R. 148; *Harrisons* v. *Shipping Controller*, [1921] 1 K.B. 122; *A.-G.* v. *Adelaide S.S. Co.*, [1923] All E.R.Rep. 31; *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, [1922] All E.R.Rep. 207; *Hain S.S. Co.* v. *Board of Trade*, [1928] 2 K.B. 534; *Yorkshire Dale S.S. Co.* v. *Minister of War Transport*, [1942] 2 All E.R. 6; *Clan Line Steamers, Ltd.* v. *Liverpool and London War Risks Insurance Assocn., Ltd.*, [1942] 2 All E.R. 367; *Liverpool and London War Risks Insurance Assocn., Ltd.* v. *Ocean S.S. Co.*, [1947] 2 All E.R. 586.

I

As to marine insurance against war risks, see 22 Halsbury's Laws (3rd Edn.) 75 et seq.; and for cases see 29 Digest 226–231.

A Cases referred to:

(1) *British and Foreign S.S. Co., Ltd.* v. *R.* (*The St. Oswald*), [1918] 2 K.B. 879; 87 L.J.K.B. 910; 118 L.T. 640; 34 T.L.R. 546; 62 Sol. Jo. 701; 14 Asp.M.L.C. 270, C.A.; 41 Digest 990, *8749*.

(2) *Britain Steamship Co., Ltd.* v. *R.* (*The Petersham*), [1919] 1 K.B. 575; 88 L.J.K.B. 521; 120 L.J. 275; 35 T.L.R. 271; *British India Steam Navigation* B *Co.* v. *Green, and Liverpool and London War Risks Insurance Association, Ltd.* (*The Matiana*), [1919] 1 K.B. 632; 35 T.L.R. 269; consolidated appeals, [1919] 2 K.B. 670; 88 L.J.K.B. 1271; 121 L.T. 533, 559; 35 T.L.R. 728; 63 Sol. Jo. 736; 14 Asp.M.L.C. 507, 513, C.A.; affirmed, [1921] 1 A.C. 99; 89 L.J.K.B. 881; 123 L.T. 721; 36 T.L.R. 791; 64 Sol. Jo. 737; 15 Asp.M.L.C. 58; 25 Com. Cas. 301, H.L.; 41 Digest 990, *8753*.

C **Appeal** from orders of the Court of Appeal affirming decisions of BAILHACHE, J. The facts appear in the opinion of VISCOUNT FINLAY.

In the ARD COASTERS case,

The Solicitor-General (*Sir Ernest Pollock, K.C.*), *Raeburn, K.C.*, and *R. H. Balloch* for the Attorney-General.

D *Leslie Scott, K.C.*, *A. T. Miller, K.C.*, and *Le Quesne* for the respondents.

In the S.S. RICHARD DE LARRINAGA case,

Raeburn, K.C., and *S. L. Porter* for the appellants.

R. A. Wright, K.C., *A. T. Miller, K.C.*, and *Le Quesne* for the respondents.

VISCOUNT FINLAY.—These two appeals have been heard together by your E Lordships, but I shall deal with the two cases separately.

A.-G. *v.* ARD COASTERS, LTD.

In this case there was a petition of right against the Crown based on obligations undertaken by the Admiralty in the form of charterparty, which is very familiar, now known as T. 99. The facts out of which the question arises are very simple. His Majesty's warship *Tartar* was engaged patrolling between the Tees and Whitby F for the purpose of looking out for submarines or anything in the shape of an enemy. The *Tartar* ranged about and proceeded a certain distance and then turned and proceeded in the opposite direction, roaming over the beat of sea she was directed to patrol. She had been proceeding at the time just before the turning which lead to the collision in a southerly direction. The *Ardgantock* was a merchantman which had been requisitioned by the British government under the terms of the G charterparty T. 99. She was proceeding in the same part of the sea in a northerly direction on a course such that, if both courses had been prolonged, they would have been parallel, and had no alteration taken place the two vessels would have passed each other safely port to port. They were navigating both vessels with lights out. It was a dark night, and the *Tartar*, when she got to the point whereabouts in the ordinary course she would turn round and go in the opposite direc- H tion, proceeded to starboard. After she did that she was within such a short distance of the *Ardgantock* that there was no time to prevent the collision which ensued. She had not been able to see the *Ardgantock*, the night being dark and visibility not being good, and the lights being out. The result was that the *Tartar* struck the *Ardgantock* on the port side at about right angles. In these circumstances the question arose as to the effect of cll. 18 and 19 in the charterparty T. 99 I under which the Admiralty had requisitioned the ship. Clause 18, which deals with sea risks, is as follows:

"The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of sea or tempest or any other cause arising as a sea risk."

Clause 19, which deals with war risks, provides:

"The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the

following or similar, but not more extensive, clause: 'Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war.' . . ." A

The rest of cl. 19 I need not read.

There can be no doubt whatever, in my opinion, that, when patrolling in this way the *Tartar* was engaged in warlike operations. In the course of that warlike operation—in the ordinary course—when she got to the end of her tether in the one direction she proceeded to turn round, and she happened to turn under her starboard helm in the direction of the *Ardgantock*, which she could not see owing to the darkness and the absence of lights, and the collision took place. It appears to me that the loss was the direct consequence of the patrolling, and the turning which took place was part of that operation. BAILHACHE, J., is reported as saying this: B C

"The negligence point therefore fails, and it remains to consider whether this collision was a consequence of hostilities or of warlike operations. I have said what the *Tartar* was doing. She was a destroyer and she was patrolling the seas in search of submarines. In doing that she was patrolling the seas without lights. The *Ardgantock*, in pursuance of Admiralty instructions, was also sailing without lights. I have already held in an earlier case that in those circumstances where there is a collision between two merchant vessels, neither of which is engaged in warlike operations, the mere fact of their both sailing without lights in pursuance of Admiralty directions to that effect and colliding does not make the collision a war risk, but it retains its character of a marine risk. But in this case there was a warlike operation. The *Tartar* was patrolling the seas. That, of itself, was a warlike operation. She was patrolling the seas without lights, which made the warlike operations dangerous. The collision was due to the fact that the *Tartar* was patrolling the seas, that is to say, it was due to a warlike operation which was being conducted on the part of the Admiralty. It seems to me, therefore, to follow that the collision which was due to that is a consequence of hostilities or warlike operations." D E F

In the Court of Appeal, ATKIN, L.J., puts the matter very clearly indeed. I may be permitted to quote one passage from his judgment.

"To my mind the *Tartar* was clearly engaged upon a warlike operation. She was patrolling the seas in search of submarines, and indeed, for the purposes of this argument counsel for the Crown accepted the findings of the learned judge, and accepted and argued the case on the assumption that the *Tartar* was engaged in a warlike operation. Now it appears to me that as part of her warlike operation it was her duty to alter her course from time to time, under circumstances where she could not effectively see where she was going; in other words, she had to turn in the dark. Turning in the dark she ran into the suppliants' vessel, the *Ardgantock*, and that vessel was, without negligence on her part, navigating without lights in such a position that the *Tartar*, executing her warlike operation without negligence, must run into her. The injury to the *Ardgantock* was proximately caused by the impact of the war vessel moving in the course of warlike operations. The injury was directly due to the warlike operation of the *Tartar*, just as it would have been, in my view, if the *Tartar* had been herself injured by running into an unlighted wreck or other peril of the same kind. The *Tartar* would have avoided the peril if she had received timely warning by lights, or otherwise, of the presence of the *Ardgantock*, but that she had in the course of her warlike operations to proceed without such warning and to expose herself and others to risk of injury is one of the risks of the warlike operation. In my view, the injury of the *Ardgantock* was proximately caused by the warlike operation of the *Tartar*." G H I

I entirely agree with that view of the case, and I desire to say one word about the *British and Foreign Steamship Co.* v. *R.* (*The St. Oswald*) (1) and the admission which was supposed to have been made on behalf of the Crown in that case, that the absence of lights made the adventure a warlike operation. I think there must have been some misunderstanding there, and that any admission which was made must be read with reference to the particular circumstances of the case. It cannot be that the mere fact that two merchantmen at sea proceeding on their peaceful errand as merchantmen become engaged in a military operation because for the purpose of escaping submarines or the enemy they are sailing with their lights out. They are sailing with their lights out on a peaceful errand, and in the hope of evading the attention of enemy warships. For these reasons, my Lords, it seems to me that in this case the decision of the courts below was right and the appeal should be dismissed.

THE RICHARD DE LARRINAGA

In *Liverpool and London War Risks Insurance Association, Ltd.* v. *Marine Underwriters of S.S. Richard de Larrinaga*, the question arises in a contest between two sets of insurers, the marine underwriters, on the one hand, who insure against sea risks and the War Risks Association who insure against war risks. We have been supplied with a copy of the policies issued by both these bodies. Taking the War Risks Association's policy the second clause is this:

> "This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies and the consequences thereof or any attempt thereat, and all the consequences of hostilities or warlike operations by or against the King's enemies, whether before or after the declaration of war."

The War Risks Association say that this case does not fall within the terms of that clause. The facts giving rise to the question are extremely simple. The *Richard de Larrinaga* was going in an easterly direction in convoy not very far from the coast of the United States on the Atlantic side. His Majesty's ship *Devonshire* was proceeding from Halifax in Nova Scotia to Hampton Roads in Virginia for the purpose of picking up a convoy there, and the *Richard de Larrinaga* was run into by the *Devonshire*. There was a collision between the two vessels, and the damage took place which is the subject of the arbitration which has finally come before your Lordships.

The award was stated in the form of a Special Case. The first paragraph states that the claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and *H.M.S. Devonshire* in the Atlantic on July 23, 1917. The second paragraph states:

> "At the time in question the *Richard de Larrinaga* was sailing in convoy at a speed of about six or seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. The *Devonshire* was on a voyage to pick up a convoy of merchant vessels; she was making a speed of about twelve knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters, and very shortly afterwards the collision occurred. A good look-out was being kept on each."

The next paragraph in the Case states that the question had been referred to MR. BUTLER ASPINALL, and the fourth paragraph states that by an interim award he had found that it was not established that either ship was to blame for the collision. The fifth paragraph states that the Marine Underwriters and the War Risks Association came before him afterwards for the determination of the question whether the collision arose from a marine or a war peril, and the sixth paragraph quotes the clause which I have already read from the policy itself. BAILHACHE, J., in dealing with this matter, says this ([1920] 1 K.B. at pp. 705, 706):

> "I do not think that very much assistance is to be obtained from *The St. Oswald Case* (1), which proceeded, as the Court of Appeal pointed out in the

Matiana Case (2), upon admissions made by the Crown, admissions which seem to make the result inevitable." A

As I have said in the ARD COASTERS case, I think there is some misconception about that.

"Leaving that case out of account, so far as the authorities go I really think these propositions are established, that where one of His Majesty's ships is B sailing at night without lights and is engaged in hostile duties such as looking for submarines, and she collides with another ship, then the collision is a consequence of hostilities. The result is the same if one of His Majesty's ships is engaged in convoying other ships and they are sailing without lights at night and a collision occurs. That collision is a consequence of hostilities or warlike operations. The question which remains, and which is not abso- C lutely covered by authority, is what was the position in such a case as the present one where one of His Majesty's ships is sailing at night without lights, but is not at the moment actively engaged in definite warlike operations, such as patrolling and on the look-out for submarines or the actual convoying of ships, but proceeding to her station for the purpose of taking up her duties there as a convoying ship. ATKIN, L.J., in *Britain S.S. Co.* v. *R.* (*The Petersham*) (2), said: D

'I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war could be included.'

I think myself that when one of His Majesty's ships is proceeding to her station to take up her duties as a convoying ship she is engaged on a warlike E operation."

In the Court of Appeal, BANKES, L.J., expressed an opinion to the same effect ([1920] 2 K.B. at p. 70):

"I cannot distinguish the facts of this case and those in *Ard Coasters* v. *R.* . . . Counsel for the appellants said that the *Devonshire* was at the material time F proceeding on a peaceful voyage with a view later on to engage in a warlike operation. I do not agree with that contention. I think a warship while proceeding to her station in order to pick up a convoy was at the time she was so proceeding engaged in a warlike operation."

I entirely agree with the opinion expressed by both these learned judges. Part of a warlike operation consists in getting to the proper point for striking at the G enemy if actual hostilities of that kind are the object of the expedition, or in proceeding to the point where the duty of undertaking the charge of a convoy is to take effect. Protecting convoys is a form of warlike operation; it is an operation in the course of war necessary to be performed by war vessels for the purpose of protecting the merchantmen. I cannot separate the proceeding under orders to the spot where the duty is to be discharged from the actual discharge of the duty H itself; both form part of the warlike operation. It is just as much a part of a warlike operation to get your ships or your troops to the spot where a thing is to be done as it is to do it when you get to the spot. It is said, "There may be great difficulties in saying where the progress to the place of operation begins." Nice questions might arise in some cases, but it seems to me perfectly plain that when a war vessel is actually at sea, and is there because she is under orders to go to I a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done. For these reasons, it appears to me that the decisions of the courts below were right and ought to be affirmed.

LORD DUNEDIN.—I concur. In the ARD COASTERS case I think the judgment may be put in a form which much resembles a syllogism. Patrolling for sub-

marines is a warlike operation. The *Tartar* was engaged in patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is, therefore, the consequence of a warlike operation. In the other case I think it is necessary first to see exactly what has been already decided in *The Matiana Case* (2). I think that that case was a clear decision to the effect that the escorting ship of a convoy is engaged in a warlike operation—the escorted ship is not. Here, if the *Devonshire* had been the escorting ship, the result, in view of *The Matiana Case* (2) and the last case, would be clear; the collision would be a consequence of a warlike operation. The *Devonshire* was not actually the escorting ship, and she was not actually convoying, but she was an a voyage to pick up a convoy; her commission to convoy covered her proceeding to the place where she was to pick up the convoy, and, accordingly, I think it comes within the decision in *The Matiana Case* (2) that she was engaged in warlike operations.

LORD SUMNER.—I agree. I think both the *Ardgantock* and the *Richard de Larrinaga* were lost in what were warlike operations and as the direct consequence of them. The *Tartar* was on patrol and so all her manœuvres in the course of that duty were warlike operations. One of these manœuvres was to starboard her helm just before this collision and she was irrevocably committed to it before she could see the *Ardgantock*. In continuing it she found the *Ardgantock* across her bows before anything could be done, and as part of the continuance of that warlike operation the *Ardgantock* was cut down. The absence of lights was only one of the conditions, not the direct cause of what happened. This case is distinguishable from those of *The Petersham* (2) and *The Matiana* (2). The RICHARD DE LARRINAGA case is another illustration of the same position. His Majesty's ship *Devonshire* was proceeding on her duty of going to pick up a convoy through waters where convoying and navigation without lights were both necessary. There was a possible risk of the sudden appearance of enemy craft, and in the area of war the *Devonshire* would be found, if occasion arose, to take appropriate warlike action. We do not know the details, but I think we must take it that she ran into the *Richard de Larrinaga* because she was steaming on the particular course which she actually took as part of that warlike operation. It cannot, at any rate, be said that this cruise of the *Devonshire* was not a warlike operation. There may be action taken and effects produced by men-of-war in time of war which are not warlike operations, and no doubt operations in war and operations of war are not necessarily the same thing, but no exact definition of these terms is needed for this case, and I think this task had better be left to those of your Lordships who may be sitting in the next war.

LORD PARMOOR.—I agree, and I desire to add nothing in the ARD COASTERS case.

In the RICHARD DE LARRINAGA case, although concurring, as I do fully, in the opinions already delivered, I desire to add a few words. The cases referred to show that a warship may be engaged in a warlike operation though no attack upon or by the enemy is taking place or immediately impending. In this case a commissioned ship of war was at the time of the collision under orders to pick up a convoy of merchant ships and was on her way at sea to carry out these orders in accordance with her duty. Under these conditions she appears to me to be a ship engaged in a warlike operation. I should be prepared to endorse the view of BAILHACHE, J., founded on an opinion expressed by ATKIN, L.J., in these words: "Indeed I think myself, agreeing, with respect, with what ATKIN, L.J., says there, that almost any movement in war-time at sea of one of His Majesty's ships is a warlike operation." It is not necessary to say that some exceptional conditions might not arise, but no such conditions are present in this case. The rest of the case appears to me to be covered by your Lordships' decision in the ARD COASTERS case.

LORD WRENBURY.—There are two cases before the House. The principles applicable to each have, I think, been largely determined, or at any rate indicated, in the opinions expressed by your Lordships in *Britain S.S. Co.* v. *R.* (*The Petersham*) (2). I take it that this is certainly decided—that an ordinary marine risk does not become a war risk because some regulation operative during and by reason of war renders the risk more serious. The question is whether the loss was occasioned by a new risk arising by reason of warlike operations.

A.-G. *v.* Ard Coasters, Ltd.

The first case with which your Lordships have to deal is this. The *Tartar* was engaged in a warlike operation. She was performing the duty of patrolling a certain area of the sea, going from north to south, then turning and going from south to north, and so on, from time to time. She was doing this in discharge of her duty as a vessel of war in order to deal with the possibility that there were submarines in the district with which it would have been her duty to engage if she had found them. While employed on that duty, having finished her beat in one direction, she was turning for the purpose of proceeding in the reverse direction. The operation of turning was a necessary part of the warlike operation of patrolling that part of the sea. There were no lights, the night was dark, and in turning she fouled the course of the *Ardgantock*, which was proceeding along the coast, and a collision occurred. It is plain, I think, that the course of the *Tartar*, whether she was proceeding directly down the coast or whether she was turning for the purpose of going in the reverse direction, was equally a course taken in discharge of her duty as a ship conducting a warlike operation. If the two ships had met end on, and without anything to attach blame to either vessel and a collision occurred, there can be no question, I think, about it. If a warship engaged in performing a particular duty of war, in the course of performing that duty without blame attaching to either vessel, comes into collision with another vessel in ignorance of her proximity because for precautionary reasons neither vessel is carrying lights, the collision results in consequence of her operation of patrolling and the loss is a loss in consequence of warlike operations. There can be no difference by reason of the fact that the ships did not meet end on, but that the *Tartar*, in discharge of her duty, was turning at the moment when the collision occurred. The Solicitor-General's argument, I think, if I seek to summarise it, really comes to this, that no doubt the *Tartar* was engaged in a warlike operation, but that the moment when she should turn, the direction in which she should turn and the place where she should turn were matters in her discretion so that she was not compelled by her duty as a ship of war to turn when she did or where she did or as she did. That is an argument which does not commend itself to me. It was her duty to turn somewhere, and, if in the ordinary course of her turning the result was a loss, it appears to me that it was in consequence of her warlike operation. I do not think it is enough to say that the ship was a warship and was proceeding under orders given by naval authority. If, for instance, her orders were to go into dock to have her bottom cleaned or her boilers overhauled, and she was simply proceeding there, that might be one case. If, on the other hand, her orders were to go as fast as she could to a particular place to take part in an action which was proceeding or immediately expected, that is another case, and I should say that certainly she was on a war errand and engaged in a warlike operation. I do not think that the matter is to be tried by the fact that she is firing her guns or using her ram at the moment or anything of that kind. The question is: What is the duty she is performing at the moment?

The Richard de Larrinaga

The particular facts in the second case that we have here to deal with are these. The vessel in question was under orders to go to a particular place to pick up a convoy of merchantmen. When she was convoying them certainly she would have been engaged in a warlike operation. I think that operation began when she took

up the duty of going to the place where she was going to act. She was, I think, engaged in a warlike operation at the time the collision occurred. For these reasons I think the second appeal fails.

Solicitors: *Treasury Solicitor*; *Charles Lightbound & Co.*; *Thomas Cooper & Co.*, for *Hill, Dickenson & Co.*, Liverpool.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

BLACKPOOL CORPORATION *v.* STARR ESTATE CO., LTD.

[House of Lords (Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Shaw and Lord Phillimore), October 20, November 8, 1921]

[Reported [1922] 1 A.C. 27; 91 L.J.K.B. 202; 126 L.T. 258; 86 J.P. 25; 38 T.L.R. 79; 66 Sol. Jo. 17; 19 L.G.R. 721]

Compulsory Purchase—Agreement for purchase of land embodied in local Act—Acquisition of land under that agreement—Land not "authorised to be acquired compulsorily" within Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1 (1).

Statute—Repeal—Generalia specialibus non derogant—Acquisition of land—Special provision for compensation in local Act—General provisions in subsequent general Act.

By s. 70 of a local Act, the Blackpool Improvement Act, 1917, the respondents were to sell and the Blackpool Corporation were to buy certain land at a price to be determined, in default of agreement, by arbitration as provided by the Lands Clauses Acts as modified by the local Act, and it was provided that the provisions of the section should apply for the benefit and protection of the respondents. By s. 1 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919: "Where (by or under any statute, whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any government Department or any local or public authority, any question of disputed compensation . . . shall be . . . determined" in the manner provided by the Act.

Notice to treat was served on the respondents by the corporation very shortly before the Act of 1919 came into force, but no arbitrator to fix the price had been appointed. The question was whether compensation was to be assessed under the general Act of 1919 or the local Act of 1917.

Held: (i) by Viscount Finlay, Viscount Cave, Lord Shaw, and Lord Phillimore, that s. 70 of the local Act constituted an agreement for the sale and purchase of the land, and that, accordingly, the land was not "authorised to be acquired compulsorily"; (ii) by Viscounts Haldane, Finlay, Cave, and Lord Phillimore (Lord Shaw dissenting), the general language of the Act of 1919 ought not, in the absence of clear words, to be construed as overriding the special provisions of s. 70 of the local Act; and, therefore, the Act of 1919 did not apply and compensation was to be assessed as provided by the Lands Clauses Act as modified by the local Act.

Notes. Distinguished: *Thurrock, Grays & Tilbury Joint Sewage Board* v. *Thames Land Co., Ltd.* (1925), 90 J.P. 1. Referred to: *Thornely* v. *Leconfield* (*Lord*), [1925] 1 K.B. 236; *West Midlands Joint Electricity Authority* v. *Pitt*, *Minister of Transport* v. *Pitt* (1931), 101 L.J.K.B. 229; *Drapers Co.* v. *London Passenger Transport Board*, [1937] 2 All E.R. 12; *Re Walsall Wood Colliery Co., Ltd.'s Application*, [1939] 3 All E.R. 864; *Walker* v. *Hemmant*, [1943] 2 All E.R. 160; *Harlow* v. *Ministry of Transport*, [1950] 1 All E.R. 898.

As to compensation for the acquisition of land, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and as to the effect of a general enactment on a previous particular enactment see ibid., 2nd Edn., vol. 31, pp. 526–528. For cases, see 11 DIGEST (Repl.) 124 et seq., and 42 DIGEST 767–771. For Acquisition of Land (Assessment of Compensation) Act, 1919, see 3 HALSBURY'S STATUTES (2nd Edn.) 975, and for Lands Tribunal Act, 1949, see ibid., vol. 28, p. 317.

Case referred to:

(1) *Barker* v. *Edger*, [1898] A.C. 748; 67 L.J.P.C. 115; 79 L.T. 151, P.C.; 42 Digest 768, *1952*.

Appeal from an order of the Court of Appeal (BANKES, ATKIN, and YOUNGER, L.JJ.), reversing a decision of SIR W. F. K. TAYLOR, K.C., sitting as Commissioner of Assize at Manchester.

The action was brought by the respondent company against the appellant corporation for a declaration that the compensation for land belonging to them, which was acquired by the corporation, should be assessed under the Blackpool Improvement Act, 1917 (a local Act: 7 & 8 Geo. 5, c. lii), and not under the Acquisition of Land (Assessment of Compensation) Act, 1919. In 1917 the corporation were promoting in Parliament the private Act for a variety of municipal purposes. The respondents, who were the owners of property in the neighbourhood, thought that the Bill would have an injurious effect upon their interests, and presented a petition in opposition to it. In consequence an agreement was come to between them and the corporation, whereby it was agreed that a clause should be inserted in the Bill for their protection, and that the opposition should be withdrawn. By s. 62 of the local Act the corporation "might enter upon, take and use all or any part of the following lands delineated on the deposited plans and described in the deposited book of reference," and then followed descriptions of the lands so referred to, including the land of the respondents. By s. 65 the powers of the corporation for the compulsory purchase of land under the Act were to cease after five years from the passing of the Act. By s. 70:

"The following provisions shall unless otherwise agreed in writing between the Starr Estate Co. (hereinafter called 'the owners' which expression shall where the context so admits include their successors and assigns) and the corporation apply and have effect for the benefit and protection of the owners and their estate (that is to say)—(1) The owners shall sell and the corporation shall purchase the whole of the lands and premises delineated on the deposited plans which belong to the owners with the easements and appurtenances appertaining thereto or connected therewith and which are situate at South Shore in the borough and are bounded on the north by the southern boundary of lands and premises belonging or reputed to belong to the Blackpool Pleasure Beach, Ltd., on the east by the Lancashire and Yorkshire and London and North-Western Joint Railway (in this section referred to as 'the said railway') on the south by lands and premises belonging or reputed to belong to the trustees of Thomas Shutt deceased and on the west by high water mark of ordinary tides (in this section referred to as 'the said lands'). (2) The price to be paid by the corporation to the owners for the said lands shall in default of agreement be determined by arbitration in the manner provided by the Lands Clauses Acts as modified or altered by this Act. (3) The corporation shall serve upon the owners notice to treat under the Lands Clauses Acts as soon as possible after the termination of the present war and at the most within a period of three years after such termination and in the event of the award of the arbitrator not being made before the expiration of the said period of three years the corporation shall pay to the owners interest at the rate of 5¼ per centum per annum on the amount of the purchase money which the arbitrator shall by his award find to be payable to the owners by the corporation for the said lands, such interest to be paid half-yearly from the expiration of the aforesaid period

at the end of every six months therefrom until actual completion of the purchase by the corporation of the said lands."

By sub-s. (4) the corporation were not to use or permit, suffer or allow the lands or any part thereof acquired or purchased by them under that Act from the owners to be used for the purposes therein mentioned. The Acquisition of Land (Assessment of Compensation) Act, 1919, was passed on Aug. 19, 1919 (the day before the service of the notice to treat) and came into operation on Sept. 1, 1919. The Act provided as follows (so far as is material):

"Section 1 (1): Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any government department or any local or public authority, any question of disputed compensation . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the reference committee under this section" [now the question of compensation is to be referred to and determined by the Lands Tribunal: see s. 1 (3) (a) (i) of the Lands Tribunal Act, 1949].

Section 2 prescribed certain rules for the assessment of compensation.

"Section 7 (1): The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect. . . ."

The learned commissioner held that the compensation should be assessed in the manner provided by the Act of 1919, and not under the Act of 1917. His decision was reversed by the Court of Appeal, and the corporation appealed to the House of Lords.

Maugham, K.C., W. Hunt, and *F. G. Cockshutt* for the corporation.
Hogg, K.C., Neilson, K.C., and *W. Allen* for the company.

Their lordships took time for consideration.
Nov. 8. The following opinions were read.

VISCOUNT HALDANE.—The decision of the question before us turns on a single point. Did the general enactment in the Acquisition of Land Act, 1919, which provided what is primâ facie an exclusive and uniform method for ascertaining the compensation to be paid for land authorised to be acquired compulsorily by certain authorities, including the appellants, repeal and supersede the provision made in s. 70 of the Blackpool Improvement Act, 1917, for the special case of a purchase from the respondents? That section was to apply, unless otherwise agreed in writing, for the benefit and protection of the respondents. By its terms the respondents were to sell and the appellants were to buy the land as to which the controversy has arisen at a price which was to be ascertained in the fashion more advantageous to the respondents than that prescribed by the later statute. The parties being put under reciprocal obligation to sell and buy, the price was to be determined by arbitration under the Lands Clauses Acts, and a notice to treat was for this purpose to be served by the appellants within a closely defined time. The case of the respondents was one of three similar cases, the others of which were analogously provided for each in a separate subsequent section. Under these sections the two other owners whose land was to be bought by the appellants obtained, as part of the special arrangements with them, restrictions on the freedom of the appellants in using the lands acquired. With the policy of the Act of 1919, and with the purposes for which it was passed, we are not at liberty to concern ourselves in deciding the question of law before us. What we have to determine is whether the special provision made in a case such as that of the appellants in the Blackpool Improvement Act, 1917, is to be deemed to have been altered by

the general legislative principle enacted by the public Act of 1919. The special provision may or may not confer on the respondents rights which can only be asserted by mandamus, as distinguished from proceedings for specific performance directed to what was the original reciprocal obligation of the parties to buy and to sell, at a price to be determined by arbitration, and under the restrictions enacted. The question does not appear to me to be an important one, for what is at least clear is that the case of the respondents was one which had been dealt with individually and in special detail by Parliament. It is not left to legal relationship of a merely general character. It represents rather what was apparently a bargain made between two corporations, one of which held land which the other desired to obtain, a bargain which was part of the basis on which Parliament passed the Act of 1917.

It is said for the appellants that the language of s. 1 of the subsequent statute is wide enough to include even such a special bargain. No doubt it may be said that it was so, if its terms could be construed merely by themselves without reference to any other consideration. Section 1 declares that when under any statute (whether passed before or after the Act of 1919 itself) land is authorised to be acquired compulsorily by such an authority as the appellants, any question of disputed compensation is to be determined in a new fashion. Section 7 says that the provisions of any Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, in relation to the matters dealt with in the Act of 1919, are to have effect only subject to that Act, and not so far as inconsistent with it. I will assume that the transaction is one relating to land "authorised to be acquired" within the meaning of that section. That it is so is not free from doubt, for the land is land which, by s. 70 of the Act of 1917, the appellants are bound to buy, as distinguished from being merely authorised to do so. But even so, the transaction is in the nature of a special and individual bargain and is not merely referred to the operation of a general principle of statute or other law.

In that state of matters we are bound, in construing the general language of the Act of 1919, to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for specially, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind to which I have referred. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest. Applying this rule of construction I do not think that we can presume that, in using the general language, however sweeping, of the Acquisition of Land Act, 1919, Parliament intended to rip up the bargain specifically and individually made by the respondents. It appears to me that the conclusion come to by the Court of Appeal was right, and that this appeal ought to be dismissed with costs.

VISCOUNT FINLAY.—The question in this case is whether the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, apply to the assessment of compensation in respect of the acquisition by the appellants of certain land belonging to the respondent company.

The land was acquired under the Blackpool Improvement Act, 1917, the last of a series of local Acts applying to Blackpool. The Act incorporated the Lands Clauses Acts with certain modifications, one of which was that any question of

A disputed compensation was to be determined by a single arbitrator. Section 62 empowered the corporation to enter upon, take, and use any part of certain specified lands delineated on the deposited plans, which include the lands now in question. By s. 65, the powers of the company for compulsory purchase of lands were to cease after the expiration of five years from the passing of the Act. By s. 69 confirmation was given to an agreement between Blackpool Pleasure Beach, Ltd., and the B corporation, set out in the third schedule to the Act, being an agreement for the acquisition by the corporation, on terms specified, of certain land for the purpose of works. Then followed s. 70, which is the material section in the present case. It enacts that the provisions therein set out shall, unless otherwise agreed in writing between the owners (the respondents) and the corporation, apply for the protection of the owners and their estate. These provisions are that the owners C should sell and the corporation should purchase the lands in question, that the price should, failing agreement, be determined by arbitration as provided by the Lands Clauses Acts as modified by the local Act, and that the corporation should serve upon the owners notice to treat as soon as possible after the termination of the war and at the most within three years after its termination, with a provision for interest if the award were not made before the expiration of the said three years. D Provisions follow preventing the corporation from using the lands for certain purposes which might cause a nuisance or be considered offensive. Provisions for the protection of certain other owners, Shutt and Robinson, were contained in ss. 71 and 72. The corporation gave notice to treat on Aug. 20, 1919. The Acquisition of Land (Assessment of Compensation) Act, 1919, had been passed on Aug. 19, and came into operation on Sept. 1, 1919. By that statute, where by or under any E statute "land is authorised to be acquired compulsorily by any government department or any local or public authority any question of disputed compensation" is to be determined by an arbitrator to be selected from a panel of official arbitrators set up by the Act: s. 1. The arbitrator is to proceed in accordance with certain rules set out in s. 2, which negative any allowance on account of the acquisition being compulsory and otherwise provide for limiting the amount to be recovered F as compensation. By s. 12 the Act was to come into operation on Sept. 1, 1919, but was not to apply

> "to the determination of any question where before that date the appointment of an arbitration, valuation, or other tribunal to determine the question has been completed, or a jury has been empanelled for the purpose."

G The respondent company brought this action against the corporation to have it declared that the compensation for their land should be assessed under the private Act of 1917 and not under the provisions of the general Act of 1919. The case was tried at the Manchester Assizes by MR. COMMISSIONER TAYLOR, K.C., who gave judgment for the corporation, dismissing the action with costs. His decision was reversed by the Court of Appeal (BANKES, ATKIN, and YOUNGER, L.JJ.), and judg- H ment was entered for the company with a declaration that the compensation should be assessed under the private Act and not under the Act of 1919. The corporation have brought the present appeal seeking to have it declared as held at the trial that the compensation must be assessed as provided in the Act of 1919.

The question is simply whether the question of compensation for this land falls within the scope of the Act of 1919. In my opinion, it does not. It was argued I on behalf of the appellants that the case falls within the statute of 1919 by virtue of the provision in s. 62 of the local Act of 1917 authorising the corporation to take any part of the lands delineated in the deposited plans. It was said that the lands so delineated include the land of the respondents now in question, and it was urged that it followed that s. 62 applied and that the compulsory acquisition of this land was thereby authorised. This argument overlooks the fact that the same Act contains also s. 70, which came into force simultaneously with s. 62. The special provisions of s. 70 with regard to the respondents' land exclude the contention that the land was acquired under s. 62. It was acquired and it could be acquired only

under and in conformity with the provisions of s. 70. That section provides for the sale by the owners and the purchase by the corporation of the land in question at a price to be ascertained by arbitration under the Lands Clauses Acts as modified by the local Act. These special provisions in the Act itself made it impossible for the corporation to acquire the land otherwise than under s. 70 and in accordance with its terms. From the language of s. 70 it is obvious that it embodies an agreement between the parties for the sale and purchase of the land. It follows that the land is not acquired compulsorily at all. It is acquired under the agreement embodied in s. 70. The whole argument of the appellants breaks down upon this short point, as it is only to cases of compulsory acquisition that the Act of 1919 applies.

But apart from this consideration, the land certainly was acquired on the special terms of s. 70, and these special terms are wholly inconsistent with the application of the Act of 1919. Even if s. 70 could be regarded as a mere enactment not embodying any agreement of the parties but in its nature compulsory, it is clear that it definitely provides, for the protection of the respondents (the owners), that the acquisition is to be on the terms specifically set out therein. It would be contrary to all principle to construe the general Act of 1919 as superseding specific provisions of this sort with regard to particular lands introduced for the protection of the owners. The Act of 1919 applies for the modification of the machinery of purchase under a general authority to acquire compulsorily; it does not and it cannot apply where the alleged authority to acquire compulsorily was given upon special terms for the protection of the owners inconsistent with the application of the procedure and rules of the general Act of 1919. In my opinion, this appeal ought to be dismissed with costs.

VISCOUNT CAVE.—I agree that this appeal fails, and on two grounds.

In the first place, s. 1 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, has no application except in cases where land is "authorised to be acquired compulsorily" by a government Department or a local or public authority, and, in my opinion, the land here in question did not come within that description. It is true that, if s. 62 of the Blackpool Improvement Act, 1917, had stood alone, the corporation would have had authority to take the land either by agreement, or, failing agreement, by the exercise of the compulsory powers contained in the Lands Clauses Act, but that section did not stand alone. It was followed by s. 70, which, doubtless giving effect to an agreement between the parties, put the corporation and the owners in a position of vendors and purchasers of the land at a price to be determined by arbitration and subject to some very special conditions (not appropriate to a compulsory purchase) as to the use of the land purchased, access to adjoining property, and other matters. Taking the sections together it appears to me that, in the case of this particular land, the corporation was not authorised to acquire it compulsorily, but was put under an obligation to acquire it on terms agreed to and embodied in the statute of 1917, and, accordingly, that the Act of 1919 had no application.

But, even if it were otherwise, and if it could be said that the land was "authorised to be acquired compulsorily," it would still, in my opinion, stand outside the Act of 1919. The rule is clear that a general statute will not, in the absence of clear words, be construed as derogating from special provisions in a previous statute. Generalia specialibus non derogant, and when the legislature has given its attention to a particular subject and made provision for it, the presumption is that a subsequent and general enactment is not intended to interfere with the special provision unless the intention so to do is clearly manifested: see the rule as stated by Lord Hobhouse in *Barker* v. *Edger* (1). In the present case the Act of 1917 was a private Act and contained in s. 70 very special provisions as to the terms upon which this land should be sold and purchased, including provisions as to the ascertainment of the price, the payment of interest from a fixed date, the future use of the land, and the form of the conveyance. If the Act of 1919 is to

A be applied, these special provisions will be seriously affected and the purchase money payable under the earlier Act will be substantially reduced; indeed one purpose of the Act of 1919, and particularly of the rules for the assessment of compensation contained in s. 2 of that Act, is to reduce the compensation payable on a compulsory purchase. It cannot be supposed, in the absence of very clear expressions, that the legislature in passing the Act of 1919 intended so seriously B to alter, to the prejudice of the vendors, the bargain into which they entered in 1917 which was embodied in the provisions of the Act of that year—a bargain without which that Act might never have been passed. It appears to me that the rule above referred to applies to this case, and that the decision of the Court of Appeal is right on this ground also.

C **LORD SHAW.**—I agree. But I have not reached that agreement without experiencing a very grave doubt; and I will explain to the House frankly how that doubt arises. In a passage in the judgment of ATKIN, L.J., he refers to *Barker* v. *Edger* (1) in the Privy Council and to the general maxim generalia specialibus non derogant. After grave consideration I am of the opinion that this maxim has no application whatsoever to the present case. I think that it is so on account of the particular language of the Act of 1919 itself. By s. 1 (1) it is provided that

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> "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any government Department or any local or public authority"

certain provisions follow. I cannot meet the specific language of that statute by a general maxim. It overturns the maxim by its own terms. The statute is passed E for the purpose of derogating not only from the procedure in the Lands Clauses Acts and the Railways Clauses Acts, but from the procedure in every special Act which has adopted those general statutes; and in so far as this Act applies it is meant to "derogate," and it is meant to substitute new procedure with consequential remedies and rights according to the new, and not according to the old, particular Acts.

F Therefore, the only question which remained to my mind was—entertaining that doubt as to the ground of the judgment—what was the scope of the Act of 1919? and that I think is the sole question which we have now to determine. But when I come to consider that, my doubts are solved because I hold that upon a sound and fair construction of the words "where land is authorised to be acquired compulsorily" what was done in the transaction in Blackpool in 1917, was not looked G upon in the light of a compulsory taking. I look at s. 72, for instance, of the Act of 1917, and then I look at s. 62, and I contrast them with s. 70 of the Act of 1917, and I find clearly in this latter section what is the ratification, and nothing but the ratification, of an antecedent concluded bargain between two parties, the undertakers (the corporation), on the one hand, and the willing seller (the Starr Estate Co.), on the other. In those circumstances, I cannot bring my mind to H conceive that when the statute of 1919 purported to affect only lands acquired compulsorily by statute it meant to affect a transaction such as that in 1917 at Blackpool covered by s. 70. I rest my judgment upon the specific limitation in the language of the Act of 1919 itself. I say again, and I wish it to be fully understood, that, in my opinion, the Act of 1919 was a derogating Act, was meant to be a derogating Act, and was meant to invade, to modify and, if necessary, to repeal I all existing codes which should interfere with the provisions of the Act of 1919, but, so reading it, I find that it applies to specific cases of compulsory acquisition, of which, in my opinion, the Blackpool case was not one.

LORD PHILLIMORE.—If the Blackpool Improvement Act, 1917, had ended at s. 67, and s. 70, with the other sections of a similar description, had been added by subsequent legislation or been the product of some agreement between the Blackpool Corporation and the owners of the lands affected, it might be reasonable to contend that, notwithstanding subsequent legislation or subsequent agreement, the

matter came within the provisions of s. 1 of the Acquisition of Lands Act, 1919, as being a case where "by or under any statute (whether passed before or after the passing of this Act) land was authorised to be acquired compulsorily by a local authority." But your Lordships cannot divide the Blackpool Act in that way. Its several sections became law at one and the same moment when the Act received the Royal Assent on Aug. 21, 1917, and they must be treated as parts of one instrument and reconciled if possible. The explanation of the appearance of s. 70 and its companions, and their juxtaposition with s. 62, is not far to seek, but for the present it may be put aside as immaterial. For the present decision your Lordships can deal merely with the Act as it stands. In s. 62 were comprised (inter alia) the lands for which special provision is made in s. 70; and no doubt by s. 62 authority is given to the Blackpool Corporation to acquire the lands, which the corporation could only do by Parliamentary authority or with a licence in mortmain; and authority is also given to the corporation to pay for the acquisition, which it certainly could not do without the sanction of Parliament. For this purpose the authority is general and applies to all the lands comprised in s. 62. The authority extends further to enable the corporation to acquire lands by the exercise of compulsory powers where such compulsory powers are needed. But for the lands comprised in s. 70 no such compulsory powers are needed, and, therefore, none is given by s. 62. This is, my Lords, I think, the reasoning upon which YOUNGER, L.J., based his judgment, with which I venture to express my concurrence. If your Lordships were driven to a more violent course it would be possible, and in the circumstances, necessary, to say that, if the two sections—62 and 70—were to any extent in conflict, the special provisions of s. 70 must be read as derogating from the general provisions of s. 62. But for the reasons which I have already given an easier course may be taken.

The most powerful argument against this conclusion rests upon the form of s. 70. It is said that, notwithstanding the peculiar nature of the provisions in s. 70 the machinery of the Lands Clauses Act as modified by the particular Act is intended to be set in motion, and that the lands must be deemed to be acquired compulsorily within the meaning of the Act of 1919. There is a notice to treat; the price is to be determined by arbitration in the same way as in the case of lands acquired compulsorily under the Blackpool Act; and there is a further reference to the Lands Clauses Act in sub-s. (10). I think the answer to this is to be found in a closer analysis of the special provisions. On the one hand, there is no option for the promoters of the Act to acquire or not to acquire the lands in question. The corporation must acquire, and, subject to a defeasance by mutual agreement, the property, if it does not pass immediately, must pass at latest by a day named; if the price is not yet fixed, provision is made for its determination, while, under sub-s. (10), provision is made for the form of the conveyance. On the other hand, a matter which is important to the corporation in two ways is left to their option. That is the time, within the limits of the fixed term, at which it will acquire the property. It is not bound to take at once and find the money at once, and the value is, I take it, to be ascertained as of the date when it does acquire—a circumstance of great importance, for the value of urban or suburban lands such as these will vary with the growth or decay of Blackpool; and all values during the period of the war and since are notoriously fluctuating when expressed in terms of currency. It seems to me that, if not the only, the most convenient procedure for effecting this purpose was the adoption of the machinery provided by the Lands Clauses Act, and that it would be converting questions of form into questions of substance were we, by reason of the show or appearance of the legislation, to treat this as a case of lands which were acquired by compulsion.

One other consideration I should mention. By s. 65 the powers of the corporation for compulsory purchase are to cease at the end of five years from the passing of the Act. But the notice to treat under s. 70, upon which the acquisition of the lands in question will follow, may be given at any time within a period of three years after the termination of the war—an uncertain date which might easily be a

much later one than that assigned for the exercise of the compulsory powers. If your Lordships adopt a construction which does reconcile ss. 62 and 70, it is unnecessary to rely upon any other ground put forward by the respondents. But I should observe that though no doubt the Act of 1919 was intended to deal retrogressively as well as prospectively with local Acts such as the Blackpool Act, it would be with the utmost reluctance that any court would construe the general language of the Act of 1919 as repealing such special provisions "for the benefit and protection of private owners and their estate," as those contained in s. 70. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *D. L. Harbottle*, Town Clerk, Blackpool; *Lewin, Gregory & Anderson*, for *Finch, Johnson & Co.*, Blackpool.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

BARTON AND MITCHELL *v.* FINCHAM

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), February 8, 1921]

[Reported [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 37 T.L.R. 386; 65 Sol. Jo. 326; 19 L.G.R. 185]

Rent Restriction—Right to contract out of Rent Acts—Possession—Grounds on which court can order—Limit of jurisdiction—Agreement by tenant to give possession—Payment by landlord—Power of court to enforce agreement—Right of landlord to recover payment on breach—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5.

The court has no power to make an order for the recovery of possession of a dwelling-house to which the Rent Restrictions Acts apply save on the grounds set forth in s. 5 (1) of the Increase of Rent, &c., Act, 1920 [now Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. 1].

Accordingly, where the tenant of a dwelling-house within the Acts agreed with the landlord that in consideration of a payment of £20 made to her by the landlord she would leave the house at the following Michaelmas, the landlord paid the £20 and gave the tenant a notice to quit on the agreed date, and the tenant then refused to give up possession.

Held: the court had no power to enforce the agreement.

Quære whether the landlord could recover the £20 which the tenant had retained.

Per BANKES, L.J.: Section 15 (2) of the Act of 1920 cannot be read as indicating any intention on the part of the legislature to recognise contracting out of the Act on the part of landlord and tenant.

Notes. Considered: *Rossiter* v. *Langley*, [1925] All E.R.Rep. 567; *Russoff* v. *Lipovitch*, [1925] All E.R.Rep. 100. Applied: *De Vris* v. *Sparks* (1927), 137 L.T. 441. Distinguished: *Turner* v. *Watts* (1927), 44 T.L.R. 105. Considered: *Smith* v. *Poulter*, [1947] K.B. 339; *Thorne* v. *Smith*, [1947] K.B. 307; *R.M.R. Housing Society, Ltd.* v. *Combs*, [1951] 1 K.B. 486. Distinguished: *Rajkenbach* v. *Mamon*, [1955] 1 All E.R. 12. Referred to: *Glossop* v. *Ashley* (1921), 90 L.J.K.B. 1237; *Reeves* v. *Davies*, [1921] 2 K.B. 486; *Brown* v. *Draper*, [1944] K.B. 309; *Solle* v. *Butcher*, [1949] 2 All E.R. 1107; *Welch* v. *Nagy*, [1950] 1 K.B. 455; *Middleton* v. *Baldock*, [1950] 1 All E.R. 708.

As to contracting out of the Rent Acts and recovery of possession, see

23 HALSBURY'S LAWS (3rd Edn.) 722, 813 et seq.; and for cases see 31 DIGEST (Repl.) 695 et seq. For the Acts of 1920 and 1933, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1044.

Cases referred to:

(1) *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P.Jo. 349, C.A.; 31 Digest (Repl.) 638, *7455*.

(2) *Artizans, Labourers and General Dwellings Co.* v. *Whittaker*, [1919] 2 K.B. 301; 88 L.J.K.B. 859; 121 L.T. 243; 35 T.L.R. 521; 31 Digest (Repl.) 696, *7874*.

(3) *Flannagan* v. *Shaw*, [1920] 3 K.B. 96; 89 L.J.K.B. 168; 122 L.T. 177; 84 J.P. 45; 36 T.L.R. 34; 64 Sol. Jo. 51; 18 L.G.R. 29, C.A.; 31 Digest (Repl.) 606, *7208*.

Appeal by the tenant from an order of the Divisional Court (LUSH and MCCARDIE, JJ., LUSH, J., dissenting), affirming the judgment of a county court judge.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (2):

> "Any person retaining possession as aforesaid shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration, by any person other than the landlord, and any person acting in contravention of this provision shall be liable on summary conviction to a fine, . . . and the court by which he was convicted may order any such payment or the value of any such consideration to be paid to the person by whom the same was made or given, but any such order shall be in lieu of any other method of recovery presented by this Act."

Sir Albion Richardson for the tenant.

Vachell, K.C., and *E. H. Coumbe* for the landlord.

Cur. adv. vult.

Feb. 8. The following judgments were read.

BANKES, L.J.—The material facts of this case are as follows. A landlord of a dwelling-house, to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, was anxious to obtain vacant possession of the house. He made an agreement with his tenant by which, in consideration of an immediate payment of £20, she agreed to give him notice to quit on Sept. 29 then next, and undertook peaceably to yield up the premises with vacant possession on that date. The agreement, which is dated July 22, 1920, was reduced into writing and signed by the tenant. The £20 was paid and the notice to quit was given. When Sept. 29 arrived the tenant refused to give up possession, but kept the £20. Upon this state of facts several interesting questions of law arise, namely, whether the landlord was entitled to take legal proceedings to recover possession, whether he could bring an action against the tenant either to recover damages for failing to carry out her agreement or to recover back the £20, and whether the tenant became liable to pay double rent under s. 18 of the Distress for Rent Act, 1737.

The landlord commenced proceedings in the county court claiming possession and mesne profits. It does not clearly appear that the tenant at the trial before the county court judge took the point that under s. 5 of the Increase of Rent Act, 1920, no order or judgment for the recovery of possession could be made against her. I will assume that the point was taken, as otherwise there would be no right of appeal. The county court judge decided in favour of the landlord, and made an order for possession. The tenant appealed. The judges in the Divisional Court were agreed that the landlord could not rely upon the tenant's notice to quit, as he had given no evidence that he would be "seriously prejudiced if he could not obtain possession," and without such evidence the provisions of s. 5 (1) (c) of that Act had not been complied with, but they disagreed as to the effect of the tenant's agreement to give up possession on the date named. LUSH, J., considered that the agreement was against public policy, and consequently unenforce-

able. McCARDIE, J., took the opposite view. The appeal was consequently dismissed, and the tenant appeals to this court. Each of the learned judges stated very fully the reasons for the conclusion at which they had arrived. I take a view of the statute which renders it unnecessary to discuss many of the grounds upon which the learned judges arrived at their decisions, or any point of law arising upon the facts, except the one point raised in the county court, namely, whether the landlord was entitled to an order for possession.

The objects which the legislature had in view in passing the various Increase of Rent and Mortgage Interests (Restrictions) Acts, and in particular the Act of 1920, appear to me clear, and are conveniently stated in the side notes to the sections of that Act. Those objects include restriction on increasing rents and mortgage interest, restriction on right to possession, restriction on levy of distress for rent, restriction on calling in mortgages, restrictions on premiums. The means adopted by the legislature for securing these various restrictions are very different. In the case of rent, a standard is fixed, and any rent in excess of that standard is declared by the statute to be irrecoverable from the tenant notwithstanding any agreement to the contrary. In the case of mortgages the Act declared that it shall not be lawful for any mortgagee, except in the permitted cases, to call in his mortgage or take any steps for enforcing the security or for recovering the principal money. In the case of premiums, in addition to allowing the recovery of the amount paid, it is made a punishable offence to require any payment or consideration in contravention of the provisions of the section. In the case of the restriction on the right to possession, s. 5 provides as follows:

> "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . ."

Then follows in a series of subsections a list of the instances in which an order or judgment may be made or given. It appears to me that the legislature in reference to claims to possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the court. The language used is so clear and precise that there is, in my opinion, no room for cutting down or restricting the operation of the section. The legislature has definitely declared that the court shall exercise its jurisdiction only in the instances specified in the section, and in no others.

Both learned judges in the court below attached considerable weight to the provisions of s. 15 (2) of the Act as indicating that the legislature contemplated agreements between landlord and tenant for valuable consideration in reference to the giving up of possession. I do not think that this subsection can be read as indicating any intention on the part of the legislature to recognise contracting out of the Act on the part of landlord and tenant. Section 15 is the section which seeks to define the statutory position of a person who continues in occupation of premises merely because the statute will not allow of his being ejected. Subsection (2) was introduced to prevent the statutory tenant making a profit out of his position by taking money or any form of consideration for letting some third person, other than his landlord, into possession. Both parties to the transaction are rendered liable to conviction. It seems obviously necessary to exclude a landlord who may be willing to pay something to a tenant for vacant possession from this penalty. It is for this reason only, as I think, that any reference is made in the subsection to the landlord, and I cannot give to the subsection the force attributed to it by McCARDIE, J.

In my opinion, s. 5 is an instance of a case where the legislature has in clear and unmistakable language restricted the jurisdiction of the court, and where no agreement between parties can give the court a jurisdiction which the legislature has said it is not to exercise. This is by no means the only statute in which the legislature has secured the object it had in view by limiting the exercise by the courts of their full jurisdiction. It is true that in some cases the strictness of the

limitation has been relaxed by the pleading rule which, while rendering the pleading of a statutory defence optional, declared that unless pleaded it cannot be relied on. No point of this kind arises in the present case, as I assume that all necessary conditions had been fulfilled entitling the tenant to raise the statutory defence in the county court. I see no ground for sending the case back for a new trial, and in these circumstances I am of opinion for the reason I have given that the county court judge had no jurisdiction to make any order for possession, and this appeal must be allowed with costs here and below, and judgment entered for the appellant with costs.

SCRUTTON, L.J.—Mrs. Fincham had been a tenant of a small house for over twelve years, paying rent monthly. Mr. Barton bought her house and was anxious to re-sell it, and for that purpose to get vacant possession. He, therefore, made an agreement with Mrs. Fincham that she should peaceably give up possession at Michaelmas, 1920, and give him a notice that she would quit on that date, in consideration of £20 paid her. That sum was paid, but the lady changed her mind when Michaelmas came, and Mr. Barton accordingly applied to the county court judge for recovery of possession, the ground alleged being the tenant's notice to quit, and her agreement to quit. The county court judge made an order for recovery of possession, but unfortunately we have no information as to the ground on which he proceeded, or his view of the agreement. On appeal to the Divisional Court, its members differed, LUSH, J., taking the view that it was contrary to public policy to contract out of the Act, MCCARDIE, J., that it was not; accordingly the judgment of the county court judge stood. There was then an appeal to this court.

The position of a tenant who, having agreed in his contract of tenancy, to give up possession in a named day, holds over, and stays in possession after that day, has been explained by this court in *Remon* v. *City of London Real Property Co., Ltd.* (1), and I do not repeat it. It is enough to say that he becomes a statutory tenant at his own will, and cannot without his consent be ejected either by peaceable entry or the order of a court, unless the conditions mentioned in s. 5 of the Act of 1920 are present, and the court makes an order. He retains possession of the dwelling-house by virtue of the provisions of the Act of 1920, as stated in s. 15 (1) of that Act, and the provision entitling him to stay in is s. 5, which determines how, alone, he can be turned out. He can leave of his own free will, surrendering his tenancy, which is probably the principal matter described as "any other reason determining the tenancy" in s. 15 (3). But if he is in possession and unwilling to give it up possession can only be obtained by order of a court, which order can only be made if certain specified facts are proved. One of those facts is that an obligation of the tenancy, so far as the same is consistent with the provisions of this Act, has been broken. This qualification was necessary, for every tenancy contains an obligation to deliver up possession at the end of the tenancy, of which obligation staying in possession is a breach. The qualification was not contained in the Act of 1915, but was held, I think, rightly by ASTBURY, J., in *Artizans, Labourers and General Dwellings Co.* v. *Whittaker* (2), to be necessarily implied, as, without it, the whole subsection would be meaningless. An agreement under the contract of tenancy to give up possession on a named day, does not "contract out of the Act," or prevent the provisions of the Act from applying and it is difficult to see why an agreement after the contract of tenancy of the same nature, should have any better results. Further, s. 5 (1) (c) deals with the case where the tenant has given notice to quit, and requires a further fact before the court can act thereon, namely, that in consequence of the notice the landlord has contracted to sell or let the house or taken any other steps which would result in his being seriously prejudiced, if he could not obtain possession. A mere notice to quit is not enough, and the case, judging by the particulars of claim in the county court, does not seem to have been based on s. 5 (1) (c) at all, but only on the agreement.

I am of opinion that the power of the court to make orders is limited by the conditions of s. 5, and unless one of these is proved, the order cannot be made. The case of an agreement to give up possession is not provided for except by ground (c) which renders it an insufficient ground for an order. It follows that the decision of the county court judge was erroneous. We are asked to order a new trial, apparently that an attempt may be made to bring the case under ground (c), but the landlord had not put this case forward in his particulars, or, apparently, in his argument, and there are no findings of fact relevant to the point. The question being fought was the effect of the agreement. It was urged that the effect of our decision would be to prevent agreements in court. If the tenant is willing to go out, I do not see why any order is wanted; let him go. But, as at present advised, I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession. This view of the case, based on *Remon's Case* (1) and on the provisions of the Act, renders it, in my view, unnecessary to consider the point on which the judges below differed. Some provisions of the Act such as ss. 1 and 3 (2) as to increase of rent, are clearly unaffected by any agreement. The agreement in this case does not on the face of it show any reference to or knowledge of the provisions of s. 5 of the Act, which it is supposed to exclude. I do not desire to hold out any encouragement to the view that a landlord of small property may make it a term of all his lettings that s. 5 of the Act shall not apply, but, further than this, I do not think it necessary to discuss the numerous arguments used or authorities cited both before us and in the court below. The appeal must be allowed and the judgment set aside with costs here and below. The question whether the £20 is recoverable is not before us. The legal advisers of the landlord are as capable as I am of deciding whether they can get any help in their difficulties from the decision of this court in *Flannagan* v. *Shaw* (3).

ATKIN, L.J.—I agree with the other members of the court in thinking that the express provisions of s. 5 of the Rent Restrictions Act, 1920, make it impossible to uphold the decision of the learned county court judge. The section appears to me to limit definitely the jurisdiction of the court in making ejectment orders in the case of premises to which the Act applies. Parties cannot by agreement give the court jurisdiction which the legislature has enacted they are not to have. If the parties before the court admit that one of the events has happened which give the court jurisdiction and there is no reason to doubt the bona fides of the admission the court is under no obligation to make further inquiry as to the question of fact; but, apart from such an admission, the court cannot give effect to an agreement whether by way of compromise or otherwise inconsistent with the provisions of the Act. I do not myself think that this question is affected by the county court rule as to giving notice of a statutory defence. A court of limited jurisdiction cannot increase its jurisdiction by a pleading rule; and is bound itself to take notice of a defect of jurisdiction appearing on the face of the proceedings. On these short grounds, which appear to have been adopted, among others, by LUSH, J., I think that his judgment was in substance right. I see no reason in the circumstances of this case for ordering a new trial, and I agree that the appeal should be allowed and judgment entered for the defendant with costs here and below, the costs in the county court on the scale allowed below to the plaintiff.

Appeal allowed.

Solicitors: *Seaton, Taylor & Co.*; *John Bransbury.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

N. JOACHIMSON (A FIRM NAME) *v.* SWISS BANK CORPORATION

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), February 9, 10, 11, March 11, 1921] B

[Reported [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 37 T.L.R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196]

Bank—Action by customer to recover balance—Need of previous demand—Duty of bank—Receipt of money for customer's account—Credit balance held as debt to customer—Duty to repay—Conditions of repayment—Duty to give notice of ceasing to do business with customer—Duty of customer—Duty to exercise care in drawing orders to bank—Bank not to be misled, or forgery facilitated. C

A banker is debtor to his customer to the extent of any money belonging to the customer which is in his hands, but in the case of money standing to the credit of the customer on current account there is, in the absence of special D agreement, an implied term that the customer shall have demanded the payment of the amount so standing to his credit as a condition precedent to the right to sue for it.

Semble: (i) In most cases the issue of a writ will be sufficient demand. (ii) A banker is liable to pay to a customer a balance on an account which has remained dormant for longer than the period of limitation in the case of an E action on a simple contract [six years: see Limitation Act, 1939, s. 2 (1) (a).].

Per ATKIN, L.J.: The contract between banker and customer includes the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank F where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except on reasonable notice. The customer, on his part, undertakes to exercise G reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. It is necessarily a term of such contract that the bank is not liable to pay the customer the amount of his balance until he demands payment from the bank at the branch at which the current account is kept.

Notes. Considered: *Admiralty Comrs.* v. *National Provincial and Union Bank of England* (1922), 38 T.L.R. 492; *Richardson* v. *Richardson, National Bank of India, Ltd., Garnishees*, [1927] All E.R.Rep. 92; *Douglass* v. *Lloyds Bank* (1929), 34 Com. Cas. 263; *Bagley* v. *Winsome*, [1952] 1 All E.R. 637; *Re Russian Commercial and Industrial Bank*, [1955] 1 All E.R. 75. Referred to: *Re British American Continental Bank, Credit General Leigeois' Claim*, [1922] All E.R.Rep. 219; *Prosperity, Ltd.* v. *Lloyds Bank* (1923), 39 T.L.R. 372; *Tournier* v. *National Provincial and Union Bank of England, Ltd.*, [1923] All E.R.Rep. 550; *Rekstin* v. *Komseverputj Bureau (Bank for Russian Trade, Ltd.)*, [1932] All E.R.Rep. 534; *Davidson* v. *Barclays Bank, Ltd.*, [1940] 1 All E.R. 316; *Graymann* v. *Treitel*, [1940] 2 All E.R. 188; *Isaacs* v. *Barclays Bank, Ltd., and Barclays Bank (France), Ltd.*, [1943] 2 All E.R. 682; *Brewer* v. *Westminster Bank, Ltd.*, [1952] 2 All E.R. 650; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263. H I

As to banking operations, see 2 HALSBURY'S LAWS (3rd Edn.) 166 et seq.: and for cases see 3 DIGEST 167 et seq.

Cases referred to:

(1) *Foley* v. *Hill* (1844), 1 Ph. 399; affirmed (1848), 2 H.L.Cas. 28; 9 E.R. 1002, H.L.; 3 Digest 168, *272.*

(2) *Pott* v. *Clegg* (1847), 16 M. & W. 321; 16 L.J.Ex. 210; 8 L.T.O.S. 493; 11 Jur. 289; 153 E.R. 1212; 3 Digest 169, *276.*

(3) *Re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154; 62 L.J.Ch. 915; 69 L.T. 255; 42 W.R. 25; 9 T.L.R. 550; 37 Sol. Jo. 618; 3 R. 657; 3 Digest 193, *402.*

(4) *Walton* v. *Mascall* (1844), 13 M. & W. 452; 2 Dow. & L. 410; 14 L.J.Ex. 54; 4 L.T.O.S. 158; 153 E.R. 188; 1 Digest 53, *425.*

(5) *Norton* v. *Ellam* (1837), 2 M. & W. 461; Murph. & H. 69; 6 L.J.Ex. 121; 1 Jur. 433; 150 E.R. 839; 1 Digest 53, *430.*

(6) *London Joint Stock Bank* v. *Macmillan and Arthur*, [1918] A.C. 777; 88 L.J.K.B. 55; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650, H.L.; 3 Digest 172, *293.*

(7) *Young* v. *Grote* (1827), 4 Bing. 253; 12 Moore, C.P. 484; 5 L.J.O.S.C.P. 165; 130 E.R. 704; 3 Digest 232, *640.*

(8) *Scholfield* v. *Earl of Londesborough*, [1896] A.C. 514; 65 L.J.Q.B. 583; 75 L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700, H.L.; 6 Digest 384, *2518.*

(9) *Walker* v. *Bradford Old Bank, Ltd.* (1884), 12 Q.B.D. 511; 53 L.J.Q.B. 280; 32 W.R. 644; 3 Digest 176, *312.*

(10) *Schroeder* v. *Central Bank of London, Ltd.* (1876), 34 L.T. 735; 24 W.R. 710; 2 Char. Pr. Cas. 77; 3 Digest 175, *310.*

(11) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

(12) *Rogers* v. *Whiteley*, [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303; 8 T.L.R. 418, H.L.; 3 Digest 176, *317.*

(13) *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q.B.D. 377; 59 L.J.Q.B. 360; 62 L.T. 857; 38 W.R. 630, C.A.; 32 Digest 336, *204.*

(14) *Birks* v. *Trippet* (1666), 1 Saund. 28; 1 Sid. 303; 85 E.R. 32; 2 Digest (Repl.) 709, *2211.*

(15) *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 31 T.L.R. 532; 59 Sol. Jo. 597; 13 L.G.R. 1156, C.A.; 21 Digest 634, *2156.*

Appeal by the defendants from the judgment of ROCHE, J., sitting without a jury. The facts appear in the judgment of BANKES, L.J.

Schwabe, K.C., and *Conway* for the defendants.

R. A. Wright, K.C., and *Wilfred Lewis* for the plaintiffs.

Cur. adv. vult.

Mar. 11. The following judgments were read.

BANKES, L.J.—The material facts of this case are as follows. Before and until Aug. 1, 1914, three persons had carried on business in Manchester in partnership under the firm name of N. Joachimson. On that date one of the partners died, and as a result the partnership was automatically dissolved. The plaintiff in the present action, L. E. Marckx, was one of the three partners. He is a naturalised Englishman, at all material times residing and carrying on business in England. The third partner on the outbreak of war on Aug. 4, 1914, became an alien enemy. The partnership banked with the branch of the defendant bank in London. On Aug. 1, 1914, the amount standing to the credit of the partnership current account was something over £2,300. No operations took place on that account between Aug. 1, 1914, and June 5, 1919, when the plaintiff commenced the present action in the name of N. Joachimson (Manchester), claiming payment of the sum standing to the credit of the account of the partnership. The action has had a chequered career during the preliminary stages, but eventually it has taken the form of an action by the plaintiff in the name of N. Joachimson, "a firm

name," claiming, for the purpose of winding-up the affairs of the partnership, to recover the amount standing to the credit of the partnership on Aug. 1, 1914, and asserting that the cause of action on which the plaintiff relied was one which accrued on Aug. 1, 1914, "for money lent by the plaintiffs to the defendants as bankers, or alternatively for money had and received by the defendants for the use of the plaintiffs." To the action as thus constituted several objections were taken. With regard to the form of the action it was said that the facts did not bring it within R.S.C., Ord. 48A, r. 1, so as to allow of the action being brought in the firm name. With regard to the substance of the action, the defendants agreed to limit their causes of action to those arising on or before Aug. 1, 1914, and they contended that on that date there was no accrued cause of action for the amount standing to the credit of the partnership at that date, because no demand had been made upon them for payment on or before that date. It was also said that, even if there was a cause of action on Aug. 1, 1914, it was not a continuing cause of action at the date of the writ. There was also a set-off and counter-claim. All these points were dealt with by ROCHE, J., in the court below. Having regard to the view I take on the question whether there was an accrued cause of action on Aug. 1, 1914, it is not necessary to refer to any of the other points, and I express no opinion and give no decision upon them.

The question whether there was an accrued cause of action on Aug. 1, 1914, depends upon whether a demand upon a banker is necessary before he comes under an obligation to pay his customer the amount standing to the customer's credit on his current account. This sounds as though it was an important question. In a sense, no doubt it is, but it is very rarely that the question will in practice arise. In most of the cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand. It is only, therefore, in the unlikely case of a banker pleading the Statute of Limitations, or in a case like the present where the facts are very special, that the question becomes important. In the present case the writ was not issued till June 5, 1919. To succeed in the action, the plaintiff had to prove a cause of action existing long before that date—namely, on Aug. 1, 1914. ROCHE, J., while recognising that at first sight the conclusion as a matter of business seemed startling, gave judgment in favour of the plaintiff, holding that the point had been decided in *Foley* v. *Hill* (1) and *Pott* v. *Clegg* (2). There is no doubt that the general opinion of these decisions, as accepted in some reported cases and as expressed in the text-books, is in accordance with the view taken of them by ROCHE, J. As illustrations I refer to *Re Tidd* (3), where counsel for the plaintiff admitted that in the case of money paid into a bank on current account the law is that the amount held by the bank is a simple debt in respect of which time runs under the Statute of Limitations without demand, and he cited as authority for the proposition *Pott* v. *Clegg* (2) and *Foley* v. *Hill* (1) in the House of Lords. NORTH, J., apparently accepted the proposition without any discussion of these cases.

It is necessary, therefore, to consider very carefully what those cases really did decide. Before proceeding to do this, it is helpful to bear in mind what the general law is with reference to payments to be made "on demand." In *Walton* v. *Mascall* (4) (13 M. & W. at p. 458) PARKE, B., states the law thus:

> "Now it is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due."

Again in *Norton* v. *Ellam* (5) the same learned judge says (2 M. & W. at p. 464):

> "It is the same as a case of money lent payable on request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan."

In every case, therefore, where this question arises the test must be whether the parties have, or have not, agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt. In the ordinary case of banker and customer their relations depend either entirely or mainly upon an implied contract. The questions for decision in the present case must therefore be: (i) whether the cases to which reference was made in the court below did decide that the relation of banker and customer is such as to negative any implied condition that the making of an actual demand is a condition precedent to the bringing of an action to recover money lent to the banker by the customer on current account; and (ii) whether, if they did not so decide, such a condition should be implied.

Pott v. *Clegg* (2) is a decision of the Court of Exchequer in 1847, and appears to have turned entirely upon the form of the pleading. The argument of the Attorney-General in showing cause against the rule was rested as a separate point upon the fact that in the pleadings the balance due from the bank to the customer was treated as an ordinary debt for money lent. In support of the rule counsel argued that as between banker and customer a special relation existed, and further that a demand was necessary as a condition precedent to the accrual of a cause of action; but both ROLFE, B., and PARKE, B., in the course of the argument pointed out that the latter point was not open on the pleadings. The judgment of the court was delivered by POLLOCK, C.B., who, after saying that the majority of the court were of opinion that money deposited in a banker's hands is equivalent to money lent, went on to say that, even assuming that

> "there are peculiar circumstances in a banking account which distinguish it from any other, yet none of those circumstances appears on these pleadings, so as to justify us in considering this case differently from what we should, if it were an ordinary case of money lent."

The Chief Baron then goes on to express his own doubt whether

> "there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan of money."

This decision does not, in my opinion, go further than recognising that the relation of banker and customer is that of borrower and lender. It certainly does not establish the proposition that, though that is the relation, it may not be in part governed by special implied terms.

Foley v. *Hill* (1) was decided, in the first instance, by LORD LYNDHURST, L.C. The main question in the action was whether an account between banker and customer, where the former pleaded the Statute of Limitations, was the proper subject for a bill in equity. The Lord Chancellor, in giving judgment, refers to cases in which it had been decided that the relation of banker and customer was that of borrower and lender, and then proceeds (1 Ph. at p. 404):

> "Here there was a loan by Foley to the defendants, to be repaid with interest at 3 per cent.; that was the simple transaction between them, and if this were a case at law, a plea of the statute would be a sufficient answer, unless there were some special circumstances to take the case out of the statute."

In the House of Lords the point mainly debated was again the question whether the plaintiff's claim was a fit subject for a bill in equity. In this connection the Law Lords expressed their opinions as to the ordinary relation existing between banker and customer, and those opinions are correctly summarised in the head-note as follows (2 H.L.Cas. 28):

> "The relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank."

The point which is raised in the present appeal was not mentioned or discussed, either in the court below or in the House of Lords, and, in my opinion, the decision cannot be treated as an exhaustive definition of all the obligations arising out of the relation between banker and customer, or as ruling out the possibility of an implied term of that relation, requiring an express demand of repayment as a condition precedent to the right to sue the banker for the amount standing to the credit of the customer's current account.

The decision of the House of Lords in *London Joint Stock Bank* v. *Macmillan and Arthur* (6), approving *Young* v. *Grote* (7), affords one striking instance of an obligation implied in the relation of banker and customer to which no reference was made in *Foley* v. *Hill* (1). LORD HALDANE points out that:

> "Ever since this House in 1848 decided *Foley* v. *Hill* (1) it has been quite clear that the relation between a banker and the customer whose balance he keeps is under ordinary circumstances one simply of debtor and creditor. But in other judgments, and notably by a later decision of this House, *Scholfield* v. *Earl of Londesborough* (8), it was made equally clear that along with this relation and consistently with it there may subsist a second one. . . . But the customer of a bank is under a yet more specific duty. The banker contracts to act as his mandatory and is bound to honour his cheques without any delay to the extent of the balance standing to his credit. The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form that is clear and free from ambiguity."

Having regard to the peculiarity of that relation there must be, I consider, quite a number of implied superadded obligations beyond the one specifically mentioned in *Foley* v. *Hill* (1) and *Pott* v. *Clegg* (2). Unless this were so, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due—that is to say, directly after the customer has paid the money into his account—and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and any place.

It is only necessary in the present case to consider the one question whether there is, arising out of the relation of banker and customer, the implied obligation on the part of the customer to make an actual demand for the amount standing to his credit on current account as a condition precedent to a right to sue for that amount. I cannot find that the point has ever been discussed in any reported case. For the reasons I have already given, I consider that the point has never been decided, and that it is open to this court to decide it.

Too much reliance must not be placed upon the language of learned judges who had not the precise point before them, but it is certainly worth noticing that in *Foley* v. *Hill* (1) in the House of Lords, the Lord Chancellor says this (2 H.L.Cas. at p. 36):

> "He (the banker) is, of course, answerable for the amount because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

LORD BROUGHAM says (ibid. 43):

> "I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon."

In *Walker* v. *Bradford Old Bank* (9) A. L. SMITH, J., in speaking of the relation of banker and customer in connection with an assignment of moneys standing to a customer's credit at the bank, says (12 Q.B.D. at p. 516):

> "I am of opinion that before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the superadded obligation on the bank's part to honour the

assignor's cheques, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all moneys then or thereafter standing to his credit."

In *Schroeder* v. *Central Bank of London* (10) BRETT, J., in dealing with the suggestion that a cheque on a banker was an assignment of the moneys standing to the customer's credit at the bank, says (34 L.T. at p. 736):

> "This is not a case of the drawer going himself and demanding all the money in his bankers' hands, and I am myself inclined to think that it might be put in this way: that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when the cheque was drawn there was no debt which could be assigned."

These dicta all favour the contention of the present defendants, and they are supported by the very strong body of expert opinion which was given in evidence in the court below as to the practice of bankers. Applying LORD ESHER'S test, as laid down in *Hamlyn & Co.* v. *Wood & Co.* (11) ([1891] 2 Q.B. at p. 491), to the question whether the term contended for by the defendants must be implied in the contract between banker and customer, I have no hesitation in saying that it must. It seems to me impossible to imagine the relation between banker and customer, as it exists to-day, without the stipulation that, if the customer seeks to withdraw his loan, he must make application to the banker for it. It has been suggested that a decision to this effect would run counter to a line of authorities which have recognised and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order nisi is, according to LORD WATSON in *Rogers* v. *Whiteley* (12), to make the garnishee "custodier for the court of the whole funds attached." The service of such an order is, in my opinion, a sufficient demand by operation of law to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced. As no demand for payment in the present case was made on or before Aug. 1, 1914, it follows, in my opinion, that the plaintiff had no accrued cause of action on that date, and the claim fails on that ground. The appeal will be allowed with costs. The judgment must be set aside, and judgment entered for the defendants on the claim with costs. No order on the counter-claim, except that it be discontinued without costs.

WARRINGTON, L.J.—The question is: In the case of money to the credit of a current account with a banker, is the existence of an actual demand an ingredient in the cause of action? In the text-books the question is answered in the negative, and it is said that the Statute of Limitations applies to a balance left untouched for six years before action: see, for example, HALSBURY'S LAWS OF ENGLAND (1st Edn.), vol. 1, tit. Bankers and Banking, s. 1196, p. 586. This view appears also to have been accepted as correct by LORD ESHER, M.R., and LINDLEY, L.J., in *Atkinson* v. *Bradford Third Equitable Building Society* (13), and by NORTH, J., in *Re Tidd* (3), but in neither of those cases did the point arise for decision. The cases usually cited in support of the above statement are *Foley* v. *Hill* (1) (1 Ph. 399), *Pott* v. *Clegg* (2), and *Foley* v. *Hill* (1) (2 H.L.Cas. 28). I have mentioned them in the above order, because it is the order in which the several judgments were given, *Pott* v. *Clegg* (2) having been decided between the judgment of LORD LYNDHURST, L.C., in *Foley* v. *Hill* (1) and the decision of the House of Lords in the same case.

In *Foley* v. *Hill* (1) the plaintiff instituted a suit in equity for an account. The defendants were bankers who had received from the plaintiff many years before suit a sum of money for which they agreed to pay 3 per cent. interest, but of this two payments only had been made, both more than six years before suit, and no interest had been credited for more than six years. The plaintiff insisted that the

transaction was not one of debtor and creditor, but one of trustee and cestui que trust, and that the Statute of Limitations did not apply. The Lord Chancellor, having held that the case was one merely of a loan to the defendants to be repaid with 3 per cent. interest, said (1 Ph. at p. 405):

> "That was the simple transaction between them, and if this were a case at law, a plea of the statute would be a sufficient answer, unless there were some special circumstances to take the case out of the statute."

He then held that it was also a sufficient answer in equity, and that in that case there were no special circumstances to take the case out of the statute. There was another ground relied upon by the Lord Chancellor (ibid. at p. 407) as a sufficient answer to the suit—namely, want of equity—the account being so simple as not to be the proper subject for a bill in the Court of Chancery. The Lord Chancellor did not consider whether the accepted course of business as between bankers and their customers has not introduced into their relation a modification of that of an ordinary borrower and lender. Still there is undoubtedly an expression of opinion that the debt was barred by the statute, based on the assumption that the claim was an ordinary one for money lent, but the point did not really arise for decision, inasmuch as there was ample ground without it for dismissing the bill.

The next decision in point of time was *Pott* v. *Clegg* (2). That case has been regarded as having decided that the contract between banker and customer is the ordinary one for money lent, and that the statute runs from the receipt of the money by the banker. But when it is examined it will be found that the customer, who desired to contend, and did contend, that the contract between banker and customer was a special one under which a demand was essential to the cause of action, had not raised the point on his pleadings (see per Rolfe, B., 16 M. & W. at p. 326), and the judgment of the court delivered by Pollock, C.B., proceeded on this footing (see ibid. p. 328). It is true that the majority of the court were of opinion that money in the hands of a banker is merely money lent, but the Chief Baron expressed considerable doubt

> "whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money."

This case again is not in reality a decision on the point.

In *Foley* v. *Hill* (1), before the House of Lords, the decision turned upon the question, raised and solemnly argued, whether the relation of banker and customer was not that of trustee and cestui que trust rather than that of debtor and creditor. The learned Lords were all of opinion that it was the latter, and that the Lord Chancellor was right in dismissing the bill on the ground of want of equity. Again, therefore, the point as to the true nature of the contract and of the banker's obligation did not arise for decision. Lord Cottenham, L.C., however, did use expressions which seem to me, at all events, to leave open the question which we have to decide. He said (2 H.L.Cas. at p. 36) the banker

> "is of course answerable for [the money placed in his custody] because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

He in terms refused to deal with the question as to the application of the Statute of Limitations. Lord Brougham also expressly abstained from expressing any opinion upon the point, but he did, in the course of his speech, describe in terms almost identical with those used by the Lord Chancellor the nature of the banker's obligation. Lord Campbell confined his speech to the point as to want of equity, and Lord Lyndhurst added nothing material to his previous judgment in the Court of Chancery.

There is one other expression of opinion to which it is useful to refer. In *Schroeder* v. *Central Bank of London* (10) the question arose whether a cheque was

an assignment of a corresponding part of the drawer's credit balance. After deciding this question in the negative for reasons not material to the present case, BRETT, J., said this (34 L.T. at p. 736):

> "This is not the case of the drawer going himself and demanding all the money in his bankers' hands, and I am myself inclined to think that it might be put in this way: that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when the cheque was drawn there was no debt which could be assigned, and consequently there can be no debt owing by the defendants to the plaintiffs."

This is, so far as it goes, the expression of an opinion in favour of the view contended for by the defendants.

In this state of the authorities, it seems to me that the question we have to decide has been left open, so far as actual decision is concerned, with expressions of opinion both ways, and we must deal with it accordingly. It is, of course, well settled that in the ordinary case of money lent, "the debt which constitutes the cause of action arises instantly on the loan": per PARKE, B., in *Norton* v. *Ellam* (5) (2 M. & W. at p. 464); and just before the same learned judge said: "There is no obligation to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so." The real question is whether or not in the special case of banker and customer the obligation to give notice is part of the contract between them. There are some points in reference to the relation of banker and customer which seem to me to indicate that such obligation is part of the contract. If the general rule above mentioned were applicable, the banker would be bound to seek out his customer and pay him, and the customer would be bound at any time and without notice to receive the amount due, but it is well settled that a banker is not at liberty to close an account in credit by payment of the credit balance without giving reasonable notice, and making provision for outstanding cheques. This restriction on a banker's liberty to discharge his debt, seems to me inconsistent with an obligation on his part to pay without demand. Of course, if the customer requires payment, he waives his right to receive notice, and then the banker's liability would immediately arise. There was evidence in the present case that bankers never in fact pay without demand, and though this by itself may not be evidence of a custom binding on both parties, it at all events shows that bankers and customers habitually act on the assumption that notice shall be given on the one side as well as on the other. Again, there are mutual obligations on both banker and customer in reference to the payment and drawing of cheques: *London Joint Stock Bank* v. *Macmillan* (6). Cheques drawn on one branch of a bank are not payable at another. Bankers are not required to pay cheques except at the banking house and in banking hours.

All these matters seem to me to distinguish the contract between banker and customer from the ordinary case of a loan of money, and having regard to the state of the authorities I think we are at liberty to hold, and ought to hold, that a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action, and that without such demand no cause of action accrues. In the present case there was no demand on or before Aug. 1, 1914. It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand. In my opinion, therefore, no cause of action had accrued on Aug. 1, 1914, and the action was not maintainable. For these reasons I am of opinion that the appeal succeeds, and judgment should be entered for the defendants with costs here and below. The counter-claim will be dealt with as BANKES, L.J., has said.

ATKIN, L.J.—This case raises the question whether the customer of a bank may sue the banker for the balance standing to the credit of his current account without making a previous demand upon the banker for payment. It is unnecessary to recapitulate the circumstances which raise this issue in this case. It is

sufficient to state that upon the hearing of a summons for particulars on Mar. 16, 1920, the defendants undertook to limit their causes of action to those arising on or before Aug. 1, 1914, and that at that date no demand for the balance had been made to the bank. A

The question seems to turn upon the terms of the contract made between banker and customer in the ordinary course of business when a current account is opened by the bank. It is said, on the one hand, that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time, but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. B C D E

The result I have mentioned seems to follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think it was clearly established by undisputed evidence in this case that bankers never do make a payment to a customer in respect of a current account except upon demand. The contention of the plaintiffs appears to me to ignore the fact that the contract between banker and customer contains special terms, and cannot in its entirety be expressed in the phrasing of an ordinary indebitatus count. A simple promise to pay upon an executed consideration, creates a debt, and the creditor may sue without notice. F G

> "It is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due": per PARKE, B., in *Walton* v. *Mascall* (4), 13 M. & W. at p. 458. H

The question is in every case whether the parties have stipulated that a request shall be made. In the case of a note made payable on demand it is clear that the words "payable on demand" do not make a demand a term of the contract (see *Norton* v. *Ellam* (5)), a decision that on a note payable with interest on demand the Statute of Limitations ran from the date of the note. PARKE, B., says (2 M. and W. at p. 464): I

> "It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan."

On the other hand, a note payable on demand at a particular place does contain

A a stipulation in the contract that demand shall be made modo et forma, and no action will lie without such a demand: see now Bills of Exchange Act, 1882, s. 87 (1). It has been said that a demand can only be necessary where the contract is a collateral promise to pay, meaning thereby a promise such as that of a surety. This is too narrow a view, and I am inclined to think has received countenance from a misreading of the words of ALDERSON, B., in *Norton* v. *Ellam* B (5) where he adds to the judgment of PARKE, B. (ibid. at p. 464): "It must be so unless there is something to show that a demand is to be a collateral matter." That, I think, means is stipulated for as qualifying the promise to pay. The use of the word "collateral" and its true explanation can be seen in *Birks* v. *Trippet* (14) (1 Saund. at p. 33). There the principal case was an action in assumpsit, which declared that the plaintiff and defendant had submitted differences to C arbitration, and that the defendant had promised the plaintiff that if the defendant did not perform the award he would pay £40 if he should be thereunto requested. Saunders, of counsel for the defendant, took objection to the declaration "that the plaintiff (in his declaration) had not laid any request of the penalty of £40," and he argued that there was a difference between a mere duty and a collateral sum:

> D "For where a mere duty is promised to be paid upon request, as if in consideration of all moneys lent to the defendant, he promised to pay them again on request, no actual request is necessary, but the bringing of the action is a sufficient request. But otherwise it is on a promise to pay a collateral sum on request, for there an actual request ought to be made before action brought. And so was the opinion of the whole court. And therefore judgment was given for the defendant."

E Serjeant Williams, in his note, cites a number of cases and then says:

> "For request is parcel of the contract, and must be proved; and no action arises until a request be made."

The question appears to me to be in every case: Did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to F their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material. In the case of such a contract as this, if I have correctly stated the manifold terms of it, it appears to me that the parties must have intended that the money handed to the banker is only payable after a demand. The nature of the contract negatives the duty of the debtor to find out his creditor and pay him his debt. If such G a duty existed and were performed, the creditor might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears to me, at the branch where the account is kept, and where the precise liabilities are known. And if this is so, I apprehend that demand at the place where alone the money is payable must be necessary. A decision to the contrary would subvert banking business. I am glad to think that, so far as I can ascerH tain, the decisions in the American courts are uniformly to the same effect as our present judgment.

The practical bearing of this decision is on the question of the Statute of Limitations. Since *Pott* v. *Clegg* (2) in 1847 it has been laid down in text-books that, in the case of a current account, the statute runs from the time of money being deposited with the banker. But if that case is looked at, it is plain that it was I decided upon the pleadings, the sum in question being claimed to be set off for money lent by the defendant's testator to the plaintiff's predecessor in title. It is stated that the majority of the court were of opinion that money in the hands of the banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer. The Lord Chief Baron was of opinion that it was a question for the jury whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. The Lord Chief Baron delivered the judgment of the court, and it is plain from his language that he

could not have done so had not the decision been confined to the pleading point. The only other direct authority is the decision of LORD LYNDHURST, L.C., in *Foley* v. *Hill* (1). The suit was for an account, and I am not certain that in dealing with the Statute of Limitations LORD LYNDHURST was not dealing with those words in the statute that deal with actions of account. The right to such an action may well accrue before a debt becomes payable. But on the assumption that the Lord Chancellor decided that the statute had run against a claim in debt or assumpsit, yet inasmuch as that decision was taken to the House of Lords and affirmed there by all the Lords present, including LORD LYNDHURST himself, upon one only of the grounds relied upon in the judgment below, the point as to the Statute of Limitations being expressly reserved, I do not think that we are bound to treat the whole of LORD LYNDHURST'S judgment as binding upon us. It may be noted that the decision of the Court of Exchequer in *Pott* v. *Clegg* (2) had been given between the dates of the decision of LORD LYNDHURST in *Foley* v. *Hill* (1) and the hearing in the House of Lords. The decision in the latter case in the House of Lords is confined to the point that the banker is debtor to his customer and not trustee. I do not think it safe to rely upon the language used by the Lord Chancellor and LORD BROUGHAM on the subject of demand and request, though the words used tend to support the contention of the present defendants.

The result of this decision will be that for the future bankers may have to face legal claims for balances on accounts that have remained dormant for more than six years. But seeing that bankers have not been in the habit as a matter of business of setting up the Statute of Limitations against their customers or their legal representatives, I do not suppose that such a change in what was supposed to be the law will have much practical effect. It was suggested in argument that the effect of our decision will be to alter the facilities given to an execution creditor to attach his debtor's bank account in garnishee proceedings. This appears to be a mistake. The provisions of Ord. 45 apply to debts owing or accruing from the garnishee, and this expression includes debts to which the judgment debtor is entitled though they are not presently payable: see the decision of the Court of Appeal in *O'Driscoll* v. *Manchester Insurance Committee* (15). The service of the order nisi binds the debt in the hands of the garnishee—that is, creates a charge in favour of the judgment creditor. If the bank disputes that the amount is payable, there is ample power to provide for a demand being made before an order for payment is made. Possibly the order nisi in itself operates as such a demand. Finally, it is perhaps unnecessary to say that the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum. For these reasons, I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendants on the claim with costs.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co.*, for *Addleshaw, Sons & Latham*, Manchester; *Michael Abrahams, Sons & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re PEEL'S RELEASE

[Chancery Division (Sargant, J.), April 12, 1921]

[Reported [1921] 2 Ch. 218; 90 L.J.Ch. 369; 127 L.T. 123; 65 Sol. Jo. 580]

B

Perpetuities—Gift of land for school in perpetuity—Reverter clause—Defeat of object of gift—Avoidance of reverter clauses—Need of scheme—Cy-près doctrine.

In 1837 P., by deed, granted and released a certain piece of land to trustees on trust to "permit and suffer the same to be for ever thereafter used as and C for a place for the instruction of seventy poor children" resident in the parish of L. "in the principles of the Church of England as by law established, and in reading, writing, casting accounts, and other proper, useful and common learning for poor children." The deed further provided that if, by reason of any law or statute or otherwise, the release of the land as to the charitable purposes thereby intended to be made and established should "either not take effect, or, D having taken effect, shall afterwards cease, or determine, or be defeated, or, the precise objects of those presents being for the education of poor children in the principles of the Church of England, become prevented," that the trustees should stand seised of the land and schoolhouse, if any, to be built thereon, in trust for P., his heirs and assigns. By a codicil to his will, P. provided for raising money to build a schoolhouse on the land, the balance to be applied E as an endowment for the school for the payment of the schoolmaster and schoolmistress. P. died in 1838, the schoolhouse was thereafter built, and a sum of money stood invested in the names of the present trustees representing the money set apart by P. for the maintenance and support of the school. The school had been carried on, but the income of the fund was insufficient to provide for the maintenance of the schoolmistress. Attendance at the school was F very low, and the school was practically derelict due to insufficient funds.

Held: the event contemplated by the reverter clause had arisen, but the clause was void as a perpetuity, and, the original gift being expressed to be perpetual, there could be no reverter or resulting trust; accordingly, a scheme must be directed.

Re Bowen, Lloyd Philipps v. *Davis* (1), [1893] 2 Ch. 491, followed.

G *Re Randell, Randell* v. *Dixon* (2) (1888), 38 Ch.D. 213, and *Re Blunt's Trusts, Wigan* v. *Clinch* (3), [1904] 2 Ch. 767, distinguished.

Notes. Considered: *Re Bawden's Settlement, Besant* v. *London Hospital (Board of Governors)*, [1953] 2 All E.R. 1235. Referred to: *Re Talbot, Jubb* v. *Sheard*, [1933] All E.R.Rep. 126; *Re Cooper's Conveyance Trusts, Crewdson* v. *Bagot*, [1956] 3 All E.R. 28.

H As to the rule against perpetuities, see 4 Halsbury's Laws (3rd Edn.) 300 et seq. and 25 Halsbury's Laws (2nd Edn.) 86 et seq.; and for cases see 37 Digest 55 et seq.

Cases referred to:

(1) *Re Bowen, Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. I 789; 41 W.R. 535; 9 T.L.R. 380; 37 Sol. Jo. 386; 3 R. 529; 37 Digest 58, *28*.

(2) *Re Randell, Randell* v. *Dixon* (1888), 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 36 W.R. 543; 4 T.L.R. 307; 8 Digest (Repl.) 435, *1253*.

(3) *Re Blunt's Trusts, Wigan* v. *Clinch*, [1904] 2 Ch. 767; 74 L.J.Ch. 33; 91 L.T. 687; 68 J.P. 571; 53 W.R. 152; 20 T.L.R. 754; 48 Sol. Jo. 687; 2 L.G.R. 1295; 8 Digest (Repl.) 435, *1254*.

(4) *Pearks* v. *Moseley, Re Moseley's Trusts* (1880), 5 App. Cas. 714; 50 L.J.Ch 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, *98*.

Also referred to in argument: A

Re Da Costa, Clarke v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337; 81 L.J.Ch. 293; 106 L.T. 458; 28 T.L.R. 189; 56 Sol. Jo. 240; 37 Digest 73, *134*.

Re Hollis' Hospital Trustees and Hague's Contract, [1899] 2 Ch. 540; 68 L.J.Ch. 673; 81 L.T. 90; 47 W.R. 691; 43 Sol. Jo. 644; 37 Digest 72, *133*. B

Lyons Corpn. v. *Advocate-General of Bengal* (1876), 1 App. Cas. 91; 45 L.J.P.C. 17; 34 L.T. 77; 24 W.R. 679, P.C.; 8 Digest (Repl.) 460, *1609*.

Corbyn v. *French* (1799), 4 Ves. 418; 31 E.R. 213; 8 Digest (Repl.) 421, *1112*.

A.-G. v. *Shadwell*, [1910] 1 Ch. 92; 79 L.J.Ch. 113; 101 L.T. 630; 26 T.L.R. 82; 54 Sol. Jo. 180; 8 Digest (Repl.) 448, *1418*.

Originating Summons. C

Robert Peel, by a deed of release of April 20, 1837, granted and released a certain area of land to trustees, one of whom was himself, on trust to

"permit and suffer the same to be for ever thereafter used as and for a place for the instruction of seventy poor children, videlicet, thirty male and forty female children resident within the parish of Llandilofaur in the principles of the Church of England as by law established, and in reading, writing, casting accounts, and other proper, useful, and common learning for poor children." D

The deed further provided that

"if by reason of any law or statute of the Realm or otherwise it shall happen that the release hereby made of the said piece or parcel of land and hereditaments shall, as to the charitable purposes hereby intended to be made and E established, either not take effect or, having taken effect, shall afterwards cease, or determine or be defeated, or, the precise object of these presents being for the education of poor children in the principles of the Church of England, become prevented, then and from thenceforth the trustees for the time being of these presents shall stand and be seised of the said piece or parcel of land and hereditaments thereby released, and the schoolhouse and buildings, if any, F to be built thereon in trust for the said R. P., his heirs and assigns."

The settlor, by a codicil to his will of the same date, provided for the raising of a sum of £2,000 to be applied in building a schoolhouse on the land released, the balance thereof to be applied as an endowment for the school for the payment of the schoolmaster and schoolmistress. In 1838, the settlor died, and the schoolhouse was erected, and a sum of £2,393 stood invested in the names of the present trustees G representing the money set apart by the settlor for the maintenance and support of the school. The school had been carried on until recently in accordance with the deed, but the income of the fund was insufficient to provide for the maintenance of the schoolmistress. The attendance at the school was very small, and the school was practically derelict as there were not sufficient funds to carry it on. This summons was taken out by the trustees for directions whether they ought to H release to the settlor's heir-at-law, H. L. Peel, or to the person claiming under the settlor's residuary legatee, or otherwise, the school, school site and endowment fund, or how otherwise they ought to deal with them.

H. M. Broughton for the applicant trustees.
H. O. Danckwerts for the Attorney-General. I
J. W. F. Beaumont for the defendant, H. L. Peel.
Edwardes Jones for the residuary legatees.

Cur. adv. vult.

April 12. **SARGANT, J.**—When this summons was before me originally, I dealt with two aspects of the matter. In the first place I held that it was unnecessary to inquire whether the deed of release of April 20, 1837, was void by reason of its containing a clause of reservation in favour of the grantor. For the trustees had

A undoubtedly held possession under the deed from its date to the present time, and had, therefore, acquired a good title under the Statutes of Limitation at any rate; and, of course, they could not set up any objection to their own title. And, in the second place, I considered to some extent the provisions of the deed, in view of certain indications which had been held out, that the parties concerned might agree by way of compromise to some variation of the deed such as the court could B properly sanction. As the result of some examination, I came to the conclusion that the purpose disclosed by the deed was the narrower of the two intentions that had been suggested—that is to say, that the purpose was education strictly and solely in accordance with the principles of the Church of England; and, accordingly that, so long as the scheme for the benefit of denominational education of this type was possible, no scheme for undenominational education could be C sanctioned. But my actual words, as reported in the shorthand notes, certainly appear to go further than this, and to amount to a rejection of the possibility of any scheme of undenominational education, not only so long as a scheme for the benefit of denominational education was practicable, but finally and absolutely. This, however, was never my intention, and the ambiguity is, no doubt, due to my observation, having been of an interim nature, and not carefully considered D and worded. I was not prejudging a question which was not then before me, and on which I had not then heard any argument.

The suggested compromise has now broken down, and the matter has to be dealt with strictly. It is clear that the event contemplated by the terms of the clause of reverter has arisen, and that, in the existing circumstances, the precise object of the deed, namely, the education on the site and in the schoolbuildings of poor E children in the principles of the Church of England, has "become prevented." What are the legal consequences of that state of things? On the part of the Attorney-General, it is argued that, however limited the character of the expressed educational purposes of the deed, the dedication to those purposes is in terms perpetual; that the clause of reverter to the donor is an equitable executory limitation which is obviously void as exceeding the limits of perpetuity; and that, F accordingly, the lands and buildings in question, as well as the subsequent testamentary endowment, must be dealt with and administer cy près by the machinery of a scheme. *Re Bowen* (1) is, perhaps, the most important decision to this effect; but there is, of course, a long series of previous authorities in the same general direction. On the part of the other defendants, it is admitted that the clause of reverter is too remote, and cannot operate in accordance with its strict terms. But G it is contended that the expressions in this clause operate indirectly and by way of construction to forbid any cy près application of the premises, and to prescribe that they shall be used for the purposes of charity only so long as the selected denominational education can be given there. This being no longer possible, it is said that the indicated period of dedication has elapsed; that there is a resulting reverter to the donor independently of the positive operation of the actual clause, and that H *Re Randell* (2) and *Re Blunt's Trusts* (3) apply.

No distinction is drawn on either side between the trusts of the deed as to the site and the trusts of the will as to the endowment. It is admitted that any decision as to the site must be equally applicable to the endowment. But counsel on behalf of those interested in the personal estate of the donor and the testator submits an additional subsidiary argument to the effect that the deed operated I under the School Sites Act, 1841, or, rather, its legislative predecessor, the School Sites Act, 1836, and that there was, accordingly, a statutory reverter to the donor and those claiming under him. This subsidiary argument I will deal with at once. It is not, in my judgment, sound. The Acts in question were Acts to enable school sites to be granted in fee for tenants for life, trustees, and other owners who were otherwise debarred from doing so. The donor here was an owner in fee who had no need to have recourse to any such legislation, and showed no intention of dealing with the site in question otherwise than by virtue of his ownership. There is no reference in the deed to any Act of the kind. It would be entirely unsound to

construe, as operating under legislation framed to meet special cases, an assurance which needs no assistance from, and contains no reference to, any such legislation. A

The main argument against the Attorney-General has more substance, but, nevertheless, when closely examined, seems to me opposed both to principle and to authority. The ratio decidendi, both in *Re Randell* (2) and in *Re Blunt's Trusts* (3), undoubtedly was that the original gift to charity was expressed to be for a limited period only, and that, therefore, a reversion was necessarily left in the donor. In B the present case, the original gift was expressed to be perpetual. There could, therefore, be no reversion left in the donor, and any interest could only come to him, as it was expressed to come, by a substantive gift, operative by way of positive curtailment and destruction of the original gift. This curtailing and original gift being itself bad in law, as it is acknowledged to be, there is not, in my judgment, any room for construing the document in a manner contrary to its expressed operation C for the purpose of validating a prohibited limitation. The mere fact that the object aimed at might have been attained in another manner, namely, by an original gift for a limited period only, is, in my opinion, immaterial. In the words of STERLING, J., in *Re Bowen* (1) ([1893] 2 Ch. at p. 495):

> "The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i.e., whether the testator D has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by LORD SELBORNE in *Pearks* v. *Moseley* (4) (1880), 5 App. Cas. at p. 719):
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> E
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> > 'You do not impart the law of remoteness into the construction of the instrument by which you investigated the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a F question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrestled to something different, for the purpose of escaping from the consequence of that law.' "
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> G

In my judgment, the present case is within the principle enunciated in *Pearks* v. *Moseley* (4), and is completely covered by the decision in *Re Bowen* (1) of a judge of great eminence and specially conversant with cases of this character. To hold otherwise would be to strike at the foundation of the cy près doctrine as applied in a long succession of cases of high authority. It is to be observed that the present is the case of an established charity which has endured for some eighty years; H it is not one of that class of cases of initial failure to which somewhat different consideration apply. I decide, therefore, that none of the defendants other than the Attorney-General has any interest in the endowment in question, and that a scheme must be directed in the usual way. The defendants, other than the Attorney-General, have no interest in the settlement of the scheme, and all proceedings should be stayed as against them. The costs of all parties, as between I solicitor and client, will be paid and retained by the plaintiffs out of the endowment.

Solicitors: *Warrens*, for *G. C. Porter*, Llandilo; *Treasury Solicitor*.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law*.]

A

IN THE ESTATE OF GOSSAGE. WOOD *v.* GOSSAGE

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), January 18, 1921]

B [Reported [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 37 T.L.R. 302; 65 Sol. Jo. 274]

Will—Revocation—Revocation by soldier on active service—Revocation without formality—Request to sister to burn will "which I have already cancelled."

A soldier "in actual military service" may revoke his will without any formality.

C A soldier made a will with all the formalities prescribed by the Wills Act, 1837. Later, while on actual military service, he wrote a letter to his sister, who had the will, telling her of other wishes concerning his property, and requesting her "to burn it [the will] for I have already cancelled it."

Held: the will was effectively revoked.

Notes. Applied: *In the Goods of Newland*, [1952] 1 All E.R. 841; *Re Wingham*, [1948] 2 All E.R. 908.

D As to wills of soldiers and sailors, see 16 Halsbury's Laws (3rd Edn.) 176–179; as to revocation of wills, see 34 Halsbury's Laws (2nd Edn.) 73–91; and for cases see 39 Digest 338, 339. For the Wills Act, 1837, see 26 Halsbury's Statutes (2nd Edn.) 1326.

E Case referred to:

(1) *In the Goods of Hiscock*, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T. L. R. 110; 39 Digest 334, *202*.

Appeal against an order of Bailhache, J., in a probate action.

The testator was a non-commissioned officer serving in the army and on active service at the time, being under orders to proceed with his regiment to South F Africa when he made the will in question dated Oct. 24, 1915. The same was executed in strict accordance with the requirements of the Wills Act, 1837. By that will, after bequeathing certain legacies, the testator gave all the residue of his property to the plaintiff, to whom he was then engaged to be married, and appointed her his sole executrix. Subsequently he thought that she ought not to have his property. Therefore he wrote to her from South Africa that he would be G much obliged if she would hand over his will to his sister, and she did so accordingly. On Jan. 9, 1918, he wrote to his sister from South Africa telling her of his wishes concerning his property, and stated: "As regards the will, if you haven't already done so, I want you to burn it for I have already cancelled it." The sister burnt the will as the testator desired. On Nov. 11, 1918, the testator died in hospital in South Africa, and among his effects a copy of his will of Oct. 24, 1915, H was discovered.

The plaintiff, as the executrix appointed under the will of Oct. 24, 1915, brought this action claiming that the court should decree probate of that will in solemn form of law. The defendants, who were the brother and sisters of the testator, alleged that he, while a soldier in actual military service, had by the paper writing of Jan. 9, 1918, declared an intention to revoke and thereby revoked the will of I Oct. 24, 1915. By way of counter-claim they said that the deceased died intestate without child or parent and leaving them his next-of-kin, and they accordingly claimed that the court should pronounce against the will of Oct. 24, 1915, and grant to them, or one of them, of letters of administration to the estate of the deceased. The plaintiff denied that the paper writing of Jan. 9, 1918, was in the nature of a testamentary disposition and that the deceased ever intended that it should be of a testamentary nature or should have any operation or effect; and further denied that the deceased died intestate.

It was contended by the plaintiff that there was nothing in the paper writing

of Jan. 9, 1918, which was a revocation of the will under the Wills Act, 1837, and the question was whether the will of a soldier could be revoked in any way other than one of the ways set out in that Act. BAILHACHE, J., sitting at the Birmingham Summer Assize Court, decided in favour of the defendants on the ground that the will of Oct. 24, 1915, had been effectively revoked by the paper writing on Jan. 9, 1918.

The plaintiff appealed on the grounds that there was no evidence to support the finding of the learned judge pronouncing against the force and validity of the will of Oct. 24, 1915; that the learned judge was wrong in law in holding that a soldier's will could be effectively revoked by destruction by a third person in the absence of the testator; and that the will was not destroyed with the intention by the testator to revoke the same.

The Wills Act, 1837, provides:

"Section 9. No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

"Section 11. Provided always, . . . that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

"Section 20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

W. J. Gandy (*D. Cotes-Preedy* with him) for the plaintiff.
E. W. Cave for the defendants.

LORD STERNDALE, M.R.—There can be no question as to the intention of the testator to revoke his bequest to the plaintiff. Among the documents in his possession at his death there was found what is said to be a copy of his will signed by him, but attested by one witness only. It was argued that the fact that he kept that document showed an intention not to revoke it. I do not think that is so. Many people keep copies of documents without intending to set them up. It is said, however, that this is not a valid revocation of the will. Obviously it would be a great injustice if the plaintiff were to take the property, but I hope that that fact does not influence me to strain the Act of Parliament against her. The real question turns on the construction of s. 20 of the Wills Act, 1837, but it is necessary to look at some of the earlier sections, beginning with s. 9. [His Lordship read ss. 9, 11, 18, 19, and 20.] The will could not have been burnt in the testator's presence, because it was in England when he was in Africa. It is said, however, that there is no valid revocation here because by s. 20 a soldier's will cannot be revoked, though it can be made without the formalities required—i.e., by another will or codicil or by a document executed with the same formalities as a will in accordance with the Act. This appears to me to be an absurd result, but, however absurd it is, effect must be given to it if that result arises from the Act. I do not think, however, that it requires any straining of the language of the Act of Parliament to arrive at an opposite conclusion. It is quite clear that, apart from the Wills Act, a soldier could at common law make or revoke his will without any formality. Is this letter of Jan. 9, 1918, a "writing executed . . . &c.," or is it a "codicil or another will" within s. 20? The word "revocation" postulates a previous will, and I think the words of the section must mean executed in the

manner in which a will is hereinbefore required to be executed, for the execution of the will which it is intended to revoke. If one reads ss. 9 and 11 together, no formalities are required for the execution of a soldier's will, but soldiers are allowed to dispose of their personal estate as they might have done before the Act—i.e., as they might have done before the Statute of Frauds. If that be the correct view, then it seems to me that the document of Jan. 19, 1918, is a writing sufficient to declare an intention to revoke the will, if it is executed in the manner required by the Act with regard to that particular will. In the case of a civilian's will certain formalities are required; in that of a soldier's will no formalities at all are necessary, and therefore upon the interpretation of the Act no formalities are required to revoke a soldier's will. In my opinion, there was here a valid revocation, and the appeal must be dismissed.

WARRINGTON, L.J.—I agree. I think there are more ways than one of approving the judgment of Bailhache, J., but I prefer the ground taken by the Master of the Rolls—that is, by comparing s. 20 of the Wills Act, 1837, with ss. 9 and 11. The disposition of personal estate, being in a statute relating to wills, must mean a testamentary disposition of personal estate. Of course no formalities were attached to a disposition of personal estate by a soldier before this Act, but he had to do something in the way of a testamentary disposition. Turning to s. 20, in my judgment the words "in manner which . . . hereinbefore" must be read in reference to the particular will with which you are dealing. If the will is that of an ordinary person, one looks at s. 9; if of a soldier, one looks at s. 11 and the requirements thereof, and one finds those requirements are those which were in existence before the passing of the Act. If, therefore, the document expressing an intention to revoke a previous will satisfies the requirements before the passing of the Act, then it satisfies the Act itself. There is no question that this document declares an intention to revoke. The writer had not "cancelled" the will in a physical sense, but he meant that he had determined it, and he believed that it was revoked. That is, in my opinion, enough to support the judgment of Bailhache, J., and to dispose of this appeal.

YOUNGER, L.J.—There can be no question in this case but that the testator did intend when he wrote the letter of Jan. 9, 1918, to revoke the will in favour of the present plaintiff by reason of the fact that their engagement had been broken off by him. There can equally be no doubt that prior to the Wills Act, 1837, such revocation would have been complete. The power of revocation is merely another aspect of the power of disposition. The privileges as to wills conferred on soldiers and sailors on active service were all of them privileges relating to the formalities of execution of wills, and did not extend to questions of testamentary capacity. The statement of Sir Francis Jeune, P., in *In the Goods of Hiscock* (1) is still mainly correct. That s. 11 of the Act now has a wider effect results from the declaratory enactment contained in s. 1 of the Wills (Soldiers and Sailors) Act, 1918.

That being so, it seems to me, as it does to my Lord and the lord justice, that we can say that it is not required for the revocation of a soldier's will that there should be the formalities necessary to revoke the will of a civilian. Nothing more is required by s. 11.

Appeal dismissed.

Solicitors: *Foster, Grave & Co.*, for *Philip Baker & Co.*, Birmingham; *E. H. Davies & Co.*, for *Hooper, Ryland & Boddington*, Birmingham.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

CELIA (OWNERS) *v.* VOLTURNO (OWNERS)

[House of Lords (Lord Buckmaster, Lord Sumner, Lord Parmoor, Lord Wrenbury and Lord Carson), June 21, 23, July 28, 1921]

[Reported [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 37 T.L.R. 969; 15 Asp.M.L.C. 374; 27 Com. Cas. 46] B

Money—Foreign currency—Rate of exchange—Date of conversion—Collision at sea—Damages for detention of ship for repair—Proof in foreign currency.

In an action of negligence causing collision with and damage to a ship and consequent loss of hire during her detention for repairs, the damages for such detention were proved in a foreign currency. C

Held: the amount of a loss consequent on a tortious act fell to be determined as at the date when it was suffered, and, therefore, the damages should be converted into sterling at the rate of exchange prevailing on the date of the conclusion of the detention when the right to compensation was complete, and not on the date when judgment assessing the damages was delivered.

Per Lord Sumner: If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected. D

Decision of Court of Appeal, [1920] P. 447, affirmed.

Notes. Applied: *Re British American Continental Bank, Goldzieher and Penso's Claim*, [1922] All E.R.Rep. 219. Considered: *Re British American Continental Bank, Credit General Liègeois' Claim*, [1922] 2 Ch. 589. Applied: *The Baarn*, E [1933] P. 251; *Re United Railways of The Havana and Regla Warehouses, Ltd.*, [1960] 2 All E.R. 332. Considered: *Graumann* v. *Treitel*, [1940] 2 All E.R. 188; *Madeleine Vionnet et Cie* v. *Wills*, [1939] 4 All E.R. 136; *Re Rickett, Ex parte Insecticide Activated Products, Ltd.* v. *Official Receiver*, [1949] 1 All E.R. 737. Referred to: *Re British American Continental Bank, Lisser and Rosenkranz's Claim*, [1923] All E.R.Rep. 52; *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] F All E.R.Rep. 705; *Ellis' Trustee* v. *Dixon Johnson*, [1924] 2 Ch. 451; *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1931), 47 T.L.R. 359; *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*, [1943] A.C. 507; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162; *Cummings* v. *London Bullion Co.*, [1952] 1 All E.R. 383; *Strand Electric and Engineering Co.* v. *Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796. G

As to the conversion into sterling of damages assessed in foreign currency, see 11 Halsbury's Laws (3rd Edn.) 306–308; and for cases see 17 Digest (Repl.) 173–175. As to right to recover cost of repairs to a ship after collision, see 30 Halsbury's Laws (2nd Edn.) 858–863, and cases there cited.

Cases referred to:

(1) *Di Ferdinando* v. *Simon, Smits & Co., Ltd.*, [1920] 2 K.B. 704; 124 L.T. 117; H affirmed, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37, C.A.; 35 Digest 175, *52*.

(2) *Joyner* v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 39 W.R. 583; 7 T.L.R. 509, C.A.; 31 Digest (Repl.) 373, *5042*.

(3) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*. I

(4) *Bertram* v. *Duhamel* (1838), 2 Moo.P.C. 212; 12 E.R. 984, P.C.; 35 Digest 176, *56*.

(5) *Cash* v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

(6) *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, *57*.

(7) *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.*, [1919] W.N. 301; 122 L.T. 159; 36 T.L.R. 59; on appeal (1920), 89 L.J.K.B. 265; 123 L.T. 105; 36 T.L.R. 245; 25 Com. Cas. 174, C.A.; 35 Digest 174, *49*.

(8) *Barry* v. *Van den Hurk*, [1920] 2 K.B. 709; 89 L.J.K.B. 899; 123 L.T. 719; 36 T.L.R. 663; 64 Sol. Jo. 602; 35 Digest 175, *50*.

(9) *Lebeaupin* v. *R. Crispin & Co.*, [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 36 T.L.R. 739; 64 Sol. Jo. 652; 25 Com. Cas. 335; 35 Digest 175, *51*.

(10) *Marburg* v. *Marburg* (1866), 26 Maryland, 8.

(11) *The Argentino* (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; 17 Digest (Repl.) 80, *27*.

(12) *Pilkington* v. *Comrs. for Claims on France* (1821), 2 Knapp, 7.

(13) *Delegal* v. *Naylor* (1831), 7 Bing. 460; 5 Moo. & P. 443; 9 L.J.O.S.C.P. 167; 131 E.R. 178; 35 Digest 174, *43*.

Appeal by the plaintiffs, the owners of the steamship *Celia*, from an order of the Court of Appeal dismissing their appeal from a decree of Hill, J., on a motion in objection to the registrar's report in an action of damage by collision.

The collision took place in the Mediterranean Sea on Dec. 17, 1917, between the steamship *Celia* and the steamship *Volturno*, an Italian ship belonging to the respondents. Both vessels were equally to blame for the collision and both were damaged. The cross-claims for damages were referred to the registrar for assessment, but were subsequently agreed and no reference was held. Subsequently a difference arose as to the date at which the rate of exchange allowed to the owners of the *Volturno* for loss by detention during repairs, should be taken, damages for that loss having been proved in Italian lire, and that point was submitted to the registrar. Hill, J., on an appeal from the registrar, following the decision of the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1), held that the respondents' claim for detention must be assessed with reference to the rate of exchange prevailing at the actual period of detention, and he, therefore, allowed the appeal with costs. The Court of Appeal (Lord Sterndale, M.R., and Atkin and Younger, L.JJ.) affirmed that decision, holding that the case was covered by the decision of the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) in *Di Ferdinando's Case* (1).

Raeburn, K.C., and *G. P. Langton* for the appellants.
Sir John Simon, K.C., *Bateson, K.C.*, and *Balloch* for the respondents.

The House took time for consideration.
July 28. The following opinions were read.

LORD BUCKMASTER.—On Dec. 17, 1917, a collision occurred in the Mediterranean between the steamship *Celia*, which belongs to the appellants, and the Italian steamship *Volturno*, which is the property of the respondents. The dispute as to liability for the collision was determined in this country in an action before Hill, J., who decided, on July 22, 1919, that both vessels were to blame and referred the question of damages to the registrar. The cross-claims for damages were agreed between the parties. The claim of the owners of the *Volturno* included one for loss due to the fact that the vessel was under hire to the Italian Ministry of Marine at all material dates, and that in consequence of her detention for the necessary repairs from Dec. 25 to 30, 1917, at Gibraltar, and Jan. 24 to Feb. 18, 1918, at Newport, deductions for her hire were made amounting in all to 304,418 lire. That the *Volturno* is entitled to damages under this head is admitted. But the question is, at what date ought the rate of exchange to be fixed, in order that those damages which were originally assessed in lire should be converted into sterling. The registrar held that the date at which the damage was assessed was the correct date, but Hill, J., decided that the time when the actual loss for each detention was incurred was the correct period, and this view has been confirmed by the Court of Appeal. It is suggested that special considerations may apply in regard to the particular circumstances in which this matter arises for determination, but I cannot see that any of these circumstances take this case out of the general rule and it is the nature of that general rule which your Lordships are

asked to consider and determine. There are only two possible dates put forward as the dates upon which the conversion can be made. The one is the date when the actual loss was incurred and the other the date when the judgment assessing it was delivered. The suggestion that it might be the date of the writ was incapable of being supported and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment. That, to my mind, is not the true function and purpose of the judgment. A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date. As was stated by WRIGHT, J., in *Joyner* v. *Weeks* (2) ([1891] 2 Q.B. at p. 33):

> "Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is, in fact, no worse off than he would have been if the contract had been performed."

As an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause. Similar considerations apply to an action for tort. In cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances, and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.

There is little authority upon the actual question until recent times, a circumstance due, no doubt, to the fact that fluctuations of currency did not formerly occur with the violent oscillations by which they have been marked in recent years. One of the earliest authorities is *Scott* v. *Bevan* (3). In that case judgment had been recovered in Jamaica for the sum of £1,554 16s. 8d., current money of the island of Jamaica, and proceedings were taken here upon the judgment, the only question being whether the judgment should be converted into English currency, £100 sterling being the equivalent of £140 currency of Jamaica, or whether it should be taken at par, and it was decided that it ought to be estimated at the rate of exchange at the time of the judgment in Jamaica. The real question raised here does not appear to have been considered by the court, a significant fact when it is remembered that LORD TENTERDEN was the presiding judge. In *Bertram* v. *Duhamel* (4) the point was not elaborately argued, and the quotation in the judgment, 2 Moo.P.C.C. at p. 217, is from the opinion of LORD ELDON in *Cash* v. *Kennion* (5), but this is not sufficiently explicit to afford real assistance.

The next case is of greater importance. It is *Manners* v. *Pearson & Son* (6). In that case an action was brought claiming an account of moneys due under a contract which provided for payment in Mexican dollars. Judgment in the action, declaring the plaintiff to be entitled to an account, was delivered on Nov. 4, 1897, and the defendant in fact delivered an account on Nov. 13 of the same year, showing that

A a balance was due to the plaintiff in Mexican dollars on Oct. 31, 1896. The question that arose was the date on which conversion from Mexican dollars into English sterling should take place. The plaintiff at first suggested that each sum of money should be converted into sterling at the date when it was shown to be due in the account, but he appears to have been willing to accept Oct. 31, 1896, the date when the balance of the amount was shown to be due, while the defendants contended B that the proper date was Nov. 13, 1897, when the account was delivered. It is at least remarkable that the actual date of the judgment was not suggested as the critical moment. The court held (VAUGHAN WILLIAMS, L.J., dissenting) that the right date was Nov. 13, 1897. The foundation of the judgment depends entirely upon the fact that the claim was a claim for account, and it appears to proceed upon the principle that the account was the real cause of action. LINDLEY, L.J., says:

C "To substitute English for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiffs can prove that the defendants committed, which is a totally different matter."

RIGBY, L.J., says:

D "the plaintiff's argument proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account and not for the several items to be included in it."

He then says that the account

"was not delivered until Nov. 13, 1897, and even if accepted on that date, could not have formed a basis of an order at an earlier period."

E This judgment clearly does not proceed upon the view that the date of the judgment is the correct date for conversion, but rather upon the ground that the judgment is a judgment for something which is found due on taking the account, and that it is at the date when the account has been taken or delivered that the true liability is disclosed. In other words the balance of the account is treated as the foundation F of the claim for judgment, and it is at that date that the conversion is to be made. I am not prepared in the absence of argument to accept this view as correct, but it is not essential to determine it in the present case. It is sufficient to say that the judgment certainly did not proceed upon the ground for which the appellants now contend. VAUGHAN WILLIAMS, L.J., on the other hand, states in clear language the principle which the respondents say is correct. He says:

G "It seems plain that this mode of computing the value of foreign currency in English sterling and thus converting the one currency into the other is based upon damage for the breach of contract to deliver the commodity bargained for at the appointed time and place; and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment."

H He adds:

"I see no reason why different rules should be applied in the case where the form of action is, as in this case, an action for an account."

He thought, therefore, that conversion should take place in respect of each item as it was shown to be due, but, as the plaintiff was willing to accept Oct. 31, 1896, he I also accepted that date as correct. With the principle as he enunciates it I am in entire agreement, and I do not think that there is any expression in the judgment of the other learned lords justices to show that they disagreed. Their judgment depended, as I have shown, on their view as to the proper application of this principle to the circumstances of the action.

The final authorities upon this matter are fortunately far from ambiguous. ROCHE, J., in *Kirsch & Co.* v. *Allen, Harding & Co.* (7) decided that the rate of exchange should be taken as at date of payment. It is a little difficult to ascertain what is exactly meant by that phrase, but it is not necessary to examine it further,

for, in a later decision of *Di Ferdinando* v. *Simon, Smits & Co.* (1), which was an action for breach of contract to carry goods from London to Italy and for conversion, ROCHE, J., held that the proper measure of damages was the value of the goods at the date when they should have arrived in Italy. He found the value in Italian lire and converted the sum into English currency at the rate of exchange on that date. This judgment was upheld by the Court of Appeal. BAILHACHE, J., in *Barry* v. *Van den Hurk* (8), also fixed the date for conversion as the date when the damages were properly measured, and MCCARDIE, J., in *Lebeaupin* v. *R. Crispin* (9), decided the same thing.

There is, consequently, a very formidable body of opinion in recent decisions against the appellants' contention, and the only authority to which they can refer in their support is an American decision in *Marburg* v. *Marburg* (10) decided in 1866. There does not appear to have been any consideration of the question in the Supreme Court of the United States, and their Lordships are deprived of the assistance which would have been afforded had the matter been the subject of argument before that tribunal. The principle underlying the decision in the Maryland case appears largely to be due to the consideration of text-books on international law. In one sense the case undoubtedly affects international matters, but it does not necessarily follow that it involves consideration of international law. The real question must depend upon the true effect of a judgment in one country relating to damages that are measured in terms of a foreign currency, and in this international relationships do not necessarily enter. Disputes similar to that in the present case could easily arise between two British subjects out of a purely British contract. Where the measure of damages was originally expressed in terms of a foreign currency in such a case, the English court could and ought to measure the damages at the proper date, and then at that date convert the foreign exchange into English currency. There can be no difference in the principle when one of the litigants is not a British subject. For these reasons I think this appeal should fail, and should be dismissed with costs.

LORD SUMNER.—A good deal of the effect of the appellants' plausible and ingenious argument is due to two fallacious suggestions, which have crept into and colour the whole of it. The first is that this is in substance a claim by the owners of the *Volturno* for a sum contractually due from the owners of the *Celia* in lire, and the other that, as they have elected to recover it here and not in Italy, the judgment recovered here is merely an attempt to put them in the same position as if a contract had been enforced in Italy.

The collision occurred on the high seas, and, subject to proof that the *Celia* was to blame, she became forthwith liable for the consequences. I may pass over the fact that the *Volturno* was also to blame as not for this purpose affecting the matter. The right to compensation was complete then and there, though it might take time to discover all the consequences and to establish the extent of the mischief. That compensation was not recoverable in any particular currency, and, although for convenience of proof it would be severable into divers heads and items, it would be one gross sum, recoverable once for all. If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected. The currency in which judgment would be given would depend upon the place in which the plaintiffs might find the defendants' ship so as to arrest her in proceedings in rem, or might succeed in serving process on the defendants themselves as the commencement of proceedings in personam. The essential thing to remember, which the appellants somewhat ignored, is that the sum in question here is only an item in a general claim for damages for a wrong done at sea, which was the subject of compensation just as naturally in British as in Italian currency. The deduction of hire for the *Volturno*, which the Italian Ministry of Marine made from the sums payable by them to her owners under the charter, is, therefore, for the purposes of this case, mere evidence of damage inflicted on them by the collision. Though proved in a different way

from the physical damage to the ship, it is on the same footing, for it measures their loss suffered by having the ship laid up, just as their repair bills measure their loss suffered by having her side stove in. If the question of damage had not been simplified by an agreement between the parties, and if all the damages had gone to the registrar and merchants for assessment together, no one would have thought of raising any questions of the rate of exchange as at the date of the judgment. The cost of the temporary repairs incurred at Gibraltar would, I suppose, have been proved in sterling; if they had been done at Marseilles or Cadiz, they would have been proved in francs or in pesetas, just as the repairs at Newport News would have been proved in dollars, and in each case these currencies would have been converted into sterling as at the date when liability for the several outlays accrued, because when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the High Court deals, is simply the process of completing that proof. When the owners of the *Volturno* came to their next item, namely, the money value of the use of the ship, of which the damage suffered in collision deprived them, why should any different rule as to exchange be applied? The charter furnished very precise evidence of the then value of the ship in use day by day, but it was evidence only and was not conclusive: *The Argentino* (11), per BOWEN, L.J., 13 P.D. at pp. 202, 203. The owners of the *Celia* would have been at liberty to challenge it, if they could, and, if there had been no charter, the Italian owners might have shown what employment in Greece or in Norway could have been got, and so have measured their loss in drachmas or in kroner instead of in lire. If the damage was such as need not be repaired at all, the whole loss might have been measured by the immediate depreciation of the ship in consequence of the collision, for the *Volturno*'s owners would not be bound to repair her merely for the benefit of the owners of the *Celia*. In that case there would either be no question of exchange, if the evidence of sound and damaged values could be given in sterling, or, if there was any conversion into sterling, it would have been calculated at the rate current at the time of the collision. I am quite unable to understand why the owners of the *Volturno* should be subjected to any different rule merely because they have had the good sense to eliminate all questions that could be agreed, and to present in the most naked form the one question as to which the parties were in difference. All that was agreed was the number of lire actually deducted by the Italian Ministry of Marine during the period when the *Volturno* was off hire, with the dates and the commencement and ending of those periods. Whether any adjustment was made for the expenses of running the ship while earning hire which would be saved while she was off hire does not appear. I do not gather that anything in the agreement was meant to vary any of the rights of the parties.

The appellants, however, completed their argument by saying that the court, having ascertained how many lire the collision cost the owners of the *Volturno* in respect of detention terminated its judicial functions at that point, and thereafter in bringing into the judgment a certain amount of sterling to correspond with that finding, was merely making its decision available to the judgment creditors as the best way in which they could be assisted by an English court to get the lire to which they were really entitled. I think this, again, is a fallacy. For the purposes of a collision action it is the judgment that is the final judicial act, and it is the judgment that is the decision of the court. The agreed numbers of lire are only part of the foreign language in which the court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues which it is used to describe. The matter may be tested in this way. Suppose that, as an incident of the collision, some seamen belonging to the *Celia* had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the *Volturno*, and that the former had received and kept it. The owners of the *Volturno* could have claimed damages for conversion of the notes or

their return with damages for their detention, as they chose. In the first case, the value of the notes would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken. Why should damage to the ship and her owners by collision be measured otherwise? A

No authority was forthcoming which really supported the appellants' propositions. There have been, during the past one hundred years, several English cases, in which these propositions might, and, indeed, ought to have been applied, if they are sound, yet very learned judges proved to be unconscious of their existence. The best example is *Scott* v. *Bevan* (3). The case in the Court of Appeal in 1898 (*Manners* v. *Pearson* (6)) really negatives them. On the other hand, considerable support for the view which I have ventured to express above is to be found in the judgment of the Privy Council in *Pilkington* v. *Comrs. for Claims on France* (12), which was pronounced by Sir William Grant, M.R. Referring to acts of the French revolutionary government, whereby between 1793 and 1796 debts due by French subjects to British subjects and payable in France had been sequestrated, and to subsequent arrangements by treaty between England and France, under which compensation was to be made by France in respect of these acts as for unjustifiable confiscation and funds were deposited with commissioners for that purpose, he is reported as having said (2 Knapp at p. 19): B C D

> "we think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. . . . The republic themselves, in effect, confess that no such decree ought to have been made. . . . Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrongdoer who must undo, and completely undo, the wrongful act he has done, and, if he received the assignats at the value of 50d., he does not make compensation by returning an assignat, which is only worth 20d.; he must make up the difference between the value of the assignat at the different periods." E F

It is true that these observations are stated to be not strictly necessary to the decision (ibid., p. 21) and that Dr. Knapp prints his report from notes by another hand, but I think these circumstances detract but little from the authority of the passage quoted.

As to *Marburg* v. *Marburg* (10), it is a case of a breach of contract to pay abroad a sum of money, which was the price of goods sold and delivered. It purports to follow *Scott* v. *Bevan* (3), and has no reference to damages for a wrong not arising out of a contract. Even so, there has been at different times much discussion in the United States as to the true rules governing such actions: Story, Conflict of Laws (8th Edn.), ss. 308–315; Sidgwick on Damages (9th Edn.), s. 274; but I think the question need not be pursued, as all such cases turn upon contractual obligations for payment of fixed or calculable sums in a foreign place and in the local currency, which have been put in suit in the courts of the United States. For the same reason, while not intending to intimate any criticism upon it, I have not troubled your Lordships with any examination of the judgment in *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1) in the Court of Appeal. *Delegal* v. *Naylor* (13) might seem at first sight to be in point for the appellants, for it began with a claim in trover for a parcel of local currency notes seized in Lima, but subsequently an agreement was made with the wrongdoers to give up the notes or pay their value as found by the officer of the court, and, the notes having been lost at sea, the question came before the court in the form of an application for directions as to the course he was to take under this agreement. I think that in substance the direction given was to find what it would cost to get notes of an equal face value in Lima, where they must be presumed to be worth what they appeared to be worth, and in any case it appears not to advance the present appellants' argument. G H I

Finally it was urged that exchanging lire with sterling at the date of the judg-

ment was the best way of eliminating speculative elements, and had the advantage of ensuring that in no case would a judgment creditor get more than the exact sum to which he was entitled. Fluctuations in foreign exchanges inevitably introduce a speculative element into all transactions and affairs, and unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable. Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays. The result may favour one side or the other, and there is no answer to this except that already discussed—namely, that the claimant's right is exclusively a right to lire, and would result in a judgment for lire, if only an English court was, so to speak, competent to express itself in Italian. This is a mere assumption. After all the court is an English court and in theory decides the right as at the time when it arises, and does so in plain English. I, therefore, think that this argument also fails, and that the appeal should be dismissed.

LORD PARMOOR.—The relevant facts may be shortly stated. On Dec. 17, 1917, there was a collision in the Mediterranean between the steamship *Celia* and the steamship *Volturno*. Both vessels have been held equally to blame for the collision. The *Volturno* was temporarily repaired at Gibraltar, causing a detention of the ship from Dec. 25 to 30, 1917, and permanently repaired at Newport, causing a detention of the ship from Jan. 24 to Feb. 18, 1918. The *Volturno* was on charter to the Italian government, and the vessel was off hire during each period of repair. The loss to the respondents from loss of hire during temporary repairs was agreed at lire 47,372.32, and during permanent repairs at lire 257,046.40, but a difference arose as to the date at which the rate of exchange for Italian lire should be taken, in order to ascertain the amount to be paid in English currency. The question for decision is, whether in calculating the amount which the respondents are entitled to recover from the appellants in respect of damages for the loss of hire of their vessel, the rate of exchange should be taken as that ruling when the loss was incurred or as that ruling when the assessment of damage was ascertained?

The answer to this question depends, not on any technical rule of English procedure but on the principle of insuring to the injured party, as far as possible, the full measure of compensation to which he is entitled. The argument on behalf of the appellants is that, in an action of tort, damages are not ascertained until they have been assessed, and that if, in the interval between the tortious act which has occasioned the damage and the ascertainment of its amount there has been an alteration in the rate of exchange, the party injured will, instead of receiving the amount due to him as compensation, receive a greater or less amount, dependent on whether the rate of exchange has fluctuated favourably or adversely to his interest. I think that there would be no answer to this argument if the probable fluctuations in the rate of exchange between the date at which the loss is suffered and that at which the amount of damage is ascertained are a relevant factor in determining what the amount of damages should be. For reasons hereinafter stated, there appears to me to be a fallacy in this contention. The argument for the respondents is that the amount of loss consequent on a tortious act, such as a collision at sea, falls to be determined at the date when it is suffered, that the probability of subsequent alterations in the rate of exchange is immaterial, and that the risk of alteration in the rate of exchange is one which affects generally the financial transactions between the two countries and is in no way connected either with the tortious act or with the ascertainment of the amount payable to the injured party.

In my opinion, this contention is correct. The probability of the alteration in the rate of exchange is not an admissible factor in the ascertainment of the amount of damages, both on the ground of remoteness and on the ground that it is a matter which affects generally all financial transactions and is in no way connected with the tortious act for which the respondents are liable. To prevent misunderstanding, I desire to add that if the probability of alterations in the rate of exchange

could be regarded as a relevant factor in ascertaining the amount of damages, it would be within the discretion of a registrar to fix that rate as at the date of the assessment or at such other time as, in his opinion, might be reasonably adopted to obtain a fair figure. The necessity for transferring into English money damages ascertained in a foreign currency, arises in the fact that the courts of this country have no jurisdiction to order payment of money except in English currency. Considerations which are irrelevant in the ascertainment of the amount of damages are irrelevant in fixing a rate of transfer, and I agree in the judgment of HILL, J., as confirmed by the Court of Appeal. In truth, the risk of a subsequent fluctuation in the rate of exchange is a risk which the parties themselves respectively incur. In its incidence it may, in any particular case, either mitigate or enhance the amount which, under a stable condition of exchange, would be payable to the injured party, but in itself it cannot affect the ascertainment of damages.

Of the many cases to which your Lordships were referred, the judgment of the Privy Council in *Pilkington* v. *Comrs. for Claims on France* (12) is most analogous to the present case. The judgment of SIR WILLIAM GRANT is based on the finding that a wrong act had been done by the French government, and that restoration in a debased currency is not restoration for the wrong done, and that, if the wrongdoer received the assignats at the value of 50d. he does not make compensation by returning an assignat which is only worth 20d., but that he must make up the difference of the assignat at the different periods. If the assignat at the later date had been worth more than the value of 50d. I think it would logically follow, on the judgment of SIR WILLIAM GRANT, that the wrongdoer would have made full compensation by returning such a number of assignats as would have replaced the numbers received, assessed at the value of 50d. The other cases cited refer to damages on breach of contract, and not on tort. In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract. In *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1), in the Court of Appeal, it was pointed out that fluctuations in value subsequent to the date of the breach were irrelevant considerations, on the ground of remoteness, and that, where there is a market, the damages is the market value of goods at the time and place where they should have been delivered. I agree with the judgment of SCRUTTON, L.J., and for the reasons given by him. The same view is expressed by VAUGHAN WILLIAMS, L.J., in *Manners* v. *Pearson & Son* (5):

> "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment."

In the same case LINDLEY, M.R., says that no claim by the plaintiff to damages can be supported, and that the judgment and trial of the action limited the right of the plaintiff to an account of what is due to him from the defendants. He held that the plaintiff was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained. It is not necessary in this appeal to consider the principles applicable to the taking of an account where no damages are claimed, but I do not think that this case supports an argument in favour of the contention of the appellants. In his judgment, LINDLEY, M.R., adopts the principle expressed by LORD ELDON in *Cash* v. *Kennion* (5):

> "I cannot bring myself to doubt that, where a man agrees to pay £100 in London upon Jan. 1 he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country

A ought to give him just as much as he would have had if the contract had been performed."

I will not detain your Lordships by reference to cases which have already been fully dealt with. In my opinion, the appeal should be dismissed.

LORD WRENBURY.—In my opinion this appeal fails. The action is for
B damages for tort. It is not a continuing tort. On Dec. 30, 1917, and Feb. 18, 1918, the defendants, the owners of the *Volturno*, were by the plaintiffs' wrong damaged to the amount to 47,372.32 lire in the one case and 257,046.40 in the other case, making together 304,418.72 lire. On June 8, 1920, the defendants' claim was agreed, subject to the question of the rate of exchange to be taken in assessing the loss. On Dec. 30, 1917, the rate of exchange was 39.90. On Feb. 18, 1918, it
C was 41.30. On June 20, 1920, it was 66.25. The order under appeal has taken 39.90 and 41.30 as the proper rates of exchange to be taken in measuring in English currency the agreed loss of 304,418.72 lire. The appellants say that this is wrong.

Your Lordships who have preceded me have already reviewed the authorities. It is unnecessary for me to do so again; more usefully can I state in my own words what I think is the true principle. Assume that a judge is sitting in July to try
D an action for damages for a tort committed on the preceding Jan. 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on Jan. 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on Jan. 1 the equivalent sum in British currency was, say, £7,500. Adjudge that the plaintiff recover against the defendant £7,500. There is no difference of
E principle arising from the fact that the loss is of lire as distinguished from, say, cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on Jan. 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on Jan. 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been
F £150. Adjudge that the plaintiff recover from the defendant £150. It would be nihil ad rem to say that in July similar cows would have cost in the market £300. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having on Jan. 1 deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant
G is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows; the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

The argument to the contrary is that the defendant is bound by pecuniary payment to put the plaintiff in a position as good as that in which he stood before the
H tort was committed. That is true, but it is necessary to add that, of which we have recently heard so much, in the form of a fourth dimension, namely, the consideration of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been had there been no tort. If the date taken be that, not of the tort, but of the judgment, it is giving the plaintiff, not damages for the tort, but damages
I also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act. All the authorities are in favour of this view except the decision of ROCHE, J., in *Kirsch & Co.* v. *Allen Harding & Co., Ltd.* (7) and the American decision in *Marburg* v. *Marburg* (10). In *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1), ROCHE, J., himself decided in favour of this view, preferring it (unless the cases could be distinguished) to his decision in *Kirsch & Co.*

v. *Allen, Harding & Co., Ltd.* (7). His decision in *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1) was affirmed on appeal. The present case is in substance an appeal from *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1). In my opinion, that case was well decided. No difference arises by reason of the fact that this is an action of tort while that was an action for breach of contract. There is here no continuing tort. I think this appeal should be dismissed.

LORD CARSON.—A collision occurred on Dec. 17, 1917, between the *Celia* and the *Volturno*. At the trial of the action on July 22, 1919, HILL, J., held both vessels equally to blame for the collision, and referred the question of damages to the Admiralty registrar. The damages, however, were agreed on June 8, 1920, and the reference was, therefore, not held. The damages were agreed in lire and the question this House has to decide is as to the proper date upon which to calculate the rate of exchange in order to fix in English currency for the purpose of entering an English judgment the damages payable by the wrongdoer to a foreign claimant. The registrar decided that the date of payment, by which I understand him to mean the date at which the judgment is entered, is the time at which the rate of exchange should be taken. He did so on the authority of a decision of ROCHE, J., in *Kirsch & Co.* v. *Allen, Harding & Co., Ltd.* (7), and he did so treating a decision of BAILHACHE, J., as distinguishable on the ground that such decision arose in a case of breach of contract. HILL, J., reversed the decision of the registrar, holding, on the authority of *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1), and other cases, that where the damages are assessed in a foreign currency they must, in entering an English judgment, be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed. The Court of Appeal simply affirmed this judgment, feeling itself bound by the decision in *Di Ferdinando* v. *Simon, Smits & Co., Ltd.* (1).

The *Volturno* was an Italian ship, and was under requisition to the Italian Government under a charterparty. By the terms of this charter hire was payable in Italian lire. By reason of the collision temporary repairs to the *Volturno* were made at Gibraltar, causing a detention of the ship from Dec. 25 to 30, 1917. Permanent repairs were made at Newport News, causing a detention of the ship from Jan. 24 to Feb. 18, 1918. The loss of the owners of the *Volturno* by reason of such detention was in respect of the first period, 47,372.32 lire; and in respect of the second period, 257,046.40 lire; and these two sums amounting to 304,418.72 lire, were claimed as damages, and were apparently included in the damages agreed. It was contended by the owners of the *Volturno* that the rate of exchange should be taken either at the date of the writ or at the respective dates when the loss by detention was suffered, and HILL, J., adopted this latter view. It is to be observed, as I will try and show later, that there is very little authority until we come to recent decisions which can be held to lay down any rule on this subject, and the fact that the respondents put forward alternative dates shows how uncertain the law is upon this subject. I would also add that all the cases so far as I know relied upon in the judgment of HILL, J., were cases of breaches of contract, and no different rule for damages in contract or tort was suggested in the argument before this House. If I am right in the view I have taken of the matter, the reasons which impel me to that view will apply a fortiori to breaches of contract.

The argument for the appellants in support of their contention that the date of the entry of the judgment is the proper date to fix the rate of exchange is shortly as follows. The foreign litigant has suffered, as is agreed, damages to the extent of 300,000 lire. On the principle of restitutio ad integrum, he is paid 300,000 lire; he gets all the damage he has suffered and it is all he would get if the claim was in Italy instead of in England, and, although those damages have referred to and are answered on the basis of a loss at an antecedent date, that affords no reason for awarding him either more or less owing to the fluctuations of the exchange one way or the other between Italy and England, which only means that the lira

A will buy more or less English money. The learned counsel for the appellants say further that the object, and the sole object, of translating the lire agreed upon into English currency is to comply with the requirements of English law—that an English judgment for damages must be for a sum of English money in order to make the damages accessible by execution to the foreign litigant. This principle, they say, would satisfy the dictum of Lord Eldon in *Cash* v. *Kennion* (5), where
B he lays down:

> "If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed."

I will deal shortly with the authorities later. On what principle are we asked
C to enter judgment for the owners of the *Volturno* for a sum of English money which will to-day produce a much larger sum of lire than that which they themselves have agreed upon, or if the exchange had gone the other way and the value of the lira had appreciated, a sum of English money which would produce less than the agreed amount? It is said that the damages must be assessed with reference to the actual periods of detention. It is at that time that the owner suffers damage
D by loss of use. With that I entirely agree. But when it is added that it follows that that is also the date at which the exchange must be taken for the purpose of conversion with a view to entering judgment I do not follow the reasoning. I assume that in assessing the damages all the necessary adjustments would be made and elements of damage considered. It may be that, for instance, in the present case the temporary repairs at Gibraltar had to be paid in sterling, and it
E would, of course, follow that the amount of lire which the sterling represented at the rate of exchange at that date should form an item in the damage. Similarly, if goods had to be bought in the market in England to replace English goods not delivered under a contract with a foreigner, the date of such purchase would necessarily fix the rate of exchange in assessing the damages. But I do not think that there is any connection between the fixing of the damages and the rate of exchange
F to be taken in relation to certain items thereof at certain dates, and the rate of exchange to be fixed for the purpose of entering judgment. I am, therefore, of opinion that the contention of the appellants is well founded and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of
G judgment is being made for the purpose of making the judgment available.

It may be said that where the rate of exchange has gone against the lira, the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply whether the exchange is adverse or otherwise. But in any event to assign this as a reason for the rule would be in reality to give damages for non-payment, which, except in special circumstances,
H are never awarded in our courts: for instance, see the judgment of Bailhache, J., in *Barry* v. *Van den Hurk* (8). In *Manners* v. *Pearson & Son* (6), Lindley, M.R., says ([1898] 1 Ch. at p. 587):

> "To substitute English money for Mexican dollars any time a payment ought to have been made is not to take an account of what is due under the contract,
I but to give damages for any breach of it which the plaintiff can prove that the defendant committed, which is a totally different matter."

I have examined the judgments delivered by the Court of Appeal in *Ferdinando* v. *Simon, Smits & Co., Ltd.* (1) and also the judgments in *Lebeaupin* v. *R. Crispin* (9) and in *Barry* v. *Van den Hurk* (8), all decided in 1920, but, although they all seem to me to lay down and assert the same rule as that upon which Hill, J., following some of these judgments, acted, which I have already considered, I do not think the learned judges who decided them rest their judgments on any authorities, but rather assume that such a rule existed, or ought, as a matter of principle, to exist.

The only case, apart from the recent authorities to which I have referred, which seems to me to give us any assistance is *Manners* v. *Pearson & Son* (6), from which I have already quoted. VAUGHAN WILLIAMS, L.J., no doubt in that case laid down the principle which is contended for by the respondents in the present case, but he was a dissenting judge, and his judgment cannot be reconciled with the judgments delivered by the majority of the court, LINDLEY and RIGBY, L.JJ. Although that action may have to some extent turned on the form of the action, it is to be noted that judgment was given for an account on Dec. 4, 1897; the account was delivered on Nov. 13, 1897, showing an amount due to August, 1896, yet upon an application by the plaintiff claiming that the rate of exchange should be fixed at the date when the account showed the amount due, namely, August, 1896, the court decided that the rate of exchange should be taken, not as of that date, but as of the date of the account under the judgment, viz., Nov. 13, 1897.

We have not been referred to any rule laid down in any English text-writers, but under American law the rule, as I have stated, seems to prevail. SEDGWICK ON DAMAGES (8th Edn.), vol. 1, s. 274, states the rule that, generally speaking, the exchange is to be estimated at time of payment, and in support quotes a number of American authorities, including *Marburg* v. *Marburg* (10), which counsel for the respondents admitted was, for what it was worth, an authority in favour of the appellants. Of course, such authorities are not binding in any way upon us, but they seem to me to be sound in principle, and the discussion of the question in STORY'S CONFLICT OF LAWS (8th Edn), ss. 308–315, leans, I think, to the same conclusion. I would refer also to WESTLAKE'S PRIVATE INTERNATIONAL LAW (5th Edn.), s. 226, p. 315, where the learned author supports the view I have already indicated. I am, therefore, of opinion that the arguments of the counsel for the appellants should prevail, and that the appeal should be allowed.

Solicitors: *Thomas Cooper & Co.*; *William A. Crump & Son.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

CHARLES BURRELL & SONS, LTD. *v.* SELVAGE

[HOUSE OF LORDS (Lord Buckmaster, Lord Sumner, Lord Parmoor, Lord Wrenbury and Lord Carson), July, 4, 1921]

[Reported 90 L.J.K.B. 1340; 126 L.T. 49; 65 Sol. Jo. 734; 14 B.W.C.C. 158]

Workmen's Compensation—Accident—Series of cuts and abrasions on fingers extending over a period—Cumulative effect causing blood-poisoning—Arthritis—Time of infection not fixed—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1 (1).

The respondent, a young girl, was employed in January, 1918, by the appellants as a finisher of shell adapters. In the course of her employment, she sustained cuts and abrasions on her fingers which were usually followed by gatherings of pus and resulted in blood poisoning. In April, 1918, she became ill and ceased work. It was found that she was suffering from arthritis caused by the poisoning of her fingers, and she became totally incapacitated for work. She claimed compensation from the appellants under the Workmen's Compensation Act, 1906.

Held: the respondent had suffered personal injury by accident within the

meaning of s. 1 (1) of the Act of 1906, and it was immaterial that the accident occurred over a period of time, and, therefore, she was entitled to compensation.

Decision of the Court of Appeal, [1921] 1 K.B. 355, affirmed.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of s. 1 (1) of the Act of 1906. See also s. 7 (1).

Distinguished: *Williams v. Guest, Keen and Nettlefolds*, [1926] 1 K.B. 497. Considered: *Cole* v. *London and North Eastern Rail. Co.* (1928), 21 B.W.C.C. 87. Followed: *Fitzsimmons* v. *Ford Motors Co.* (*Aero Engines*), [1946] 1 All E.R. 429. Considered: *Roberts* v. *Dorothea Slate Quarries Co.*, [1948] 2 All E.R. 201. Applied: *Pyrah* v. *Doncaster Corpn.*, [1949] 1 All E.R. 883. Referred to: *Ferguson* v. *Shotts Iron Co.* (1927), 20 B.W.C.C. 741; *Hughes* v. *Lancaster Steam Coal Collieries, Ltd.*, [1947] 2 All E.R. 556; *Roberts* v. *Lord Penrhyn* (1949), 41 B.W.C.C. 272.

As to industrial accidents, see 27 HALSBURY'S LAWS (3rd Edn.) 802 et seq.; and for cases see 34 DIGEST 323 et seq.

Cases referred to:

(1) *Innes* (*or Grant*) v. *Kynoch*, [1919] A.C. 765; 88 L.J.P.C. 85; 121 L.T. 39; 35 T.L.R. 392; 63 Sol. Jo. 444; 12 B.W.C.C. 78, H.L.; 34 Digest 327, *2665*.

(2) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 49 Sol. Jo. 445; 7 W.C.C. 1, H.L.; 34 Digest 464, *3799*.

Appeal by the employers from an order of the Court of Appeal (LORD STERNDALE, M.R., WARRINGTON and SCRUTTON, L.JJ.), dated Nov. 17, 1920, affirming an award of the learned judge at Thetford County Court awarding the respondent compensation in proceedings instituted by her under the Workmen's Compensation Act, 1906.

Shakespeare and *Edgar Dale* for the appellants.
Disturnal, K.C., and *Thesiger* for the respondents.

LORD BUCKMASTER.—This case comes before your Lordships in novel circumstances. The appeal is from a judgment of the Court of Appeal affirming a judgment of the county court judge who decided that the respondent, Mabel Selvage, was entitled to compensation under the Workmen's Compensation Act, 1906, for injury that she received owing to an accident arising out of and in the course of her employment by the appellants. The history of her connection with the appellants was that she appears to have been working for them on some work that was not material towards the latter part of 1917, but that in January, 1918, she was engaged in cleaning a certain part of a shell known as an adapter, and in the course of that work she from time to time suffered cuts and abrasions on her fingers. She continued in the work until April 27, 1918, when she became ill and went home. It was then found that she was suffering from some form of injury due to the poisoning of her cut fingers which has resulted in the respondent being stricken for life, and she is apparently now an incurable invalid. The evidence shows this first, that the work on which the respondent was engaged was work in which the injuries she received were not uncommon, and, secondly, that, as these injuries were from time to time suffered, the scratches and wound suppurated; sometimes they healed and sometimes they did not. On April 29 when she was examined by a doctor there were still a considerable number of cuts on the fingers which were suppurating, and which he seems to have thought might have been sufficient in themselves to have caused the state in which he found her. In cross-examination he modified this view, and stated that the fact that she had been

suffering in a similar way for the preceding four months was a matter which ought not to be taken into account for the purpose of considering what was the true cause of her injury. But whether it arose by reason of definite cuts suffered by her towards the end of April or whether it arose by reason of a series of cuts over a longer period of time, in my opinion she is equally entitled to recover for the injury that she has sustained. A

The statute provides that if in any employment personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall in certain circumstances be liable to pay compensation. The employer is bound to pay compensation for the personal injury, the personal injury must be due to an accident, and the accident must arise out of and be in the course of the employment. It has been decided by this House in *Innes (or Grant)* v. *Kynoch* (1), and also in *Brintons, Ltd.* v. *Turvey* (2), that disease arising out of and in the course of employment may, in certain circumstances, be regarded as an accident within the meaning of the statute, and be made the proper subject-matter of a claim for compensation. In the present case, there is no dispute that the disease from which the respondent suffered is a disease which distinctly arose out of the injuries that she received while in the course of her employmnt, and it cannot be disputed that her cut and abrased fingers were on each occasion what would be called an accident within the meaning of the statute. The only question, therefore, for consideration is whether when the disease is due not to one specific and definite accident, but to a series of accidents, each one of which is specific and ascertainable though its actual influence on the resulting illness cannot be precisely fixed, the workman is disentitled to the benefit of the statute. B C D

I cannot find any words in the statute which permit of such a construction. In the present case, personal injury was suffered, it was suffered by accident, and the injury is no less accidental because it occurred on a series of occasions instead of on one. It follows that the claim to compensation was properly established. E

I have only to add that I find that this opinion is in exact agreement with the line of reasoning adopted by the learned county court judge, and the Court of Appeal, and, having regard to the fullness of the judgment of that court, the terms of which I entirely agree, there is nothing further that I desire to add. F

LORD SUMNER.—I agree. I think that the Court of Appeal rightly decided this case.

LORD PARMOOR.—I concur. I also think that the Court of Appeal was correct. G

LORD WRENBURY.—The initial words of the Workmen's Compensation Act, 1906, s. 1 (1), are: "If in any employment personal injury arising out of and in the course of the employment is caused to a workman" his employer shall pay compensation. I read that sentence for the purpose of pointing out that the compensation is paid not for the accident but for the personal injury arising by accident. In a case where the contraction of disease is the injury for which compensation is given, it cannot be material that the disease was contracted by reason of a succession of scratches sustained over a period of, say, some four months. Not the scratches but the disease resulting from the scratches formed the injury for which compensation was here given by the Act. The scratches in the sentence I am going to quote from the judgment of LORD BIRKENHEAD, L.C., in *Innes (or Grant)* v. *Kynoch* (1) formed what he called the assault, and the disease was the result of the assault. LORD BIRKENHEAD says this ([1919] A.C. at p. 770): H I

> "An interval is assumed (perhaps rightly) before the assault, which is the accident, is followed by the infection or contraction of disease, which is the injury."

Here there were a succession of assaults extending from January to April. In April, at any rate, these resulted in an injury. The contraction of the disease was the injury. To my mind, it is immaterial that the accidents, the scratches, were

sustained over successive periods of time. The only question is whether when the injury resulted it resulted from the scratches which were suffered in the course of the employment. I am of opinion that the appeal fails.

LORD CARSON.—I concur.

Appeal dismissed.

Solicitors: *Carpenters; Moodie & Sons*, for *Bankes, Ashton & Co.*, Bury St. Edmunds.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

Re BOSTOCK'S SETTLEMENT. NORRISH *v.* BOSTOCK

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), June 6, 7, July 26, 1921]

[Reported [1921] 2 Ch. 469; 91 L.J.Ch. 17; 126 L.T. 145; 66 Sol. Jo. W.R. 7]

Settlement—Realty—Equitable estate—Ultimate limitation—Settlement executed before 1926—Strict legal language—No words of limitation—Intention of settlor.

By a marriage settlement dated Sept. 13, 1886, the settlor conveyed, inter alia, certain freehold hereditaments to trustees to hold the same after the intended marriage to such uses as the settlor and his wife should by any deed jointly appoint, and in default of and until such appointment, and so far as any such appointment should not extend, to the use of the wife during her life, and after her death to the use of the settlor during his life, and after his death in trust for such of his children as should attain the age of 21 years, and, if more than one, in equal shares as tenants in common. The freehold hereditaments in question were subject to mortgages, and, therefore, the settlor only conveyed in each case his equity of redemption and a trust of an equitable estate was created. The joint power of appointment was never exercised. On the construction of the settlement the court took the view that there appeared from it the intention of the settlor to grant to the children absolute interests and not only estates for life.

Held: while no particular words were necessary to create a trust of equitable estates, where, as here, strict legal language had been used, the settlement could not be construed to give effect to the intention of the testator, but the language must receive its legal meaning, and, in absence of the word "heirs," the children only took life interests.

Re Whiston's Settlement (1), [1894] 1 Ch. 661, applied.

Re Tringham's Trusts (2), [1904] 2 Ch. 487, overruled.

Notes. This case is an authority in respect of all deeds executed before 1926. In the case of deeds executed after Dec. 31, 1925, words of limitation are not necessary to pass a fee simple: Law of Property Act, 1925, s. 60 (1) (20 HALSBURY'S STATUTES (2nd Edn.) 427).

Considered: *Re Arden, Short* v. *Camm*, [1935] Ch. 326; *Banks* v. *Ripley*, [1940] Ch. 719.

As to ultimate limitations in a settlement of realty, see 29 HALSBURY'S LAWS (2nd Edn.) 628, 629; and for cases see 40 DIGEST (Repl.) 686–688.

Cases referred to:

(1) *Re Whiston's Settlement*, [1894] 1 Ch. 661; 63 L.J.Ch. 273; 70 L.T. 681; 42 W.R. 327; 38 Sol. Jo. 253; 8 R. 175; **40 Digest** (Repl.) 686, *1828.*

(2) *Re Tringham's Trusts*, [1904] 2 Ch. 487; 73 L.J.Ch. 693; 91 L.T. 370; 20 T.L.R. 657; 40 Digest (Repl.) 687, *1832*.
(3) *Pugh* v. *Drew* (1869), 17 W.R. 988; 40 Digest (Repl.) 687, *1830*.
(4) *Holliday* v. *Overton* (1852), 15 Beav. 480; 21 L.J.Ch. 769; 19 L.T.O.S. 211; 16 Jur. 346; affd. 20 L.T.O.S. 12; 40 Digest 686, *1825*.
(5) *Tatham* v. *Vernon* (1861), 29 Beav. 604; 4 L.T. 531; 7 Jur.N.S. 814; 9 W.R. 822; 40 Digest 686, *1827*.
(6) *Lucas* v. *Brandreth* (1860), 28 Beav. 274; 2 L.T. 785; 6 Jur.N.S. 945; 40 Digest (Repl.) 631, *1235*.
(7) *Re Oliver's Settlement*, [1905] 1 Ch. 191; 74 L.J.Ch. 62; 53 W.R. 215; 21 T.L.R. 61; 40 Digest 687, *1833*.
(8) *Re Irwin*, [1904] 2 Ch. 752; 73 L.J.Ch. 832; 53 W.R. 200; 48 Sol. Jo. 640; 40 Digest (Repl.) 497, *101*.
(9) *Re Hudson* (1895), 72 L.T. 892; 39 Sol. Jo. 468; 13 R. 546; 40 Digest (Repl.) 497, *100*.
(10) *Re Monckton's Settlement*, [1913] 2 Ch. 636; 83 L.J.Ch. 34; 109 L.T. 624; 57 Sol. Jo. 836; 40 Digest 498, *103*.

Also referred to in argument:

Re Gillie's Settlement, [1917] 2 Ch. 205; 86 L.J.Ch. 769; 117 L.T. 333; 40 Digest (Repl.) 687, *1834*.
Re Nutt's Settlement, [1915] 2 Ch. 431; 84 L.J.Ch. 877; 113 L.T. 914; 59 Sol. Jo. 717; 40 Digest (Repl.) 498, *104*.
Re Thursby's Settlement, [1910] 2 Ch. 181; 79 L.J.Ch. 538; 102 L.T. 838; 54 Sol. Jo. 581; 38 Digest 668, *109*.

Appeal from an order of Eve, J., made on an originating summons.

By an indenture dated Sept. 13, 1886, and expressed to be made between William Bostock, of the first part, Ada Lever, of the second part, and three trustees, two of whom had since died, the plaintiff, William Arthur Norrish, being one of such trustees, of the third part, it was recited that a marriage was intended to be solemnised between William Bostock and Ada Lever, and that William Bostock was seised in fee simple of the freehold hereditaments respectively described in the first schedule thereto subject to the several mortgages therein mentioned, and that he was possessed of the leasehold hereditaments described in the second schedule thereto for the residue of the term of ninety-nine years then subsisting therein, subject to the mortgage thereof to the trustees of a settlement made on Nov. 7, 1870, on the marriage of William Bostock and his late wife Mary Woodroffe Bostock also mentioned in the same schedule, and he was also possessed of the furniture, chattels, and effects in and about the leasehold premises and of certain other furniture, chattels, and effects then being in and about the dwelling-house situated at Oxton called "Heathley," and was possessed of a policy of assurance on his life for £1,500 with the Reliance Mutual Life Assurance Society subject to the payment of annual premiums. The indenture now in statement witnessed and declared as follows:

"1. The said William Bostock as settlor hereby conveys unto the parties hereto of the third part (hereinafter called the trustees) all those freehold hereditaments described in the first second and third parts of the first schedule hereto, to hold the same unto the trustees in fee simple, subject nevertheless to the respective mortgages thereof hereinafter mentioned, to the use of William Bostock in fee simple until the intended marriage, and after the intended marriage to such uses as William Bostock and Ada Lever shall by any deed or deeds jointly appoint, and in default of and until such appointment and so far as any such appointment shall not extend to the use of Ada Lever during her life for her separate use without impeachment of waste and after her decease to the use of William Bostock during his life without impeachment of waste and after his decease, in trust for the child or children of William Bostock now born or hereafter to be born who shall attain the age of

twenty-one years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs of William Bostock.

"2. William Bostock as settlor hereby assigns and conveys unto the trustees the leasehold hereditaments described in the second schedule hereto, to hold the same unto the trustees for all the residue now unexpired of the term of ninety-nine years subsisting therein under the lease mentioned or referred to in the second schedule, subject nevertheless to the rent reserved by the lease and to the covenants and conditions in the lease contained and on the lessees part to be observed and performed, and subject also to the indenture of mortgage, in trust for William Bostock until the intended marriage and, after solemnisation thereof, in trust for such person or persons and in such manner as William Bostock and Ada Lever shall by any deed or deeds jointly appoint and in default of and until such appointment and so far as any such appointment shall not extend, in trust with and out of the rents and profits of the premises to pay the rents and observe and perform the covenants by and in the lease reserved and contained and on the lessee's part to be paid observed and performed and, subject thereto, in trust for Ada Lever during her life and after her death in trust for William Bostock during his life (if he shall survive Ada Lever) and after the death of the survivor of them William Bostock and Ada Lever in trust for the child or children of William Bostock now born or hereafter to be born who shall attain the age of twenty-one years and if more than one in equal shares as tenants in common and, if there shall be no such child, then in trust for the person or persons who under the statutes for the distribution of intestates' estates would have been entitled thereto at the death of William Bostock if he had died intestate such persons if more than one to take as tenants in common in the shares in which the same would have been divisible between them under the statutes.

"3. William Bostock as settlor hereby assigns and conveys unto the trustees all the household furniture plate linen china glass books pictures prints wines liquors provisions horses cattle carts carriages with the appurtenances and other household effects in and about the leasehold lands messuages and hereditaments called 'Plas Euryn' mentioned in the second schedule hereto and also in and about the dwelling-house of the settlor called 'Heathley' situate at Oxton also all other furniture chattels and effects which shall during the life of William Bostock be brought by him in and upon the premises in substitution therefor or in addition thereto all which premises are hereinafter called 'the said furniture, chattels and effects' to hold the same unto the trustees upon similar trusts to those hereinbefore declared with respect to the leasehold hereditaments comprised in the second schedule hereto and to the trusts and powers hereinafter declared and contained, and it is hereby expressly agreed and declared that all and singular the furniture chattels and effects which shall at any time hereafter during the life of William Bostock be upon or belonging to the messuages and premises called 'Plas Euryn' and 'Heathley' shall be included in these presents and be subject to the powers and trusts therein contained."

Then followed an appointment by William Bostock, of the trustees as his attorneys at any time to make any assignment or delivery of the furniture, chattels and effects thereby assigned and to demand and give receipts for the same and to make, do, and execute all things in relation thereto as effectually as William Bostock.

"4. William Bostock as settlor hereby assigns and conveys unto the trustees the hereinbefore recited policy of assurance and the sum of £1,500 thereby assured and all other moneys to become payable thereunder by way of bonus or otherwise to hold the same unto the trustees upon similar trusts to those

hereinbefore described with respect to the leasehold hereditaments described in the second schedule hereto. A

By cl. 5 the trustees were given power during the lives of Ada Lever and William Bostock, or of the survivor or afterwards at their own discretion to sell "the said lands, messuages, hereditaments and premises and sell and assign or surrender the policy of assurance," and in case of such sale to invest the proceeds and stand possessed of the proceeds and investments upon the trusts and subject to the B powers and provisions thereinbefore declared concerning the premises thereby conveyed and assigned on such of them as should be then subsisting. Clause 7 of the settlement was as follows:

"Ada Lever and William Bostock during their respective lives and the trustees after the death of the survivor of them may by any deed mortgage or charge the premises hereinbefore expressed to be hereby conveyed and assigned C with any sum or sums not exceeding together one half of the expectant share of any child of William Bostock and apply the same for his or her benefit or advancement."

Clause 10 contained a declaration conferring on a tenant for life of the premises hereby settled " and on every person having the powers of a tenant for life" under D the Settled Land Acts additional or larger powers to those conferred by those Acts as to leasing or leasing 'Plas Euryn" without the consent of the settlement trustees or any order of the court or without notice to the trustees and the settlement trustees were declared to be trustees of that settlement for all the purposes of the Settled Land Acts and the Conveyancing Act, 1881.

Clause 13 was as follows: E

"The provisions made by the settlement and the previous settlement made by the late Mr. George Hill for the benefit of the children of William Bostock shall not be cumulative and no child of his shall take any part of the trust premises herein comprised without bringing into hotchpot all sums of money and other benefits which he or she may receive or be entitled to under or by virtue of such previous settlement." F

The first schedule of the settlement of 1886 contained in Part I a farm and lands "Penrhyn Isaf" which was stated together with the property described in Part III of the schedule, to be then in mortgage to secure £1,300 and interest. Part II contained a farm and land "Ty Gwyn" stated to be then in mortgage for £1,700 and interest. Part III contained a farm and land "Penrhyn Isaf bach," stated to be in mortgage with the property in Part I of that schedule. The second schedule G to the settlement of 1886 contained land and a messuage "Plas Euryn" premises demised to William Bostock for the term of ninety-nine years from Jan. 1, 1876, at the yearly rent of £15, and were stated to have been demised by way of mortgage for securing £1,800 and interest.

William Bostock died on Feb. 20, 1895, having had nine children who attained the age of twenty-one years all of whom were living at the date of the originating H summons, viz., six daughters and three sons, including Eric Lever Bostock, being the third defendant to the originating summons. The shares and interests of some of the daughters of William Bostock had been settled on their respective marriages and the share of one of the sons, George William Bostock had been assigned by way of mortgage. William Bostock and Ada Lever did not exercise the joint power of appointment conferred on them by the settlement of 1886 over the freehold I hereditaments. In the years 1896 and 1897 the freehold hereditaments comprised in the first schedule to the settlement were sold for £14,500, and conveyed by Ada Bostock in exercise of the powers conferred upon her as tenant for life by the Settled Land Acts, 1882 to 1890, and the purchase money (except that part of it used in paying off mortgages on the freehold hereditaments) was paid to the trustees of the settlement for the purposes of the Settled Land Acts. The original leasehold property called "Plas Euryn" and the furniture, chattels, and effects in that house were still subject to the trusts of the settlement. There had been

purchased subject to the trusts of the settlement the freehold reversion of "Plas Euryn," and about two acres of land adjoining that property and another small piece of freehold land. William Bostock, by his will dated April 19, 1887, after appointing executors and trustees devised and bequeathed all his real and personal estate to his trustees upon the trusts therein mentioned for his wife Ada Bostock for life, with remainder to his children and their issue at twenty-one or marriage with a power of advancement with the consent of Ada Bostock during her life. His will was duly proved by Ada Bostock one of the executors alone. Ada Bostock and Lawrence William Hodson, who was appointed a trustee of William Bostock's will in the year 1897, were the first two defendants to the originating summons.

An originating summons by the plaintiffs, trustees of the marriage settlement dated Sept. 13, 1886, to which Eric Lever Bostock was the third defendant, asked for the determination of the question whether under the settlement the children of William Bostock who attained the age of twenty-one years became entitled for an estate in fee simple or other absolute interest in equal shares to the freehold hereditaments thereby conveyed or the property representing the same or whether such children became entitled to such property in equal shares only for their respective lives. Eve, J., held that there was not in the settlement a sufficient indication of the settlor's intention that the interests in the real estate should be other than that which they were expressed to be by the actual language used, that was to say, life interests. From that decision the children appealed.

Maugham, K.C., and *Harold Mather* for the appellants.

Tomlin, K.C., and *H. R. P. Gamon* for the respondents, the trustees of the will.

E. Ackroyd for the respondents, the trustees of the settlement of 1886.

Cur. adv. vult.

July 26. The following judgments were read.

LORD STERNDALE, M.R.—The question in this case arises on the construction of a settlement made on the marriage of William Bostock to Ada Lever. By that settlement William Bostock conveyed certain freehold and leasehold hereditaments and chattels to trustees to hold the same after the intended marriage to such uses as William Bostock and Ada Lever should by any deed jointly appoint and in default of and until such appointment and so far as any such appointment should not extend to the use of Ada Lever during her life without impeachment of waste and after her decease to the use of William Bostock during his life without impeachment of waste and after his decease in trust for such child or children of William Bostock then born or thereafter to be born as should attain the age of twenty-one years, and if more than one in equal shares as tenants in common, and if there should be no such child then in trust for the right heirs of William Bostock. No question arises as to the leaseholds and chattels, but in the case of the freeholds the question has arisen whether in the absence of the words "heirs" the children take more than a life estate. If the legal estate had been conveyed no question could have arisen. It would have been quite clear that only a life estate was granted to the children. But the legal estate was outstanding in mortgagees, and therefore William Bostock only conveyed his equity of redemption.

In these circumstances it was argued that the settlement only created a trust of equitable estates, and in that case the court was not bound by the construction of the words as applied to legal estates, and, if the intention of the settlor to grant absolute interests and not estates for life only appeared sufficiently from the instrument, could disregard the omission of the word "heirs" and construe the settlement as granting to the children absolute interests. In dealing with this argument it must be remembered that there is no doubt that the trust in this case is executed and not executory, and, therefore, the court has not the power which it would have in the case of an executory trust of moulding the conveyance so as to carry out the settlor's intention. It was also argued that the power of the court to disregard the strict conveyancing words and interpret the deed according to the intention appearing in it though contrary to the strict legal meaning of the

language employed was confined to a case where the equitable estate was created by the deed itself, and did not exist in a case like this of the conveyance of an equity of redemption. I do not think it necessary to decide this point and shall treat the case on the footing that the power of the court is the same in the two cases. A

If strict conveyancing language with a definite legal meaning is used in the creation of a trust of an equitable estate is it competent for a court of equity to disregard that legal meaning where a contrary intention appears from the rest of the deed and construe the deed according to that intention? The point has been discussed in several cases to which I do not think it necessary to refer in detail, and some of them I think are not reconcilable with this. Reliance was also placed by the appellants upon statements in the old books of authority on conveyancing which, it was argued, supported the proposition that, if the intention were clear, no particular words are necessary to create a trust of equitable estates such as are necessary in the case of legal estates, and, therefore, that whatever words were used the court could and would inquire into the intention and construe the deed accordingly. B C

I have looked into these passages carefully, and, in my opinion, they do establish the first half of that contention, but they do not establish the second, although one passage in HAYES ON CONVEYANCING ((5th Edn.) p. 91) is in favour of it. There may be other passages pointing in the same direction. But after examining the passages in the text-writers and also the numerous authorities to which we were referred, I think the true result is that stated in LEWIN ON TRUSTS (12th Edn.) p. 125: D

> "But though technical terms are not absolutely necessary, yet where technical terms are employed they should be taken in their legal and technical sense. LORD HARDWICKE indeed once added the qualification 'unless the intention of the testator or author of the trust plainly appeared to the contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust perfected and declared by the settlor must have the same construction as in the case of a legal estate executed." E F

Applying that result to the present case, I think that here strict legal conveyancing language has been used, and it must receive its legal meaning. The result is that, in my opinion, in the absence of the word "heirs" the children only take life estates. I am aware that in coming to this conclusion I am differing from the decision of JOYCE, J., in *Re Tringham's Trusts*, *Tringham* v. *Greenhill* (2), and I need hardly say that I do so with diffidence. I think also that I am taking a different view of the effect of the statements in the old conveyancing writers than was taken by that learned judge, and also, I think, by CHITTY, J., in *Re Whiston's Settlement*, *Lovatt* v. *Williamson* (1). But I think there was not before either of those learned judges so full a discussion and examination of those writers as before us. It was said that to arrive at this conclusion we must also differ from *Pugh* v. *Drew* (3) before JAMES, V.-C. But I am not satisfied that this is so considering the unsatisfactory nature of the report, the brevity of the judgment, and the general terms in which it is expressed. I, therefore, arrive at the same conclusion as EVE, J., but on different grounds. The learned judge did not decide this point, but gave judgment for the respondents on the ground that no sufficient expression of intention to give the children more than a life estate could be found in the settlement. If it were necessary to decide this point I should not agree with the learned judge, and should think there was such a sufficient expression of intention. I think this difference of opinion and that to be found in some of the cases cited to us show the advantage of adhering to the recognised meaning of words of conveyancing if the settlor chose to use them, for if that once be put aside the matter is one upon which most varying views as to what was the settlor's meaning may be held, and safety only lies in saying that the settlor or his drafts- G H I

man has used words with a recognised conveyancing meaning and must be taken to have used them with that meaning. The appeal fails and must be dismissed.

WARRINGTON, L.J.—The question in this case is whether the interest in certain freehold hereditaments conferred by a marriage settlement upon the children of the settlor is an estate in fee simple or owing to the absence of words of limitation an estate for life only. EVE, J., has decided that the interest is an estate for life.

The settlement in question is an indenture dated Sept. 13, 1886, whereby certain freehold hereditaments were conveyed in the following terms, viz.:

> "Unto trustees to hold the same unto the trustees in fee simple. . . . to the use of the said William Bostock in fee simple until the said intended marriage, and after the said intended marriage to such uses as the said William Bostock and Ada Lever shall by any deed jointly appoint and in default of and until such appointment and so far as any such appointment shall not extend to the use of the said Ada Lever during her life for her separate use without impeachment of waste and after her decease to the use of the said William Bostock during his life without impeachment of waste and after his decease, in trust for the child or children of the said William Bostock now born or hereafter to be born who shall attain the age of twenty-one years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs of the said William Bostock."

If William Bostock had been seised of the hereditaments for a legal estate in fee simple there could have been no question as to the effect of these limitations. The grantees would all take legal estates, Ada Lever for her life, with remainder to William Bostock for his life, with remainder to the children attaining twenty-one for their respective lives equally as tenants in common and in default of such children to William Bostock in fee simple. The reversion in fee also remained vested in William Bostock and would take effect on the deaths of such children as might become entitled under the limitation in their favour. But the fact is, the settlor was not so seised of the land. It appears on the face of the settlement that the land was subject to mortgages and was so conveyed. The estate dealt with was an equity of redemption and all the limitations were therefore equitable. The real question is whether, in such a case as the present, a court of equity would follow the law and give to the limitations the same effect as they would have, had the legal estate been dealt with, or would look to the general intention of the settlor expressed in the deed, and if satisfied that an intention to confer absolute interests on the children is sufficiently expressed, would give effect thereto, notwithstanding the absence of the necessary technical words. EVE, J., has assumed that he was at liberty to look to the settlor's intention, but has found that the necessary intention was not sufficiently expressed and has, on that ground, held that the children take life estates only. Before us his right to make the assumption was vigorously disputed. If he was wrong in this, his judgment would be affirmed, but on different grounds. This question is one of general importance. The point on which the learned judge in the court below proceeded depends on the construction of the particular instrument, and I am bound to say that, if I felt myself at liberty to act on my view of the construction of the deed without reference to technical rules governing its effect, I should come to the opposite conclusion to that of the learned judge. But for reasons which I will proceed to give, I do not think myself so at liberty, and I, therefore, refrain from stating in detail the grounds in which my conclusion on this point is founded.

The real question, therefore, is, in such a case as this: Would equity follow the law and give the same effect to the equitable limitations as they would have at law, or would it mould them according to the intention? The learned judge in the court below has based the assumption to which I have referred on the following statement in LEWIN ON TRUSTS (12th Edn.), p. 124:

"In creating a trust a person need only make his meaning clear as to the interest he intends to give without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs' provided words be used which, though not technical, are popularly equivalent or the intention sufficiently appears upon the face of the instrument."

It is not disputed that this passage expresses a correct view of the law. But it is said, and I think with truth, that it does not apply to the present case. The principle which does apply is that stated on p. 125 of the same book:

"But though technical terms are not absolutely necessary yet where technical terms are employed they should be taken in their legal and technical sense. LORD HARDWICKE, indeed, once added the qualification, 'unless the intention of the testator or author of the trust plainly appeared to the contrary.' But this position has since been repeatedly and expressly overruled, and at the present day it must be considered a clear and settled canon that a limitation in a trust perfected and declared by the settlor must have the same construction as in the case of a legal estate executed."

I am satisfied that this passage is a correct statement of the law as regards the interpretation and effect of deeds. How far, if at all, it requires modification as applied to wills I need not consider. The matter has been elaborately discussed in FEARNE ON CONTINGENT REMAINDERS ((10th Edn.), vol. 1, p. 126 et seq.) in reference to the distinction between executed and executory trusts. In the case of the former, he says (at p. 142) the court has no authority to make them different from what they would be at law. Strictly speaking, the present case is not one of trust at all. The estates limited are equitable merely because the legal estate is outstanding. But the limitations are complete and perfect; technical terms and forms of conveyancing are used and the principles applicable to executed trusts are those which must be applied. According to technical rules a limitation to A. and his heirs to the use of or in trust for B. confers on B. a legal estate for life only. Where as here an equitable estate is dealt with it must, in my opinion, confer on B. an equitable estate for life only, and the court is not, in my opinion, entitled to regard an intention gathered from the terms of other parts of the instruments.

I now turn to the more modern authorities in the form of judicial decisions. Three cases before SIR JOHN ROMILLY, M.R., were cited as supporting the view I have just expressed. Two of them, *Holliday* v. *Overton* (4) and *Tatham* v. *Vernon* (5), were cases of legal limitations, and are, therefore, not directly applicable: see *Lucas* v. *Brandreth* (6). The limitation in question in trust for the next-of-kin of the settlor was equitable the hereditaments being conveyed unto and to the use of the trustees and their heirs. Much stress was laid on evidence of intention to give the next-of-kin an absolute interest, and there was strong ground for holding that such intention was expressed, but nevertheless the Master of the Rolls considered himself bound to hold that the next-of-kin took for life only, saying that he thought the case governed by *Holliday* v. *Overton* (4), a case in which, as I have already stated, the limitations were legal. The next case is *Pugh* v. *Drew* (3), a decision of JAMES, V.-C. In that case freeholds were conveyed unto and to the use of trustees and their heirs upon the same trusts and so forth as were declared of certain leaseholds by a previous deed or as near thereto as the difference of the estates of the trustees would admit. Among the trusts of the leaseholds were trusts for certain persons absolutely. The Vice-Chancellor held that the freeholds also were to be in trust for them absolutely and not for life. In my opinion, that decision can be supported on the ground that the trust was executory. The trust was not completely declared by the instrument itself, but by reference to another by which absolute interests were conferred, and as an estate in fee simple in freeholds corresponds to an absolute interest in leaseholds the trustees would properly execute their trust by holding the lands in trust for the beneficiaries in fee simple. In other words, in giving effect to the referential trusts the court would not merely

read in the words of the model, but would so frame them as to effectuate the obvious intention. Another case in which effect was given to the intention gathered from the instrument as a whole is *Re Tringham's Trusts*, *Tringham* v. *Greenhill* (2). In that case there was an executed trust of copyholds the legal estate in which was vested as trustees for a class of children without words of limitation. JOYCE, J., finding an intention sufficiently expressed on the face of the instrument, held that the children took in fee simple, and not for life only. The learned judge took no account of the distinction between trusts executed and trusts executory. In the passage cited by him from PRESTON'S ELEMENTARY TREATISE ON ESTATES (3rd Edn.), vol. ii, p. 64, the learned author clearly makes the distinction, the instances given of an estate in fee simple in equity being created without words of limitation being in all cases of executory trusts, but yet the learned judge relies on that author's statement in forming his opinion, and moreover, in dealing with *Lucas* v. *Brandreth* (6), he says there was nothing to show the intention beyond the simple words of the limitation itself. There was, in fact, an elaborate argument on the part of Mr. Selwyn and Mr. Jessel founded on expressions of intention, and I gather from the judgment of the Master of the Rolls that he was much impressed thereby. With the greatest respect to the learned judge I think he has applied to an executed trust doctrines applicable only to an executory one, and that his decision cannot stand and ought to be overruled.

In *Re Oliver's Settlement*, *Evered* v. *Leigh* (7) the trust was "to convey" the estate, and, therefore, executory, and the decision may be supported on that ground: see the passage in the judgment of FARWELL, J. ([1905] 1 Ch. at p. 195). In *Re Whiston's Settlement*, *Lovatt* v. *Williamson* (1), CHITTY, J., held distinctly that an equitable limitation by way of trust executed has the same construction as a legal limitation. In that case the limitation in question was equitable only by reason that the legal estate was outstanding in a mortgagee the so-called trustees being merely grantees to uses. The case, therefore, is precisely in point. The learned judge seems to have thought that there had been a change in the views of text-writers on the subject. But I think the statements of the earlier text-writers to which the learned judge refers as expressing the view that considerable latitude is permissible in construing equitable limitations are really dealing with either executory trusts or dispositions of equitable interests in an informal manner, in both of which cases effect was given to sufficient expressions of intention. In my opinion, the learned judge intended to decide and did decide, that in the case of a formal limitation of an equitable estate executed and perfect in itself the court must give the same effect to it as to a legal limitation. It is true that he referred in his judgment to indications of intention which, he said, were not sufficient, but I am satisfied that in so doing he did not do more than say in effect "if I am wrong in the principle to be applied the result would be the same." In my opinion, the principle applied by CHITTY, J., in *Re Whiston's Settlement*, *Lovatt* v. *Williamson* (1) is correct as applicable to the present case, and ought to be applied.

It is unnecessary to refer to the other cases cited except to mention that in *Re Irwin*, *Irwin* v. *Parkes* (8) BUCKLEY, J., expressed and acted on the same view of the law as that adopted by CHITTY, J. On the whole I come to the conclusion, but for a different reason, that the judgment of EVE, J., was correct, and that this appeal must be dismissed.

YOUNGER, L.J.—The learned judge in this case in the court below decided as he did because he was unable to find in the settlement in question any intention sufficiently manifested to confer upon the children of the settlor any estate in the settled freeholds greater than the life estate which is alone imported by the language employed to define their interest. As I read his judgment he reached that conclusion with reluctance. I have reached the same conclusion with even greater reluctance, because I cannot take of the settlement the view adopted by the learned judge, and my conclusion is based not on any presumed intent of the settlement but in spite of and contrary to what I believe to be its real purpose.

A close study of the deed satisfies me that it embodies from first to last no other intention than that the children of the settlor attaining twenty-one are to take an absolute interest no less in the freeholds than in the other property settled. And I cannot bring myself to doubt that the omission from the limitation of the freeholds to the children of the words adapted indubitably to produce that result is an omission of the draftsman attributable either to accident or to ignorance. I desire to state this conclusion in terms unqualified because the whole ground of my judgment is that notwithstanding it the court has no option but to declare, however reluctantly, that these children take in the settled freeholds life interests only. I doubt whether such difficulty as that with which on some of the authorities we are here confronted would have arisen had the court always in some recent decisions been able to distinguish between those cases where the question is one of intention and those in which it is not one of intention at all, but is one the solution of which is governed by settled principles of construction operative in equity no less than at law—principles from which no judicial escape is possible. It is because I bow to these principles which, in my judgment, are applicable here that I feel constrained, with the same reluctance as NORTH, J., expressed in *Re Hudson, Kühne* v. *Hudson* (9), and BUCKLEY, J., shared in *Re Irwin, Irwin* v. *Parkes* (8), to join the learned judge in declaring that these children of the settlor, notwithstanding the manifest intention to the contrary, take in the settled freeholds life estates only, and if the question at issue, as I think, is not one of intention, I need not detail at length—perhaps I need not even refer to—the reasons which have led me to the conclusion that by this settlement the children in question are intended to take absolute interests in the freeholds. I will permit myself only to say that I find it manifested in the implication throughout the settlement that the proceeds of sale and investment whether proceeding from the real or personal settled property shall all be held upon the same trusts (and the interests of the children in the personal property are admittedly absolute), I find it apparent in the provisions as to hotchpot and like FARWELL, J., in *Re Oliver's Settlement, Evered* v. *Leigh* (7), I find the provision as to advancement almost conclusive and the gift over absolutely conclusive on the subject.

But there is one thing I do not find in the settlement. I find no recital which would justify the court in saying that its operative provisions are incomplete or imperfect. I find no basis for reforming it or rectifying it. Nor is there anything executory in the frame of the document. No further or additional instrument is required to give it complete effect. In these cases all that the court can do is to construe it according to the import of the words used. And in doing so the only difficulty presented is occasioned by the fact that the settled freeholds were at the date of the settlement subject to mortgages so that the conveyance of these was a conveyance of equities of redemption only. The legal estate in every case remained outstanding. We are, therefore, concerned with equitable estates such in fact as were in question in *Re Whiston's Settlement, Lovatt* v. *Williamson* (1). And I pause here, to observe that the distinction suggested by JOYCE, J., in *Re Tringham's Trusts, Tringham* v. *Greenhill* (2) between estates which are equitable merely by reason of the legal estate being outstanding in a mortgagee or otherwise and an express trust estate where legal fee simple is in trustees was not supported in argument and cannot, I think, be maintained. We are dealing here, therefore, with equitable estates in the relevant sense of these words none the less because we are dealing with uses of equities of redemption executed by the statute. It is not disputed by counsel for the children, that, if these freeholds had not been subject to mortgages, and if, by identical words, the legal estate in them had been the subject of conveyance, the interests taken by the children would have been life estates only, notwithstanding any intention manifested in the settlement to the contrary.

The only question, therefore, is whether because the interests are equitable the rule of construction, as to legal interests, ceases to apply. Whether in equity the fee simple passes to the children because the intent is clear. There can be no

doubt that in some circumstances it would so pass. It must do so, if the words of conveyance were referential, and the interest conferred by the instrument to which reference was made was an absolute interest: see *Pugh* v. *Drew* (3). It would do so if it were clear on the deed that there was intended to pass thereby all interest that the grantor—owner in fee simple—had in the freeholds conveyed: see *Re Hudson, Kühne* v. *Hudson* (9) (72 L.T. at p. 894). It would pass if the grantee could establish the right to the grantor's entire interest independently of the deed—e.g., a purchaser who paid the price for the property. But these children do not stand in that position: see *Holliday* v. *Overton* (4). And the present is not one of the other cases. Here we have an executed document complete in its terms expressed in the language of legal limitations, and the result in such a case is thus put by SARGANT, J., in *Re Monckton's Settlement* (10) ([1913] 2 Ch. at p. 642):

> "In the case of an executed document as distinguished from an executory document the rule is fairly well settled that the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of a legal estate in fee simple. Equity follows the law in that respect."

The examination of the opinions of the text-writers ancient and modern made by counsel before us has satisfied me that the rule referred to by SARGANT, J., is, and always has been, thoroughly well settled, and I cannot myself doubt that the questions suggested by some of the cases following *Re Whiston's Settlement*, *Lovatt* v. *Williamson* (1) would not have arisen if CHITTY, J., had not in that case too readily accepted the statement of counsel, not as I think on examination justified, that there was on this subject any real divergence of view between the more modern and the older text-writers. With slight exceptions, not, I think, difficult to explain, the true view of all the text-writers is that an equitable limitation by way of trust executed has the same construction as a legal limitation. In other words an absolute estate therein can only be conferred by the use of the word "heirs" or, since the Conveyancing Act, 1881, but not before, by the addition of the words "in fee simple."

In view of the examination of the authorities just made in the judgment of WARRINGTON, L.J., I am spared from saying more. I entirely concur in the conclusions drawn by the lord justice from that examination, if I may be permitted to say so. In my judgment, the principle contended for by the trustees must be established. We are recognising here a binding rule of construction. We are disregarding as in duty bound, intention altogether. It is unnecessary to say how reluctant any court is to take that course. But, as counsel for the trustees says, the rule for which he contends is of such long standing that it deserves and requires for its destruction a legislative funeral. I am not certain that it has any deserts. But I am satisfied that, whether it has or not, it is now beyond the competence of any court to interefere with its operation where it is applicable. In my opinion, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Parker, Pritchard & Co.*, for *North, Kirk & Co.*, Liverpool.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

HEMELRYCK *v.* WILLIAM LYALL SHIPBUILDING CO., LTD.

[PRIVY COUNCIL (Lord Buckmaster, Lord Dunedin and Lord Shaw), January 21, 1921]

[Reported [1921] 1 A.C. 698; 90 L.J.P.C. 96; 125 L.T. 133]

B

Canada—British Columbia—Practice—Service out of the jurisdiction—Breach of contract—Breach within jurisdiction of "real and substantial term"—Sale of ship—Delivery within jurisdiction—Payment outside jurisdiction—Refusal to accept delivery—Rules of Supreme Court of British Columbia, Order 11, *r.* 1 (*e*).

C

Under Ord. 11, r. 1 (e), of the Rules of the Supreme Court of British Columbia, the court or a judge has power to grant leave to serve notice of a writ of summons outside the jurisdiction when the action is one to recover damages for breach of contract if there is reasonable evidence of a concluded contract and a breach of a real and substantial term of it within the jurisdiction. The respondents agreed to sell six sailing ships to the appellant to be delivered within the jurisdiction, but to be paid for outside the jurisdiction. The appellant refused to accept delivery.

D

Held: the refusal to accept delivery was a breach of a real and substantial term of the contract entitling the respondents to the issue of a writ of summons against the appellant.

Johnson v. *Taylor Bros. & Co., Ltd.* (1), [1920] A.C. 144, distinguished.

E

Notes. Order 11, r. 1 (e), of the Rules of the Supreme Court of British Columbia, is in similar terms to R.S.C., Ord. 11, r. 1 (e).

Referred to: *Cromie* v. *Moore*, [1936] 2 All E.R. 177; *Malik* v. *Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663; *Korner* v. *Witkowitzer Bergbau und Eisenhuetten Gewerkschaft*, [1950] 1 All E.R. 558; *Vitkovice Horni a Hutni Tezirstvo* v. *Korner*, [1951] 2 All E.R. 334.

F

As to service of a writ out of the jurisdiction, see 30 HALSBURY'S LAWS (3rd Edn.) 323 et seq.; and for cases see DIGEST (Practice) 339 et seq.

Case referred to:

(1) *Johnson* v. *Taylor Bros. & Co., Ltd.*, [1920] A.C. 144, 153; 89 L.J.K.B. 227; 122 L.T. 130; 36 T.L.R. 62; 25 Com. Cas. 69, H.L.; Digest Practice 340, *581.*

G

Appeal by special leave from a judgment of the Court of Appeal of British Columbia, dated April 6, 1920. The facts are set out in the judgment of their Lordships.

Sir M. Macnaughten, K.C., and *G. Lawrence* for the appellant.

Barrington-Ward, K.C., and *Horace Douglas* for the respondents.

H

LORD BUCKMASTER.—On Mar. 20, 1919, the respondents obtained leave ex parte from the chief justice of the Supreme Court of British Columbia to issue and serve against the appellant out of the jurisdiction notice of a writ claiming damages for breach of a contract alleged to have been entered into by them with the appellant for the sale and delivery to him of six sailing vessels. The appellant moved to rescind the order, but his application was dismissed by MURPHY, J. On appeal to the Court of Appeal of British Columbia, this order was confirmed, and from that judgment by special leave this appeal has been brought. A question arose in the course of these proceedings whether an application by the appellant for leave to cross-examine amounted to a submission to the jurisdiction, but this point need not be considered as, for other reasons, their Lordships think that this appeal must fail.

I

The rule which permits service out of the jurisdiction in British Columbia is the same as that which exists in this country, and the relevant part of that rule provides that leave to effect such service may be granted when the action is founded

on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.

The appellant objects in the present case that there is, in fact, no contract as between himself and the respondents, and, further, that, if such contract exists, there has been no breach within the jurisdiction of any of its terms.

With regard to the first matter, the difficulty arises in this way. Cablegrams and correspondence passed between the parties during the months from July to October, 1918, as to terms for the purchase by the appellant of the six sailing vessels, and ultimately, when an agreement appeared to have been reached, a document was drawn up dated Nov. 7, 1918, putting into full and formal language the arrangements to which the parties ultimately agreed. This document, the appellant states, was delivered as an escrow, and the appellant contends that, as the conditions on which delivery was to be made complete have never in fact been satisfied, he is not liable under its terms. That may be true, but, in that event, it might, none the less, be also true that he was liable under the previous correspondence and cablegrams which had led up to the making of that contract. So far as the courts in British Columbia are concerned, the learned judges in the Court of Appeal at least appear to have assumed that the question whether or not there was a contract was one which had not been strenuously argued before them. Counsel for the appellant, however, say that this statement must have been due to some misapprehension. Their Lordships only refer to the matter for the purpose of making clear that they do not intend by the opinion which they express to prejudice in any way the right of the appellant to urge at the hearing of these proceedings that, in fact, no contract existed between himself and the respondents at all. For the purpose, however, of enabling the discretion which is conferred by the rules to be exercised, it is sufficient if there appears reasonable evidence that a contract has been made, unless, indeed, the defendant is in a position to satisfy the court that such evidence should be disregarded and that, in fact, there was no contract at all. Their Lordships think in the present case that there is sufficient evidence of a contract to found the jurisdiction, although they do not intend to exclude the appellant from trying to show at the hearing that no contract in fact exists.

The remaining question is whether, assuming there be a contract, it ought to be performed within the jurisdiction according to its terms. On this point, it is well settled that, for the purpose of satisfying the rule, it is sufficient if there be, in fact, one term that has to be performed within the jurisdiction; but, as was recently pointed out in the case to which reference has been made in the judgment of McPHILLIPS, J., *Johnson* v. *Taylor Bros. & Co., Ltd.* (1), that principle cannot be invoked for the purpose of using an artificial cause of action in order to found jurisdiction when the real right of action would be somewhere else. But, even on this assumption, there still remained the breach due to refusal to accept the ships, which, though it would follow in sequence the payment of the money, was a real and substantial breach of the contract sufficient to satisfy the rule.

The argument, however, that has been urged in support of the appeal is that here the real breach is non-payment of the money, and that non-payment of the money was a breach that must have taken place, at any rate according to the terms of the formal document, in New York, and that it was that precedent breach that really gave rise to these proceedings. If, however, this document be, as the appellant contends, inoperative, there remains the question as to the contract created by the correspondence, which contains no express condition making payment of the balance of the purchase money a condition precedent to the delivery of the vessels, nor is there any express term as to the place where the balance of the purchase money is to be paid. In the result, the appellant has declined to be bound by the contract, and it results that he has refused to accept the vessels which were to be delivered at Vancouver. This refusal is a real and substantial cause of action and satisfies the conditions of the rule.

For these reasons, their Lordships think this appeal must fail and should be dismissed with costs. They will humbly advise His Majesty accordingly. The time for entering appearance in the action will be extended to six weeks from to-day.

Appeal dismissed.

Solicitors: *Linklaters & Paines*; *Lawrence Jones & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

AKSIONAIRNOYE OBSCHESTVO A. M. LUTHER *v.* JAMES SAGOR & CO.

[Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), April 29, May 2, 12, 1921]

[Reported [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604]

Conflict of laws—Foreign law—Enforcement—Decree of foreign State nationalising property—Decree by government recognised by English government—Retroactive effect of recognition.

When the British government have recognised the government of a foreign country the acts of that government must be treated by English courts with all the respect due to the acts of a duly recognised foreign sovereign State, and, as such, their validity cannot be questioned. It is immaterial whether the recognition of the foreign government is as a government de jure or as a government de facto. In either case the effect of recognition is retroactive to such date as the British government accepts as that by which the government in question had established its authority, and so the court will not question the validity of an act done after that date but before recognition. The English courts will give effect to the decree of a foreign independent State confiscating property situated within its territorial limits, for such a decree does not contravene any essential principle of justice or morality and it is immaterial that in this country confiscation of property without compensation is not recognised by our law and is repudiated by the vast majority of the citizens.

Decision of Roche, J., [1921] 1 K.B. 456, reversed on further facts.

Notes. Followed: *White, Child and Beney* v. *Simmons; White, Child and Beney* v. *Eagle Star and British Dominions Insurance Co.*, [1922] All E.R.Rep. 482. Considered: *The Jupiter* (*No. 3*), [1927] All E.R.Rep. 237; *Bank of Ethiopia* v. *National Bank of Egypt and Ligouri*, [1937] 3 All E.R. 8. Distinguished: *Haile Selassie* v. *Cable and Wireless, Ltd.* (*No. 2*), [1939] Ch. 182. Considered: *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator, Re Banque des Marchands de Moscou* (*Koupetschesky*), *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269. Referred to: *Fenton Textile Assocn.* v. *Krassin* (1921), 38 T.L.R. 259; *The Jupiter*, [1924] All E.R.Rep. 405; *Banque International De Commerce De Petrograd* v. *Goukassow* (1924), 40 T.L.R. 837; *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte De Mulhouse*, [1924] All E.R.Rep. 381; *Musmann* v. *Engelke*, [1928] 1 K.B. 90; *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1932] All E.R.Rep. 571; *Re Russian Bank for Foreign Trade*, [1933] All E.R.Rep. 754; *Compania Naviera Vascongada* v. *S.S. Cristina*, [1937] 4 All E.R. 313; *The Arantzazu Mendi*, [1938] 3 All E.R. 333; *Re Amand*, [1941] 2 K.B. 239; *Re Amand* (*No. 2*), 1 K.B. 445; *Frankfurther* v. *Exner, Ltd.* (1947), 177 L.T. 257; *Apt* (*otherwise Magnus*) v. *Apt*, [1947] 2 All E.R.

677; *Boguslawski* v. *Gdynia Ameryka Linie*, [1950] 2 All E.R. 355; *Sayce* v. *Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State*, [1952] 1 All E.R. 326; *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna* v. *Boguslawski*, [1952] 2 All E.R. 470.

As to recognition of foreign law and the acts of foreign States, see 7 HALSBURY'S LAWS (3rd Edn.) 8–14, 282–285; and for cases see 11 DIGEST (Repl.) 324–326, 611 et seq.

Cases referred to:

(1) *Williams* v. *Bruffy* (1877), 96 U.S.Rep. 176.

(2) *Underhill* v. *Hernandez* (1897), 168 U.S.Rep. 250.

(3) *Oetjen* v. *Central Leather Co.* (1917), 246 U.S.Rep. 297.

(4) *Hope* v. *Hope* (1857), 8 De G.M. & G. 731; 26 L.J.Ch. 417; 29 L.T.O.S. 4; 3 Jur.N.S. 454; 5 W.R. 387; 44 E.R. 572, L.JJ.; 11 Digest (Repl.) 443, *841.*

(5) *Kaufman* v. *Gerson*, [1904] 1 K.B. 591; 73 L.J.K.B. 320; 90 L.T. 608; 52 W.R. 420; 20 T.L.R. 277; 48 Sol. Jo. 296, C.A.; 11 Digest (Repl.) 444, *843.*

(6) *Santos* v. *Illidge* (1860), 8 C.B.N.S. 861; 29 L.J.C.P. 348; 3 L.T. 155; 6 Jur.N.S. 1348; 8 W.R. 705; 141 E.R. 1404, Ex. Ch.; 11 Digest (Repl.) 444, *846.*

(7) *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, *435.*

(8) *Lecouturier* v. *Rey*, [1910] A.C. 262; 79 L.J.Ch. 394; 102 L.T. 293; 26 T.L.R. 368; 54 Sol. Jo. 375, H.L.; 11 Digest (Repl.) 386, *467.*

(9) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, *516.*

(10) *Vavasseur* v. *Krupp* (1878), 8 Ch.D. 351; 39 L.T. 437; 27 W.R. 176; 22 Sol. Jo. 702, C.A.; 36 Digest (Repl.) 956, *3008.*

(11) *Morgan* v. *Larivière* (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 23 W.R. 537, H.L.; 43 Digest 641, *779.*

(12) *Quarrier* v. *Colston* (1842), 1 Ph. 147; 12 L.J.Ch. 57; 6 Jur. 959; 41 E.R. 587, L.C.; 11 Digest (Repl.) 445, *852.*

(13) *Moulis* v. *Owen*, [1907] 1 K.B. 746; 76 L.J.K.B. 396; 96 L.T. 596; 23 T.L.R. 348; 51 Sol. Jo. 306, C.A.; 25 Digest 420, *240.*

(14) *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195; 1 New Rep. 422; 32 L.J.Ch. 249; 8 L.T. 61; 9 Jur.N.S. 403; 11 W.R. 418; 1 Mav.L.C. 312; 71 E.R. 85; 11 Digest (Repl.) 380, *426.*

(15) *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 35 T.L.R. 552; 17 L.G.R. 569, H.L.; 42 Digest 705, *1217.*

Also referred to in argument:

Folliott v. *Ogden* (1789), 1 Hy. Bl. 123; 126 E.R. 75; affirmed sub nom. *Ogden* v. *Folliott* (1790), 3 Term Rep. 726; (1792), 4 Bro. Parl. Cas. 111, H.L.; 11 Digest (Repl.) 537, *1471.*

Peru Republic v. *Dreyfus Bros. & Co.* (1888), 38 Ch.D. 348; 57 L.J.Ch. 536; 58 L.T. 433; 36 W.R. 492; 4 T.L.R. 333; 28 Digest (Repl.) 759, *149.*

Wolff v. *Oxholm* (1817), 6 M. & S. 92; 105 E.R. 1177; 11 Digest (Repl.) 386, *466.*

Wright v. *Nutt* (1788), Dick. 691; 1 Cox, Eq. Cas. 424; 1 Hy. Bl. 136; 21 E.R. 440, L.C.; 11 Digest (Repl.) 538, *1483.*

Appeal by the defendants from an order of ROCHE, J., in a non-jury action.

The plaintiff company claimed a declaration that certain quantities of veneer or plywood which had been sold by the Russian government to the defendants in this country under a contract made on behalf of the Russian republican government with the defendants in this country was their (the plaintiffs') property. The plaintiff company was incorporated in Russia in 1899, and had thereafter carried on

business in Russia. The company owned a factory or mill at Staraja Russa in the government of Novgorod in Russia, where it manufactured veneer or plywood. The wood was marked with the trade mark "Venesta," or "V.L.," which trade mark was the property in England of Venesta, Ltd. That company authorised the plaintiff company to import into this country boards or crates or packages marked with this trade mark or trade name. On June 20, 1918, a confiscatory decree purporting to issue from the government of Russia was passed. The following translation was accepted by the parties:

> Decree of Council of Commissars for the People of June 20, 1918, which appeared in "Izvestia" in Moscow on June 30, 1918. No. 134. By art. 1: All industrial and commercial establishments mentioned below with their capital and assets of whatever nature are declared the property of the Russian Socialist Federative Republic . . . (17) All the mechanical saw-mills of limited or private companies which have a capital of at least 1,000,000 roubles. (18) All woodworking establishments equipped with machinery which belonged to private or limited companies. Decree signed by Lenin in presence of Council of Commissars and by Commissars of the People.—Tsirioup Naguine Rikof, Business Director; Bovitch-Brovenitsch, Secretary of the Council.

In 1919 the plaintiff company owned and had in their factory at Staraja Russa a large stock of boards of veneer or plywood of about 1,500 cubic metres, most, if not all, of which was marked with the trade mark or trade name, "Venesta" or "V.L." The plaintiff company alleged that in 1919 certain persons calling themselves commissaries, and claiming to be Russian government commissaries, or the duly appointed agents of the Russian republican government, seized and took possession of, and purported to expropriate and deprive the plaintiff company of its factory or mill at Staraja, and wrongfully deprived the plaintiff company of its stock of boards at the factory or mill without making any payment therefor to the plaintiff company. The plaintiff company further alleged that no such republican government of Russia ever in fact or law existed and no such republican government had ever been recognised by His Majesty's government. By a contract dated Aug. 14, 1920, the defendants in this country purported to agree to buy from the so-called Russian republican government the plaintiff company's stock of boards of not less than 1,500 cubic metres, and obtained possession of, and imported into this country a certain quantity of those boards. Other quantities were landed in London. The statement of claim alleged that the defendants were intending to import further quantities of this wood, and the plaintiffs claimed the declaration already mentioned and an injunction restraining the defendants from dealing with the wood. The defendants admitted that, by a contract of Aug. 14, 1920, expressed to be made between them and one L. B. Krassin, the representative of the Russian Commercial Delegation in London, they purchased from the Russian Soviet Republic certain quantities of plywood (including the plywood claimed in the action), and that 1,500 cubic metres of the plywood was therein described as being at "Station Starie Russey." The defendants denied that the plywood or any of it ever was the property of the plaintiff company or that the plaintiff company ever was entitled to the possession thereof. The Russian Commercial Delegation was present in London with the knowledge, consent, and permission of His Majesty's government, for the purpose of entering into commercial contracts with traders in this country, and such traders, including the defendants, were authorised and permitted by His Majesty's government to enter into such commercial contracts with the delegation. By a letter of July 26, 1920, written on behalf of the Secretary of State for Foreign Affairs to the solicitors for L. B. Krassin, it was stated, as was the fact, that the said L. B. Krassin was the authorised representative of the Soviet government and had been received by His Majesty's government for the purpose of carrying out certain negotiations. It was further stated therein, as was the fact, that his Majesty's Secretary of State regarded Mr.

Krassin as a foreign representative, and as one who, in view of the negotiations, should be exempt from the processes of the courts.

By a further letter of Oct. 5, 1920, the Secretary of State stated to the defendant's solicitors that His Majesty's government assented to the claim of the Russian Commercial Delegation to represent in this country a State government of Russia. The defendants alleged on those facts that (inter alia) the Russian Soviet Republic had been recognised by His Majesty's government as the government of a foreign state exercising authority in territory which included Staraja Russa. They also said that no demand for delivery up of the goods claimed was made before action brought by the plaintiffs or by any person on their behalf.

ROCHE, J., held that the plaintiffs were entitled to the declaration claimed, subject, as to the quantity of goods covered, to inquiry before the referee, and, with the like observation, to the injunction prayed. The claim of the defendants to sell the goods amounted to conversion. An assessment of damages by the referee was necessary. The defendants appealed.

After the date of ROCHE, J.'s judgment further information was obtained from the Foreign Office touching the status of the Soviet government of Russia. The defendants applied for and obtained leave to bring this further information before the court. It was conveyed in the following letters. On April 12, 1921, the defendants' solicitors wrote to the Under Secretary of State for Foreign Affairs asking for a certificate of production to the Court of Appeal that the government of the Russian Socialist Federal Soviet Republic had been recognised by His Majesty's government as the de facto government of Russia. In answer to this request they received a letter dated April 20, 1921, in these terms:

> "(1) I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's government and the Soviet government of Russia. (2) I am to inform you that His Majesty's government recognise the Soviet government as the de facto government of Russia."

In answer to a request for information concerning the provisional government, its duration and status, a letter was written from the Foreign Office on April 22 stating that on the termination of the Imperial government of Mar. 14, 1917, the provisional government came into power and was recognised by His Majesty's government as the then existing government of Russia, that it remained in power until Dec. 13, 1917, and was then dispersed by the Soviet authorities. On Mar. 16, 1921, a trade agreement was executed between His Majesty's government and the government of the Russian Socialist Federal Soviet Republic. It was signed at London by Sir R. S. Horne on behalf of His Majesty's government and by L. Krassin on behalf of the Russian Soviet government. By cl. 10 of this agreement the Russian Soviet government undertook "to make no claim to dispose in any way of the funds or other property of the Imperial and Provisional Russian governments in the United Kingdom." His Majesty's government gave a corresponding undertaking as regards British government funds and property in Russia.

Leslie Scott, K.C., and *H. L. Murphy* for the defendants.
Barrington-Ward, K.C., and *St. John Field* for the plaintiffs.

Cur. adv. vult.

May 12. The following judgments were read.

BANKES, L.J.—The action was brought to establish the plaintiff company's right to a quantity of veneer or plywood which had been imported by the defendants from Russia. The plaintiffs' case was that they are a Russian company having a factory or mill at Staraja Russa in Russia for the manufacture of veneer or plywood, and that in the year 1919 the so-called republican government of Russia, without any right or title to do so, seized all the stock at their mill and subsequently purported to sell the quantity in dispute in this action to the defendants. The plaintiffs contended that the so-called Republican government had no existence

as a government, that it had never been recognised by His Majesty's government, and that the seizure of their goods was pure robbery. As an alternative they contended that the decree of the so-called government nationalising all factories, as a result of which their goods were seized, is not a decree which the courts of this country would recognise. The answer of the defendants was twofold. In the first place they contended that the republican government which had passed the decree nationalising all factories was the de facto government of Russia at the time, and had been recognised by His Majesty's government as such, and that the decree was one to which the courts of this country could not refuse recognition. Secondly, they contended that the plaintiff company was an Esthonian and not a Russian company, and that as a result of the provisions of the treaty of peace between Russia and Esthonia the plaintiffs' complaint must be dealt with by a commission set up in pursuance of art. 14 of that treaty. ROCHE, J., decided the two main points in the plaintiffs' favour. Upon the evidence which was before the learned judge I think his decision was quite right. As the case was presented in the court below the defendants relied on certain letters from the Foreign Office as establishing that His Majesty's government had recognised the Soviet government as the de facto government of Russia. The principal letters are referred to by the learned judge in his judgment. He took the view that the letters relied on did not establish the defendants' contention. In this view I entirely agree. In this court the defendants asked leave to adduce further evidence, and as the plaintiffs raised no objection, the evidence was given. It consisted of two letters from the Foreign Office dated respectively April 20 and 22, 1921. The first is in reply to a letter dated April 12 which the appellants' solicitors wrote to the Under Secretary of State for Foreign Affairs, asking for a

> "Certificate for production to the Court of Appeal that the government of the Russian Social Federal Soviet Republic is recognised by His Majesty's government as the de facto government of Russia."

To this request a reply was received dated April 20, 1921, in these terms:

> "I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's government and the Soviet government of Russia. (2) I am to inform you that His Majesty's government recognise the Soviet government as the de facto government of Russia."

The letter of April 22 is in reply to a request for information whether His Majesty's government recognised the provisional government of Russia, and as to the period of its duration, and the extent of its jurisdiction. The answer contains (inter alia) the statement that the provisional government came into power on Mar. 14, 1917, that it was recognised by His Majesty's government as the then existing government of Russia, and that the Constituent Assembly remained in session until Dec. 13, 1917, when it was dispersed by the Soviet authorities. The statement contained in the letter of April 20 is accepted by the plaintiffs' counsel as the proper and sufficient proof of the recognition of the Soviet government as the de facto government of Russia.

In these circumstances the whole aspect of the case is changed, and it becomes necessary to consider matters which were not material in the court below. The first is a question of law of very considerable importance—namely, what is the effect of the recognition by His Majesty's government in April, 1921, of the Soviet government as the de facto government of Russia upon the past acts of that government, and how far back, if at all, does that recognition extend. The second is a question of fact—whether sufficient evidence was given to establish the identity of the Soviet government now recognised by His Majesty's government with the government which seized and confiscated and sold the appellants' goods.

On the first point counsel have been unable to refer the court to any English authority. Attention has been called to three cases decided in the Supreme Court of the United States: *Williams* v. *Bruffy* (1), *Underhill* v. *Hernandez* (2), and

A *Oetjen* v. *Central Leather Co.* (3). In none of these cases is any distinction attempted to be drawn in argument between the effect of a recognition of a government as a de facto government and a recognition of a government as a government de jure, nor is any decision given upon that point. Nor, except incidentally, is any mention made as to the effect of the recognition of a government upon its past acts. The mention occurs in two passages, one in the judgment of FIELD, J., in B *Williams* v. *Bruffy* (1), where, after discussing the essential differences between the government of the Confederate States and the two kinds of de facto governments which he says may exist, he explains that the second of the two kinds exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. He says (96 U.S.Rep. at p. 186):

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> "The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognised, its acts from the commencement of its existence are upheld as those of an independent nation."

D The second mention of the point occurs in the judgment of FULLER, C.J., in *Underhill* v. *Hernandez* (2). He says, in speaking of civil wars (168 U.S.Rep. at p. 253):

> "If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognised, then the acts of such government from the commencement of its existence are regarded as E those of an independent nation."

These are weighty expressions of opinion on a question of international law. Neither learned judge cites any authority for his proposition. Each appears to treat the matter as one resting on principle. On principle the views put forward by these learned judges appear to me to be sound, though there may be cases in F which the courts of a country whose government has recognised the government of some other country as the de facto government of that country may have to consider at what stage in its development the government so recognised can, to use the language to which I have already referred of those learned judges, be said to have "commenced its existence." No difficulty of that kind arises in the present case, because, upon the construction which I place upon the communication of the G Foreign Office to which I have referred, this court must treat the Soviet government, which the government of this country has now recognised as the de facto government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.

An attempt was made by the plaintiffs' counsel to draw a distinction between the effect of the recognition of a government as a de facto government and the H effect of a recognition of a government as a government de jure, and to say that the latter form of recognition might relate back to acts of State of a date earlier than the date of recognition, whereas the former could not. WHEATON, quoting from MOUNTAGUE BERNARD (NEUTRALITY OF GREAT BRITAIN DURING AMERICAN CIVIL WAR (London, 1870), p. 108), states the distinction between a de jure and a de facto government thus (INTERNATIONAL LAW, 5th (English) Edn., I p. 36):

> "A de jure government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A de facto government is one which is really in possession of them, although the possession may be wrongful or precarious."

For some purposes, no doubt, a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose, in my opinion, no distinction can be drawn. The government of this country having, to use the language just quoted, recognised the

Soviet government as the government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the courts of this country with all the respect due to the acts of a duly recognised foreign sovereign State.

It becomes material now to consider whether the defendants have given sufficient evidence to establish that the confiscation and subsequent sale of the respondents' property were the acts of the government which His Majesty's government have now recognised as the de facto government of Russia. In my opinion, they have. The decree of confiscation [ante, p. 140] purports to be a "decree of Council of Commissars for the People." The contract of sale of the goods to the defendants dated Aug. 14, 1920, purports to be made by L. B. Krassin on behalf of the Russian Commercial Delegation. The trade agreement between this country and Russia of Mar. 16, 1921, is made between His Majesty's government and the government of the Russian Socialist Federal Soviet Republic, thereinafter referred to as the Russian Soviet government, and is signed by M. Krassin as the representative of that government. From the letter from the Foreign Office to Messrs. Linklater of April 22, 1921, it appears that the Soviet authorities dispersed the then Constituent Assembly on Dec. 13, 1917, from which date I think it must be accepted that the Soviet government assumed the position of the sovereign government and purported to act as such. The witness Rastorgoueff explained that Council of Commissars for the People is the executive body of the Soviet Republic. The witness Schotter deposed to the seizure of the plaintiffs' goods at the factory being made by persons holding official documents from the Soviet government, and to the fact that at that time and up to the date of the trial the power (as he expressed it) was in the hands of the Bolshevists. The witness Muller who described himself as confidential clerk to the Russian Trade Delegation of the Russian Socialist Federal Soviet Republic, of which M. Krassin was the head, deposed to the fact that since the end of 1917 the Russian Socialist Federal Soviet Republic had in fact been ruling over that part of Russia in which the plaintiffs' factory at Staraja Russa is situate. Upon these materials I consider that it is established that the decree of confiscation of June 20, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet government which has now been recognised by His Majesty's government as the de facto government of Russia, and must be accepted by the courts of this country as such.

It is necessary now to deal with the point made by the plaintiffs, that the decree of confiscation of June, 1918, even if made by the government which is now recognised by His Majesty's government as the de facto government of Russia, is in its nature so immoral, and so contrary to the principles of justice as recognised by this country, that the courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the court is not one in which the assistance of the court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope* v. *Hope* (4) and *Kaufman* v. *Gerson* (5). The question before the court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f.o.b. contract for export to this country. The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods.

I do not think that any authority can be produced to support the contention. Authority appears to negative it. In *Santos* v. *Illidge* (6), BLACKBURN, J., says (8 C.B.N.S. at p. 876):

> "Assuming the taking to have been prohibited by a British Act, still the taking having been of property locally situated in a foreign country, in a manner lawful according to the laws of that country, I apprehend that the property actually passed by the sale, and vested in the purchasers, though they com-

mitted a felony according to our law by taking it. It would be otherwise if the transfer were by a British subject of personal property situated within the British dominions; for, the contract passing the property, being prohibited, would be held void, and so the property would not vest; and it would be questionable how the case would have been, if it had been shown that the vendor was a domiciled British subject, though the property was locally situated in Brazil. But, where, as we must take it to be here, a Brazilian vendor, in Brazil, transferred property locally situated in Brazil, I apprehend that though the vendees were British subjects the validity of the transfer must on every principle of law depend upon the local law of Brazil, and not upon that of the country of the purchaser: see STORY ON THE CONFLICT OF LAWS, c. 9, p. 308 (Edn. 1835)."

The plaintiffs' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognised sovereign State whose law conferred the title which is challenged. Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the de facto government of a civilised country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the government of this country, are repudiated by the vast majority of its citizens, and are not recognised by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called.

The only remaining point is one that does not become material having regard to my view of the evidence now before this court. In the court below the defendants contended that the courts of this country had no jurisdiction to entertain the present dispute because the plaintiffs are really an Esthonian company and not a Russian company, and that by the terms of the treaty of peace the present claim is one which must be adjudicated upon by a commission appointed under the treaty. There is, in my opinion, no substance in the point. Even if the defendants were right on their facts they fail, in my opinion, in making out either that the present dispute falls within the language of the treaty, or that, if it did, the language of the treaty ousts the jurisdiction of the courts of this country. Upon the facts, in my opinion, ROCHE, J., was quite right in deciding that the plaintiffs never ceased to be a Russian company. Although I consider that upon the materials before him the learned judge's judgment was quite correct, I think that upon the fresh materials before this court the appeal succeeds and the judgment must be set aside and entered for the defendants.

WARRINGTON, L.J.—The question in this case is whether the plaintiffs, or the defendants, are to be treated in this country as the owners of certain goods formerly the property of the plaintiffs, but since seized and sold to the defendants by persons purporting to act as the agents of the Russian Soviet government. ROCHE, J., has given judgment in favour of the plaintiffs' claim, and the defendants appeal. ROCHE, J., founded his judgment on the conclusion of fact arrived at by him on the evidence before him that the Russian Soviet government had not been recognised by the government of this country, and, therefore, the courts could not recognise it or hold that it had sovereign power or was able to deprive the plaintiff company of its property. With this finding on the materials before the learned judge I entirely agree. Since the date of the judgment, however, it appears by a letter dated April 20, 1921, written by the Foreign Office to the defendants' solicitors that His Majesty's government recognise the Soviet government as the de facto government of Russia. The case, therefore, comes before us upon fresh materials of which we are bound to take notice, and which make a radical alteration in the circumstances under which the question is to be decided.

It is unnecessary to state the facts in detail, and for the present I will assume that the decree of June 20, 1918, declaring the establishments, capital, and assets

of certain companies, including such a company as the plaintiffs, to be the property of the Russian Socialist Federal Republic was a decree of the same government as that which has since been recognised, and that the persons who afterwards seized the goods in question and those who sold them to the defendants were acting as the agents of that government. The question then is whether the court has any power to question the validity of the proceedings under which the property in the goods has primâ facie been transferred to the defendants. The letter of the Secretary of State is clearly conclusive as to the status of the Soviet government—namely, that it is an independent sovereign government: see *Mighell* v. *Sultan of Johore* (7), per LORD ESHER, M.R., 1 Q.B. at p. 158. It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory":

per CLARKE, J., delivering the judgment of the Supreme Court of the United States of America in *Oetjen* v. *Central Leather Co.* (3) ((1917), 246 U.S.Rep. at p. 303). The existence of this principle of law is implicit in the speeches of both LORD MACNAGHTEN and LORD SHAW in *Lecouturier* v. *Rey* (8), and is not disputed by counsel for the plaintiffs in the present case. Some reliance was placed by the plaintiffs upon the principle enunciated in such cases as *Kaufman* v. *Gerson* (5) that the courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no such objection could be raised to it. In my opinion, this principle has no application. The defendants are not seeking to enforce such a contract. They are resisting an endeavour on the part of the plaintiffs to induce the court to ignore and override legislative and executive acts of the government of Russia and its agents affecting the title to property in that country. It is that which, in my opinion, we are not at liberty to do.

But then it is said that at the time when the legislative or executive acts were done the persons assuming to act as the government of Russia had not been recognised by this country, and those acts, therefore, are not entitled to the respect due to the acts of an independent sovereign State. This contention raises the question whether recognition is retroactive to any and what extent. Assuming that the acts in question are those of the government subsequently recognised I should have thought that in principle recognition would be retroactive at any rate to such date as our government accept as that by which the government in question in fact established its authority. It appears from the letter of the Foreign Office dated April 22, 1921, that that date is anterior to any of the events material to the present case.

> "Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an international person and a member of the family of nations": (OPPENHEIM, INTERNATIONAL LAW (3rd Edn.), vol. 1, p. 135).

If this is so then, provided the act in question was an act of the State so recognised it must, in my opinion, be entitled to the same respect as the act of a sovereign State, whether done before or after recognition.

We have not been referred to, nor have I found, any authority in English law on the point, but there are decisions of the Supreme Court of America directly supporting the view I have expressed. The first of those is the judgment of FIELD, J., delivering the opinion of the Supreme Court in *Williams* v. *Bruffy* (1). Speaking of de facto governments he says (96 U.S.Rep. at p. 185):

> "The latter are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the

public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. . . . As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognised; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled."

It is true that there are here no express words affirming the validity of the acts of such a de facto government as from the commencement of its existence, but that such a view is implied is clear; the learned judge is obviously speaking of all the acts of such a government after it has come to represent the sovereignty of the nation. In the case of the other kind of de facto governments—namely, "where a portion of the inhabitants of a country have separated themselves from the parent State, and established an independent government," his view is quite plainly expressed. He says (ibid., at p. 186):

> "If it succeed, and become recognised, its acts from the commencement of its existence are upheld as those of any independent nation."

Speaking (of the American States after their separation from Great Britain) he says:

> "Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged."

The same view is expressed in the judgment already referred to in *Oetjen* v. *Central Leather Co.* (3) (246 U.S.Rep. at p. 302). It is true that in that case the court is applying the principle to a government recognised as the de jure government, but, in my opinion, there is no difference for the present purpose between a government recognised as such de jure and one recognised de facto. In the latter case, as well as in the former, the government in question acquires the right to be treated by the recognising State as an independent sovereign State, and none the less that our government does not pretend to express any opinion on the legality or otherwise of the means by which its power has been obtained. In fact I rather think a de jure government in international law means "one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them"; while a de facto government is one which is "really in possession of them, although the possession may be wrongful or precarious": WHEATON, INTERNATIONAL LAW (5th (English) Edn.), p. 36. I express no opinion on the question whether the retroactive effect of recognition is so wide as to cover every act of the recognised government from the commencement of its existence. It is unnecessary to do so in the present case for the reason that our government clearly treats the Soviet government as having effectively displaced the previous government at a date anterior to the earliest of the relevant events. I am of opinion, therefore, that on the assumptions mentioned above the court is not in a position to question the validity of the acts whereby the property in the goods in question has been taken from the plaintiffs and transferred to the defendants.

I have now to consider whether those assumptions are justified. I think they are. In my opinion, it is sufficiently proved that the Council of Commissars by whom the decree of June 20, 1918, purported to have been made were the persons at that time exercising supreme authority in Russia, and that the actual seizure of the goods in question was in pursuance of that decree, and by persons acting under the authority of the government. The contract for sale to the defendants was made by M. Krassin as the representative of the commercial delegation in this country, which was treated by our government as representing "a State government of Russia": see the letter of Oct. 5, 1920, from the Foreign Office. Was the government afterwards recognised the same government as that by which

the several acts above referred to were done? There is no evidence of any change of government in Russia since before June 20, 1918, and in cl. 10 of the trade agreement between this country and the Russian Soviet government the succession of governments in Russia is described as "The late Imperial and Provisional Russian governments," and the Russian Soviet government, and in the letter of April 22, 1921, already referred to, it is stated that it was the Soviet authorities who displaced the provisional government. I think, therefore, we are entitled to infer that the government recognised as the Soviet government existed before the date of the decree, and has been the government of Russia ever since. A further point was taken by the defendants founded on the suggestion that the plaintiff company must, since the recognition of Esthonia as a separate independent State, be treated as an Esthonian subject, and that its rights are regulated exclusively by certain treaty stipulations between Russia and Esthonia. ROCHE, J., decided against the appellants on this point. I am quite content with his judgment in this respect, and desire to add nothing thereto. On the other point, however, I am of opinion that the appeal succeeds, and that judgment ought to have been entered and ought now to be entered for the defendants in the action.

SCRUTTON, L.J.—This appeal, which raises questions of general importance, relates to the ownership of certain wood goods which came to England from Russia by way of Esthonia. The plaintiffs, a Russian company, claim them as their property because they were made by the company's servants in Russia in 1918, at their factory at Staraja Russa. The defendants, an American firm, claim them under a purchase on Aug. 14, 1920, from one Krassin, claiming to be the representative in England of the government in Russia, and selling the goods as the property of that government. Going a step further, the defendants allege that the goods became the property of that government by virtue of a government decree of June 20, 1918, nationalising all wood factories and their property, followed by a taking possession of the goods by the government under that decree in January, 1919. ROCHE, J., decided in favour of the plaintiffs, and the defendants appeal. The plaintiffs' head office before the war was in Reval, then in Russia. One of the defendants' points was that now, by the treaty of peace between Russia and Esthonia, Reval formed part of Esthonian territory; that the plaintiffs had thus become an Esthonian company, and were, therefore, confined in their remedies to the method prescribed by that treaty of peace. On this I agree with ROCHE, J., that by their proceedings in evidence before us the company preserved themselves as a Russian company. If they had failed I am not satisfied that the treaty prevented them from protecting their rights of property in foreign countries.

On the more serious question of the position of the government of Russia, this court is in a different position from ROCHE, J. In his judgment on Dec. 21, 1920, he stated that he was satisfied that His Majesty's government had not recognised the Soviet government as the government of a Russian Federal Republic or of any sovereign State or power. There were laid before us letters from the Foreign Office, one dated April 20, 1921, stating "that His Majesty's government recognise the Soviet government as the de facto government of Russia"; one dated April 22, 1921, stating that the provisional government (the government of M. Kerensky) was displaced by the All Russian Congress of Workmen's, Soldiers', and Peasants' deputies on Nov. 8, 1917, and the Constituent Assembly dispersed by the Soviet authorities on Dec. 13, 1917; and also a trade agreement made on March 16, 1921, between the government of the United Kingdom and the government of the Russian Socialist Federal Soviet Republic, acting by L. Krassin. This gentleman is the person who sold the goods to the defendants on behalf of the Russian Commercial Delegation. There was evidence that this delegation was a department of the Russian Socialist Federal Soviet Republic, as was the Soviet of People's Commissaries by whom the decree nationalising woodworking factories was made. An appeal to this court is a re-hearing, and it has been frequently decided that the court must give the judgment which the judge below would have given had any

retrospective statute, passed since the date of his judgment, been in force at that date. His Majesty's government having in 1921 clearly recognised the Soviet government as the de facto government of Russia, the questions argued before us were (i) whether that recognition extended back to Aug. 14, 1920, when L. B. Krassin sold the goods in question to the defendants, or to June 20, 1918, when the decree nationalising the factories was passed. This would include the question whether the government de facto on those dates was the same government as was recognised by the British government in 1921, or a predecessor in title of that government; (ii) whether, assuming that recognition to extend to the dates in question, yet the legislation in question in confiscating private property without compensation was so contrary to British moral and political ideas that the English courts would decline to recognise it, or to give effect to rights derived from it.

The principle of the immunity of foreign States from the jurisdiction of this country was stated by this court in *The Parlement Belge* (9) (5 Prob.D. at p. 217):

> "We are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

On this question *Vavasseur* v. *Krupp* (10) is instructive. Shells alleged to infringe an English patent were landed in this country, but on the Mikado of Japan claiming the goods as the public property of his State the court ordered them to be released to him, without any inquiry whether in fact they infringed an English patent and so were, if found in England, liable to destruction. If M. Krassin had brought these goods with him into England, and declared on behalf of his government that they were the property of the Russian government, in my view, no English court could investigate the truth of that statement. To do so would not be consistent with the comity of nations as between independent sovereign States. In *Morgan* v. *Larivière* (11) the opinions as to the power of the court to deal with a trust fund in which a foreign government was interested were obiter dicta—as the court held there was in fact no trust fund. If by any misadventure the authorised representative of a sovereign State should claim property not really belonging to the State it appears to me that the remedy is by diplomatic means between States, not by legal proceedings against an independent sovereign. The case may be different where the sovereign State submits to the jurisdiction as plaintiff, and asks the court to use its remedies in favour of the plaintiff. But where the sovereign State is defendant I cannot conceive the courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property.

In *Vavasseur* v. *Krupp* (10) the Mikado, in joining as defendant, was held only to have done so in order more effectively to call the attention of the court to the fact that inadvertently it had interfered by injunction with the property of a sovereign State. What the court cannot do directly it cannot, in my view, do indirectly. If it could not question the title of the government of Russia to goods brought by that government to England, it cannot indirectly question it in the hands of a purchaser from that government by denying that the government could confer any good title to the property. This immunity follows from recognition as a sovereign State. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognise it as a sovereign State. Then the courts could investigate the title

without infringing the comity of nations. But it is impossible to recognise a government and yet claim to exercise jurisdiction over its person or property against its will. Further, the courts in questioning whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction. As was said by this court in *Mighell* v. *Sultan of Johore* (7) ([1894] 1 Q.B. at p. 158):

> "When once there is the authoritative certificate of the Queen through her minister of State as to the status of another sovereign, that in the courts of this country is decisive."

In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the de facto government, and a statement that in 1917 the Soviet authorities expelled the previous government recognised by His Majesty. It appears to me that this binds us to recognise the decree of 1918 by a department of the Soviet Republic, and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree, as acts of a sovereign State the validity of which cannot be questioned by the courts of this country, unless it is possible to do so for the second reason argued before us, incompatibility with the moral and political policy of the United Kingdom.

This view renders it unnecessary for me to express a final opinion whether and to what extent a recognition of a de facto government is retrospective to previous acts and times. It appears to me that a recognition of a government as de facto the government in one year does not necessarily recognise that it was the de facto government from the first moment when some of the individuals supporting its cause began to resist or to attack the then established government. It may well be a question when first the struggling body attained such power that it was a government de facto, and over what area, and that you cannot answer that question by knowing that some years later the sovereign recognised it as the government de facto over a particular area. When that question is to be answered, the courts must ask the sovereign for information; but here the Foreign Office letters appear to show that since the beginning of 1918 the Soviet Republic has been the government de facto of Russia. On the first point, therefore, I am of opinion that the defendants show a title derived from a recognised sovereign State, which by the comity of nations cannot be questioned in these courts unless the second ground to be referred to is sufficient justification for questioning it. We were referred to decisions of the Supreme Court of the United States dealing with a similar state of facts: *Oetjen* v. *Central Leather Co.* (3); *Underhill* v. *Hernandez* (2); *Williams* v. *Bruffy* (1). These decisions, while deserving of the highest respect in our courts, are not binding on us. But it is satisfactory to find that the principles there stated are in accordance with the views already expressed except that I should prefer at present to reserve my opinion as to the exact meaning to be given to the principle that

> "when a government which originates in revolution or revolt is recognised by the political department of our government as the de jure government of the country in which it is established such recognition is retroactive in effect and validates all the actions and conduct of the government so recognised from the commencement of its existence."

The definition of the last six words may require very careful consideration.

It remains to consider the argument that the English courts should refuse to recognise the Soviet legislation and titles derived under it as confiscatory and unjust. This was based on the general principle stated by MR. DICEY in his work on the CONFLICT OF LAWS (2nd Edn.), p. 31, that

> "English courts will not enforce a right otherwise duly acquired under the law of a foreign country. . . . (B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political institutions."

When this is expanded later in the same work (at p. 36) the only head applicable to this case is (Inconsistency with) "Morality," i.e., as supported by English courts. There are very few instances in which this principle has been applied. Rights derived from a contract for the sale of slaves made in a country where such a sale is legal have been enforced by English courts: *Santos* v. *Illidge* (6). Gaming debts incurred abroad where gaming is legal have been enforced here: *Quarrier* v. *Colston* (12), though securities payable in England for gaming debts of the same character have not been enforced: *Moulis* v. *Owen* (13). Two cases in particular in which English courts have ignored foreign law of which they disapproved (*Simpson* v. *Fogo* (14) and *Kaufmann* v. *Gerson* (5)) have been the subject of considerable adverse comment. The former can, perhaps, be treated as a retaliation by English courts on foreign States whose tribunals refuse to recognise rights acquired by English law. The latter decision, in which English courts refused to recognise a contract validly made in France on the ground it was contrary to English principles of morality, is adversely criticised in MR. DICEY'S CONFLICT OF LAWS (2nd Edn.), App. Note, 3, p. 727, who treats it as a mistaken application of the sound principle that English courts will not enforce foreign contracts, valid where made, where the court deems the contract to be in contravention of some essential principle of justice and morality. But it appears a serious breach of international comity if a State is recognised as a sovereign independent State to postulate that its legislation is "contrary to essential principles of justice and morality." Such an allegation might well with a susceptible foreign government become a casus belli; and should, in my view, be the action of the sovereign through his ministers, and not of the judges in reference to a State which their sovereign has recognised. The English courts act on the rule

> "that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms": *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ltd.* (15).

If it were, they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the State more than half their income in income tax and supertax, and a large proportion of their capital in death duties, with the fear of a capital levy hanging over their heads, can hardly declare a foreign State immoral which considers (though we may think wrongly) that to vest individual property in the State as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a State recognised by my sovereign as an independent sovereign State is so contrary to moral principle that the judges ought not to recognise it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the sovereign and not on the judges. In my view, therefore, on the new materials available since the judgment of ROCHE, J., the plaintiffs fail in their action, and the judgment below should be set aside.

Appeal allowed.

Solicitors: *H. W. & S. Patey*; *Linklaters & Paines.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re WEST. DENTON *v.* WEST

[Chancery Division (Astbury, J.), February 16, 1921]

[Reported [1921] 1 Ch. 533; 90 L.J.Ch. 342; 125 L.T. 117; 37 T.L.R. 433; 65 Sol. Jo. 379]

B

Settlement—Hotchpot—Appointment of life interests—Reversionary interests never taking effect—Valuation.

By her will the donee, who died in 1886, exercised a power of appointment created by her marriage settlement and appointed the life interest in the whole fund to her daughter T. and after her death upon trust for her issue, in default of such issue, to her (the donee's) daughters, G. and F., for their lives in equal shares. T., G. and F. survived the donee and T. survived G. and F. All three died without issue, and, under the marriage settlement T., G. and F. each took £1,000 in default of appointment. A hotchpot clause in the settlement provided that no one of the children who should take "any part of the said trust premises" under any appointment should in default of appointment have or be entitled to any share of the unappointed part (viz. the £1,000) without bringing the share appointed into hotchpot and accounting for it.

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Held: as T. had taken "part of the said trust premises" under an appointment the hotchpot clause applied to her life interest which must be brought into account as against her £1,000; as the reversionary life interest of G. had never taken effect in possession she had taken no "part of the said trust premises" within the clause, and her interest was not liable to be brought into account; it was immaterial how the life interest of T. was valued, since it must largely exceed the £1,000, but in a case where the parties had waited until it was known that the reversionary life interests were of no value, it would be inequitable now to value these interests, which never fructified, at their past actuarial value.

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Notes. Considered: *Re North Settled Estates, Public Trustee* v. *Graham*, [1946] Ch. 13; *Re Thomson Settlement Trusts, Robertson* v. *Makepeace*, [1953] 1 All E.R. 1139. Referred to: *Re Gordon, Public Trustee* v. *Bland*, [1942] 1 All E.R. 59; *Re Bradberry, National Provincial Bank* v. *Bradbury, Re Fry, Tasker* v. *Gulliford*, [1942] 2 All E.R. 629.

As to the application of the hotchpot clause, see 29 Halsbury's Laws (2nd Edn.) 603; and for cases see 40 Digest (Repl.) 614.

G

Cases referred to:

(1) *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36; 32 L.J.Ch. 46; 9 Jur.N.S. 17; 11 W.R. 137; 71 E.R. 16; 40 Digest (Repl.) 614, *1108*.

(2) *Eales* v. *Drake* (1875), 1 Ch.D. 217; 45 L.J.Ch. 51; 24 W.R. 184; 40 Digest (Repl.) 614, *1110*.

H

(3) *Re Heathcote, Trench* v. *Heathcote*, [1891] W.N. 10; 40 Digest (Repl.) 614, *1109*.

(4) *Re Westropp, Ex parte Westropp* (1903), 37 I.L.T. 183.

(5) *Wheeler* v. *Humphreys*, [1898] A.C. 506; 67 L.J.Ch. 499; 78 L.T. 799; 47 W.R. 17, H.L.; 44 Digest 1241, *10*, *719*.

Adjourned Summons for the determination of the following questions; (i) whether, on the true construction of the settlement and in the events which happened the estate of Theresa ought to bring into hotchpot, as against the £1,000 which, under the trusts of the settlement, was raisable out of the trust funds and payable to her estate, the life interest in the whole of the fund appointed to her by the will of Mrs. West, and if so, how that life interest ought to be valued for the purpose of such hotchpot; and (ii) whether the estate of Georgiana ought to bring into hotchpot against the £1,000 similarly raisable and payable to her estate the life interest in one moiety of the trust fund (which life interest did not take

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effect in possession) appointed to her by her mother's will, and if so, how that life interest should be valued for the purpose of such hotchpot.

Gavin Simonds for the estates of the appointor's son and her daughter Florence.
F. E. Farrer for the estate of the appointor's daughter Theresa.
Farwell for the estate of the appointor's daughter Georgiana.
H. A. H. Christie for the trustees of the settlement.

ASTBURY, J.—This is a summons in the matter of an indenture of settlement made in 1865, followed by an appointment under a power therein contained, seeking a decision as to whether, on the true construction of the settlement, and in the events that have happened, certain life interests ought to be brought into hotchpot, and, if so, how the interests respectively ought to be valued. Under the settlement certain funds were directed to be invested and held on trust, the relevant trusts after the death of Mrs. West, the donee of the power of appointment, being for all such one or more of her four children, or their issue, in such shares as Mrs. West should by deed or will appoint. Mrs. West had one son and three daughters. In default of appointment the settlement provided that the funds should be held in trust out of the capital to raise and pay to Georgiana West, Florence West, and Theresa Lucy West respectively £1,000, and as to the residue, after raising these three several sums of £1,000, in trust for her son absolutely. There was a hotchpot clause in these terms:

> "Provided always that no one of [the four children] who or whose issue shall take any part of the said trust premises under any appointment in pursuance of either of the powers lastly hereinbefore contained shall in default of appointment to the contrary have or be entitled to any share in or to any sum of money raisable out of the unappointed part of the said trust premises under the said trust in default of appointment without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly."

By her will made in 1873, Mrs. West, after reciting that her daughters Georgiana and Florence had been sufficiently provided for, and that she desired to place her daughter Theresa as near as possible upon an equal footing in point of fortune, appointed that the trustees of the settlement should from her death stand possessed of the property which was subject to the trusts of the indenture of 1865 upon trust to pay the income to her daughter Theresa for life, and after her death upon trust for her issue in such shares as she should appoint, and in default of appointment in equal shares, and in default of Theresa having issue, then as to one moiety to pay the income to Georgiana for life, and as to the other moiety to pay the income to Florence for life upon the same trusts and with the same powers as were declared in favour of Theresa. Mrs. West died in 1886, her three daughters surviving her. Florence died in 1906 a spinster, and under her will appointed her brother executor and universal legatee. Georgiana married, and died in 1915 without issue. Theresa survived her two sisters, and has since died without leaving any issue. Mrs. West's son died in 1917, and his legal personal representative is the plaintiff on the summons. [HIS LORDSHIP referred to the questions in the summons and continued:]

The main question concerns Theresa, who took a life interest in the whole of the trust fund, and who survived her brother and sisters. It is contended on her behalf that the £1,000 settled on her and her executors, in default of appointment, should be paid intact for two reasons, first, because she did not take "a part of the said trust premises" within the meaning of the hotchpot clause, and, secondly, because under the will of Mrs. West an intention that the clause should not apply appeared. In my opinion, neither contention is sound. Mrs. West clearly had power to make an exclusive or other appointment, to appoint the capital or the income, and in general to distribute this fund amongst her issue as she should appoint. She appointed the life interest in the whole of the fund to Theresa, with remainder to her children. That remainder has failed, and also the two remainders

which followed Theresa's life interest, and the trust fund now goes as in default of appointment. It seems to me impossible to say that this lady, who was appointed and enjoyed the whole interest in the trust fund, did not, within the meaning of the hotchpot proviso, "take any part of the said trust premises under any appointment," and, on the construction of that proviso, I declare that the life interest to Theresa must be brought into account as against the £1,000, which her estate takes in default of appointment. I am of opinion that it is immaterial how that interest is valued, because the value in any event must largely exceed the £1,000.

The second question, with regard to Georgiana's life interest, is more difficult. Under her mother's will Georgiana took a life interest in remainder if Theresa died without issue. Georgiana died before Theresa, and in fact never attained any interest in possession in the settled fund. The answer to this question depends upon the true construction to be placed on the hotchpot clause. The ordinary common-sense view is that Georgiana never obtained "any part of the said trust premises" under the appointment made in her favour. She had a contingent reversionary interest dependent on her surviving Theresa and on Theresa's dying without issue. She did not survive Theresa, and, on the true construction of the clause, I am of opinion that Georgiana did not take any part of the "trust premises" within the true meaning of the language of the settlor. It is contended to the contrary that she did take a share under an appointment which was liable to be divested if Theresa died leaving issue who attained a vested interest, and that the reversionary interest, which in these circumstances was contingent or liable to be defeated, is one that ought to be actuarily calculated as from the death of Mrs. West in 1886. In 1886 all the children of the testatrix were living. Theresa might have had issue, and her brother and two sisters might have predeceased her. If an actuarial calculation had been made in 1886 of Georgiana's interest in remainder, it is difficult to imagine on what basis it could have been calculated. It is true that, for the purpose of hotchpot, a life interest must be brought into account. It is also true that in certain cases an actuarial calculation must, in default of other possible methods, be adopted. In *Rucker* v. *Scholefield* (1) under an exclusive power to appoint a trust fund of stock to children and their issue born during the lives of the donees of the power, with a hotchpot clause, an appointment was made to five daughters out of nine of the children, whereby the trustees were directed, after the death of the parents, who were tenants for life, to stand possessed of the fund upon trust thereout to appropriate one-fifth part to and for the benefit of each daughter, and to pay and apply the income of the share of each daughter for her separate use, and after the decease of each daughter, upon trusts for the benefit of her children. The limitations over to the daughters' children were held to be void, but, on the question of the valuation of the life interest of the five daughters for the purpose of the hotchpot clause, which provided that

> "no child taking under any appointment to be made in exercise of the aforesaid powers, or either of them, shall be entitled to any share of the unappointed part of the said trust fund, without bringing his or her appointed share into hotchpot and accounting for the same accordingly, unless such appointment shall contain an express direction to the contrary,"

Sir William Page Wood, V.-C., said (1 Hem. & M. at p. 42):

> "With respect to the question of hotchpot, it is clear that a life interest may come into hotchpot as well as any other. The power of appointment includes the power to appoint life interests, and though it was urged that it could not have been intended that the hotchpot clause should extend to life interests, it is impossible to accede to that argument. Each daughter, therefore, taking her life interest, must bring her share into hotchpot, and the life interest must be valued for this purpose."

These were life interests each of which was capable of being valued in the ordinary way.

In *Eales* v. *Drake* (2) Sir George Jessel, M.R., is reported to have said (1 Ch.D. at p. 219):

> "It is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can; and if you cannot agree, there must be an inquiry at chambers on the subject."

The Law Journal and the Weekly Reporter do not mention reversionary interests, and it is not easy to ascertain from the Law Reports to what reversionary interests Sir George Jessel, M.R., was alluding. Under the will and codicil of the appointor, who died in 1874, John had a life interest in £4,000, the reversion on which—omitting the lapsed testamentary appointment in reversion to George - was appointed to Charles and Harriet in equal shares, namely, £2,000 apiece absolutely. These vested absolute reversions may have been the reversionary interests intended. But, if so, the court must have forgotten the trust in default of appointment in the 1856 settlement, under which the unappointed fund, which in the event was £1,000, went, as to £5, to Harriet, and as to the residue, to George and John in equal shares. George's estate was no doubt liable to bring in the £3,000 previously appointed to him by deed in 1860, and John, as the court held, was liable to bring in his life interest. But as Charles had nothing in default of appointment, he was not liable to bring in anything at all. Harriet, on the other hand, no doubt took £5 under the trust in default of appointment, but as she also took £5 by appointment, as well as her vested absolute reversionary interest in £2,000, the valuation of her reversionary interest for hotchpot was primâ facie a mere work of supererogation. In these circumstances the point as to reversionary interests did not really arise, and in any case the judgment or dictum, whichever it may be, must, on the facts, be confined to absolute and indefeasibly vested reversionary interests. No indication as to the date or mode of valuation of the life interest or reversions is given, because the reversionary interest was given by the will and revoked by a codicil and therefore never came into operation. The Master of the Rolls decided that the life interest must be brought into account, but he did not say how the value was to be calculated either in that or other cases.

In *Re Heathcote, Trench* v. *Heathcote* (3), by a settlement certain funds were settled upon trust for the children of the settlor as he should appoint, and in default of appointment for the children equally, with the usual hotchpot clause. The settlor by his will appointed the funds in moieties between two of his daughters for their respective lives, with remainders over, which were held to be void as being either too remote or in excess of the power. The question was raised on an adjourned summons whether the life interests of the daughters ought to be immediately valued and brought into hotchpot, so that the interests of the other children in the unappointed reversionary trust funds might be ascertained. Kekewich, J., held that the life interests of the daughters must be brought into hotchpot and at once valued, that it was fair to the other children that they should have their interests in the trust fund immediately ascertained, and that the value of the life interests must be calculated, not by reference to their duration, but by an actuarial valuation of them at the time when they first took effect, that is, at the death of the settlor. In that case it is difficult to see how any other course could have been adopted. The appointed life interests came into existence at the settlor's death, and the persons entitled to the unappointed reversions, which were vested absolute reversions, were entitled to have their interests immediately ascertained. This could only be done by an actuarial calculation.

In *Re Westropp, Ex parte Westropp* (4), a testator with power to appoint £8,000, portions charged on Irish lands, appointed £2,000 to George for life, with void remainders over. The rest of the fund was appointed to other objects absolutely. The testator died on March 2, 1866. George died on Aug. 16, 1888. On a subsequent petition for the sale of the lands, it became necessary to value the portions

for the purposes of the schedule of incumbrances. On the point coming before Ross, J., in 1903, he said (37 I.L.T. at p. 185): A

> "The proper way to ascertain the value of his [George's] life estate for the purpose of hotchpot is by obtaining an actuarial calculation of the value of his life interest in the £2,000, as from the death of the appointor,"

and at the end of his judgment he declared that George's life interest was to be valued "as at the date of" the appointor's death. In that case there was no contingency or uncertainty, and it may well be that the actuary, in pursuance of this direction, would have valued the expired life interest as an annuity for about twenty-two years certain. B

I have already stated that, on the true construction of the present clause, Georgiana took no part of the "trust premises," but in the event of my answer to the second question on the summons being wrong, I think there is grave difficulty here, after the parties have waited until all these lives have ceased and until they have ascertained in fact that Georgiana and Florence took no interest in this trust fund, in saying ex post facto that there ought to be a valuation, on an actuarial basis, of what in 1886 was the value of these prospective life interests of Georgiana and Florence. This appears to be the view taken in JARMAN ON WILLS (6th Edn., vol. 2, p. 1180 [see (8th Edn.) vol. 2, p. 1163]), where it is said: C D

> "When life and reversionary interests have to be brought into hotchpot, as is not infrequently the case, it is difficult to say how they should be valued. In *Eales* v. *Drake* (2), JESSEL, M.R., said that their 'value must be ascertained in the best way you can.' In *Re Heathcote* (3), a case on a settlement, KEKEWICH, J., held that the value of certain life interests, which were to be brought into hotchpot, must be calculated not by reference to the duration of the interests, but by an actuarial valuation of them at the time when they first took effect. In *Wheeler* v. *Humphreys* (5) the House of Lords do not seem to have considered the point, but their decision appears to involve the view that actual, and not actuarial values are to be taken. With great diffidence it is submitted that the correct method is that stated above in the case of annuities, namely, that you consider the state of facts and contingencies at the time when the life interest or reversion is to be brought into hotchpot. If you know the actual value, because the life interest has ceased, you take that; if you do not, you take the actuarial value." E F

In my view the method of calculation indicated in this passage is correct, and even if I am wrong on my construction of the hotchpot clause, I still think that where the parties interested have chosen to wait until it is ascertained that Georgiana really took nothing under the appointment, it would be unfair and inequitable now to assess a post actuarial value on the reversionary life interest given to her in 1886, which interest in fact never fructified. G

I hold therefore that Georgiana's estate is not liable to bring anything into hotchpot as against her £1,000. H

Solicitors: *Bockett, Stunt & Bockett*; *Patersons, Snow & Co.*, for *Longueville & Co.*, Oswestry.

[*Reported by* J. B. B. MACMAHON, ESQ., *Barrister-at-Law.*]

Re DRAKE. DRAKE *v.* GREEN

[Chancery Division (P. O. Lawrence, J.), April 13, 14, 1921]

[Reported [1921] 2 Ch. 99; 90 L.J.Ch. 381; 125 L.T. 461; 65 Sol. Jo. 553]

Will—"Servant"—Legacy to—Farm bailiff, estate clerk, carpenters, labourers, gardeners, woodmen, gamekeepers—"In my service for upwards of five years prior to my death"—Construction—Periods spent in military service under promise of re-engagement by testator—Aggregation of periods of interrupted service.

A testator, after bequeathing pecuniary legacies to certain named servants, bequeathed to each other of his "indoor and outdoor servants" (i) who should have been in his service for upwards of ten years prior to his death, £200; (ii) who should have been in his service for upwards of five years, but less than ten years, one year's wages.

Held: (i) in the absence of any controlling context the word "servants" must be given a comprehensive meaning, and so included a farm bailiff, an estate clerk, carpenters, labourers, gardeners, woodmen and gamekeepers.

Re Forrest, Bubb v. *Newcomb* (1), [1916] 2 Ch. 386, not followed.

(ii) periods of absence on military service during the 1914–18 war could not be counted as periods in the testator's service, even though the testator had promised to re-engage each servant who joined the armed forces.

Re Cole, Cole v. *Cole* (2), [1919] 1 Ch. 218, distinguished.

(iii) persons whose service with the testator had been interrupted, whether by military service or for other reasons, could aggregate their periods of service before and after the interruption for the purpose of calculating the number of years they had been in the testator's service prior to his death.

Notes. Considered: *Re Marryat, Westminster Bank, Ltd.* v. *Hobcroft*, [1948] 1 All E.R. 796. Referred to: *Re Rosse, Parsons* v. *Rosse*, [1923] All E.R.Rep. 634; *Re Feather, Harrison* v. *Tapsell*, [1945] 1 All E.R. 552; *Re Bedford, National Provincial Bank, Ltd.* v. *Hulton*, [1951] 1 All E.R. 1093.

As to release and performance of conditions imposed by a will, see 34 Halsbury's Laws (2nd Edn.) 116–121, as to gifts by will to "servants," see ibid. 323–325; and for cases see 44 Digest 899–903.

Cases referred to:

(1) *Re Forrest, Bubb* v. *Newcomb*, [1916] 2 Ch. 386; 85 L.J.Ch. 784; 115 L.T. 476; 32 T.L.R. 656; 60 Sol. Jo. 655; 44 Digest 899, *7589*.

(2) *Re Cole, Cole* v. *Cole*, [1919] 1 Ch. 218; 88 L.J.Ch. 82; 120 L.T. 374; 35 T.L.R. 183; 44 Digest 472, *2912*.

(3) *Bulling* v. *Ellice* (1845), 9 Jur. 936; 5 L.T.O.S. 475; 44 Digest 901, *7613*.

(4) *Armstrong* v. *Clavering* (1859), 27 Beav. 226; 54 E.R. 88; 44 Digest 902, *7615*.

(5) *Re Ravensworth, Ravensworth* v. *Tindale*, [1905] 2 Ch. 1; 74 L.J.Ch. 353; 92 L.T. 490; 21 T.L.R. 357, C.A.; 44 Digest 903, *7633*.

(6) *Re Earl of Sheffield, Ryde* v. *Bristow*, [1911] 2 Ch. 267; 80 L.J.Ch. 521; 105 L.T. 236, C.A.; 44 Digest 903, *7634*.

Also referred to in argument:

Booth v. *Dean* (1833), 1 My. & K. 560; 2 L.J.Ch. 162; 39 E.R. 793; 44 Digest 903, *7630*.

Herbert v. *Reid* (1810), 16 Ves. 481; 33 E.R. 1067, L.C.; 44 Digest 902, *7624*.

Blackwell v. *Pennant* (1852), 9 Hare, 551; 22 L.J.Ch. 155; 19 L.T.O.S. 336; 16 Jur. 420; 68 E.R. 631; 44 Digest 901, *7612*.

Thrupp v. *Collett* (*No. 2*) (1858), 26 Beav. 147; 5 Jur.N.S. 111; 53 E.R. 853; 44 Digest 902, *7620*.

Ogle v. *Morgan* (1852), 1 De G.M. & G. 359; 18 L.T.O.S. 296; 16 Jur. 277; 42 E.R. 590, L.C.; 44 Digest 903, *7631*.

Originating Summons for the determination (inter alia) of what classes of persons employed by the testator were included in the description "my indoor and outdoor servants" contained in his will.

The testator William Wykeham Tyrwhitt Drake, of Shardeloes, Amersham, Bucks, made his will, dated Aug. 9, 1918, and thereby (inter alia) bequeathed the following pecuniary legacies free of all death duties:

> "To each of them Thomas Meeton (butler and valet) and James Ladbrooke (groom) who shall be in my service at the time of my death and shall not be under notice to leave whether given or received the sum of five hundred pounds in addition to any moneys owing to them respectively by me at my death. To each other of my indoor and outdoor servants who shall have been in my service for upwards of ten years prior to my death and shall not be under notice to leave whether given or received the sum of two hundred pounds in addition to any moneys owing to them respectively by me at my death. To each other of my indoor and outdoor servants who shall have been in my service for upwards of five years but less than ten years prior to my death and shall not be under notice to leave whether given or received the amount of one year's wages in addition to any moneys owing to them respectively by me at my death."

The testator died on July 29, 1919, without having revoked or altered his will. At the time of his death there were in his employment, and not under notice to leave, a farm bailiff, an estate clerk, carpenters, labourers, gardeners, woodmen, and gamekeepers. Some of these had been employed on military service between the years 1914 and 1918. The testator also had estates in Lincolnshire and Cheshire. This summons was taken out by the executors and trustees of the will for the determination of the question above mentioned.

G. S. Tetley for the executors.

Jenkins, *K.C.*, and *Crossfield* for one of the residuary legatees (a daughter of the testator.

Bryan Farrer for the remaining residuary legatee.

Owen Thompson, *K.C.*, and *C. D. Myles* for those claiming to be included in the bequest as servants of the testator.

P. O. LAWRENCE, J.—The first question raised by this summons is as to the true meaning of the words "indoor and outdoor servants" in the will of the testator. Counsel for the residuary legatees, relying on *Re Forrest* (1), has argued that these words ought to receive the restricted meaning of persons who have in some way ministered to the testator's personal comfort or to his wants, in other words, persons of the class of domestic servants, though not necessarily employed in the house, and the point the court has to determine is whether that argument is well founded. Now "indoor and outdoor servants" are perfectly general words, and there is nothing in the context in which they are used in the present will or in the surrounding circumstances to indicate an intention on the part of the testator to cut down their generality or to exclude any particular class of servants. In these circumstances to accede to the arguments addressed to me by counsel for the residuary legatees would be to introduce a qualification not to be found in the will nor warranted by the surrounding circumstances. The court would be guessing at an intention on the part of the testator which he has not expressed. The only questions open for consideration in the present case are whether the claimants have proved that the relationship of master and servant existed between themselves and the testator, and if so, whether they have satisfied the condition as to length of service.

The authorities show that in the absence of any controlling context the word "servant" in a bequest such as the one now under consideration will receive a comprehensive meaning: (see, e.g., *Bulling* v. *Ellice* (3) and *Armstrong* v. *Clavering* (4)). In the former a farm bailiff and in the latter a land agent was held to be

A a "servant." The more modern cases, *Re Ravensworth* (5) and *Re Earl of Sheffield* (6), strongly bear out that this is now the accepted view. In *Re Ravensworth* (5), certain servants, including woodmen, keepers, masons, and hinds employed at a weekly wage, were excluded from a bequest to "all servants who shall be in my employment at my death," not because they did not come within the definition of "servants," but because the bequest was framed in such a manner
B as to confine it to servants receiving a yearly wage to the exclusion of servants employed at a weekly wage. Joyce, J., expressly pointed out that the gift in that case was in general terms, and that the testator had not drawn any distinction between indoor and outdoor servants or between domestic servants and farm servants. None of the members of the Court of Appeal cast any doubt on the correctness of this view, and the obvious inference is that both courts would have
C held that the woodmen, keepers, masons, and hinds would have taken legacies as "servants" if they had been employed at a yearly wage. In *Re Earl of Sheffield* (6) the bequest was to "my servants (indoor and outdoor)" and the question was whether twelve outdoor servants comprising under-gardeners, estate carpenters, estate labourers, a lodge-keeper and an errand or odd job man were included in the bequest. Both Neville, J., and the Court of Appeal held that they were so
D included. It is true that the immediate point there argued was whether the bequest was framed so as to include servants employed at a weekly wage as well as servants employed at a yearly wage, but neither the counsel engaged in that case nor any of the learned judges who took part in the decision seemed to have had any doubt that the twelve servants concerned were outdoor servants within the meaning of the bequest, and I think I am justified in assuming that the reason for
E this was that they considered it well settled that the word "servant" when unqualified by the context ought to receive a comprehensive meaning.

I come to the decision of Sargant, J., in *Re Forrest* (1). I need hardly say that I attach great weight to the opinion of that learned judge, and that I distrust my own opinion when it differs from his. Although the decision in that case was expressly confined to the construction of a particular will there before the court
F (in which will the words "indoor and outdoor" did not occur), yet, as it was not suggested that there was any controlling context in that will, counsel for the residuary legatees was fully justified in pressing that case on the court as a decision directly in point in the question I have to decide. It was there held that the word "servants" ought to receive the limited meaning which it is contended the words "indoor and outdoor servants" ought to be held to bear in the present
G case. I do not feel myself at liberty to give any such restricted meaning to the words of the present will. Many wills (including in all probability the present will) must have been drawn and many wills (including the will in the *Earl of Sheffield's Case* (6)) must have been acted on in reliance on the comprehensive meaning hitherto given by the court to the word "servants." With the greatest respect to Sargant, J., it seems to me that the limitation he has imposed on that word in
H *Re Forrest* (1), besides being contrary to the current of authority, might in many cases give rise to great difficulty. In my opinion every servant ministers in some way, either to the personal comfort or to the wants of his or her master. The difficulty I have in mind is exemplified in *Re Forrest* (1) itself, where an under-keeper was admittedly included as a servant whilst farm-servants were held to be excluded. I cannot help asking myself if keepers are servants, why are not wood-
I men; and if woodmen, why not farm servants? Obviously the line cannot be drawn according to whether the testator happened to be more fond of shooting than of forestry or farming. In view of the many authorities on this subject, it is of course far too late at the present day for the court to hold that the meaning of "servants" in a bequest of this kind is confined to purely domestic servants, and Sargant, J., was careful not to go so far as this. For the reasons which I have shortly expressed, I feel myself compelled to differ from the opinion expressed by that learned judge, and unable to follow the decision in *Re Forrest* (1) if and so far as it can properly be said to govern my decision in this case. Counsel has called

my attention to what appears to be a slip in the judgment of *Re Forrest* (1). From the report of that case it appears that the learned judge stated that in *Re Earl of Sheffield* (6) the estate labourers and other outdoor servants were held to have been excluded from the bequest, whereas the contrary is the case. I do not, however, for a moment think that the learned judge was under any real misapprehension as to the effect of the decision in *Re Earl of Sheffield* (6), or that this slip in any way detracts from the force of his judgment.

In the result I hold that all the persons named in the schedules to the plaintiffs' affidavit who fulfil the conditions as to length of service (with the exception of Margaret Long whose claim was expressly withdrawn at the hearing on personal grounds) are entitled to legacies as indoor or outdoor servants under the testator's will.

The next point which I have to decide arises in this way. Some of the servants joined the Colours during the war and were absent from the testator's service for varying periods. The question is whether the period of their military service can be counted in the ten years or five years, as the case may be, for the purpose of qualifying them for the legacies given by the will. It is argued by counsel for the servants that these servants continued in the service of the testator notwithstanding that they were serving with H.M. Forces and in support of his argument he relies on *Re Cole* (2). There SARGANT, J., held, under special circumstances, that a gentleman had not ceased to be in the employ of a company, although he had voluntarily enlisted and was still serving in H.M. Forces. But in my opinion the facts of that case are altogether different from the facts we have here. In that case the learned judge concluded as a fact that the employment by the company continued, although there was a temporary dispensation by the directors under which the legatee was not bound to render actual service to the company during the time he was employed in H.M. Forces. In the present case I can come to no such conclusion. The persons concerned were servants employed at a weekly wage. Some of them voluntarily enlisted, and others were compelled to join the Colours. In all cases they left the testator's service with a promise by the testator to re-engage them on their return should they so desire. In these circumstances I regret to find myself quite unable to hold that while these men were serving in H.M. Forces they were in the testator's service, and that, after all, is the only point to be determined on this part of the case. I, therefore, most reluctantly feel compelled to make a declaration that the time during which the servants served in H.M. Forces cannot be counted towards the length of their service with the testator. The only point remaining to be dealt with is whether the period of service before the servants joined the Colours can be aggregated with the period of service after they came back and were re-engaged, for the purpose of making up the ten years or five years, as the case may be, under the will. In my view, the language of the will justifies me in holding that these periods can be aggregated. All that the will requires is that a servant should have been in the testator's service for upwards of ten years or five years prior to his death. I think that the language of the will does not compel me to hold that the service must necessarily have been continuous, but is wide enough to include service in which there has been a break. I, therefore, decide that the period of service prior to the service in H.M. Forces ought to be taken into account in computing the qualifying periods under the will. This decision, in my opinion, covers the claim of the head gardener, in whose case a break occurred, not by reason of his joining the Colours, but from another cause. The head gardener was in the service of the testator from 1904 to 1911. He then left the testator's service, but was re-engaged in the year 1918, and remained in the service of the testator up to the time of the latter's death. In my judgment no logical distinction can be drawn between his case and the case of those servants who joined the Colours.

Solicitors: *Dawes & Sons*; *Valpy, Peckham & Chaplin.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

Re WILLCOCKS. WARWICK *v.* WILLCOCKS

[Chancery Division (P. O. Lawrence, J.), July 15, 1921]

[Reported [1921] 2 Ch. 327; 91 L.J.Ch. 27; 126 L.T. 86; 65 Sol. Jo. 793]

Will—Legacy—General or specific—Gift of stock running into shillings and pence to X. "and the remainder of my real and personal estate" to Y.—Amount bequeathed exact amount owned by testator at date of will.

The rule that a legacy of stock is primâ facie a general, and not a specific, legacy, prevails even when the amount bequeathed is not a round sum but an amount running into shillings and pence and is the exact amount possessed by the testator at the time he made the will.

A testatrix by her will bequeathed £948 3s. 11d. Queensland 3½ per cent. Inscribed Stock to her father, £613 18s. 5d. Victoria 3½ per cent. Consolidated Stock and £300 Queensland 3 per cent. stock to her mother, and "the remainder of my real and personal estate" to her husband. The amounts specified were the exact amounts of these stocks owned by the testatrix when she made her will, but she subsequently sold them all and at her death possessed no Queensland or Victoria government stock.

Held: the legacies of stock were all general, not specific; neither the descriptions of the stock in shillings and pence nor the wording of the ultimate residuary gift showed sufficient contrary intention to exclude the general rule, and, therefore, the mother and father were entitled to receive the value of the stock.

Jeffreys v. *Jeffreys* (1) (1743), 3 Atk. 120, not applied.

Notes. Considered: *Re Rose, Midland Bank Executor & Trustee Co.* v. *Rose*, [1949]Ch. 78. Referred to: *Re O'Connor, Westminster Bank, Ltd.* v. *O'Connor*, [1948] 2 All E.R. 270.

As to general and specific legacies, see 16 Halsbury's Laws (3rd Edn.), 316, 317; as to bequests of "stock," see 34 Halsbury's Laws (2nd Edn.). 260; and for cases see 44 Digest 295–298, and 651–652 and 703–705 respectively.

Cases referred to:

(1) *Jeffreys* v. *Jeffreys* (1743), 3 Atk. 120; 26 E.R. 873; 44 Digest 296, *1274.*

(2) *Purse* v. *Snaplin* (1738), 1 Atk. 414; 26 E.R. 262, L.C.; 44 Digest 404, *2365.*

Also referred to in argument:

Partridge v. *Partridge* (1736), Cas. Temp. Talb. 226; 9 Mod. Rep. 269; 2 Eq. Cas. Abr. 570; 25 E.R. 749, L.C.; 44 Digest 409, *2405.*

Robinson v. *Addison* (1840), 2 Beav. 515; 9 L.J.Ch. 369; 4 Jur. 647; 48 E.R. 1281; 44 Digest 298, *1299.*

Re Tyler, Tyler v. *Tyler* (1891), 65 L.T. 367; 7 T.L.R. 310; 44 Digest 406, *2383.*

Re Nottage, Jones v. *Palmer*, [1895] 2 Ch. 657; 64 L.J.Ch. 695; 44 W.R. 22; 12 R. 571; 44 Digest 705, *5480.*

Re Pratt, Pratt v. *Pratt*, [1894] 1 Ch. 491; 63 L.J.Ch. 484; 70 L.T. 489; 8 R. 601; 23 Digest (Repl.) 433, *5027.*

Adjourned Summons.

A testatrix by her will bequeathed to her father £948 3s. 11d. Queensland 3½ per cent. Inscribed Stock; and to her mother, £613 18s. 5d. Victoria 3½ per cent. Consolidated Stock and £300 Queensland 3 per cent. Stock, and gave the remainder of her real and personal estate to her husband. At the date of the will the testatrix was possessed of the above-mentioned amounts of those stocks. She subsequently sold all the stocks in question and transferred them to the respective purchasers. At the date of her death she possessed no stock of either the Queensland or the Victoria Government. The testatrix died without having altered or revoked her

will, which was duly proved on Feb. 12, 1921. This summons was taken out by her father and mother for declarations that they were entitled to be paid out of her estate the value, at the date of her death, of the respective stocks above mentioned, with interest.

Jenkins, K.C., and *A. Adams* for the plaintiffs.

Owen Thompson and *H. J. H. Mackay* for the defendant.

P. O. LAWRENCE, J.—The rule by which, at all events, I am bound is that a legacy of stock of whatever denomination is primâ facie general and not specific, although the testator may have had the exact amount of stock of the description mentioned at the time when he made his will. In the present case the amount of stock which the testatrix had at the time of her will, and the amount which she bequeathed by her will, consisted of sums which run into shillings and pence in two cases—£948 3s. 11d. Queensland 3½ per cent. Inscribed Stock, in the one case, and £613 18s. 5d. Victoria 3½ per cent. Consolidated Stock, in the other case, and the third legacy which she gives consists of £300—a round sum—of Queensland 3 per cent. stock. It is argued by counsel for the defendant that there is an indication on the face of this will that the legacies, although the rule is that they are primâ facie, general, are specific, first because of the shillings and pence which are mentioned in the cases of the Queensland and Victoria stock, and, secondly, because of the ultimate gift in which the testatrix gives the remainder of her real and personal estate. In my view, on the first point, in principle, there is no distinction between a gift of a round sum of stock and a gift of stock which runs into shillings and pence. I agree with Mr. HAWKINS when he says in his book on wills:

> "Query whether even an exact coincidence in amount be a reason for not construing a bequest generally. The possession of the particular sum may be the motive of fixing the amount of the bequest, but yet the testator may intend to give it in the form of a general legacy."

Jeffreys v. *Jeffreys* (1) is relied on by counsel for the defendant in support of his argument. In that case the learned judge gave as one of the reasons for coming to the conclusion that the gift was specific—and I think it is quite fair to say as his main reason—that the odd shillings and pence were added to the amount. Mr. HAWKINS shows that at all events, in his opinion, that is a decision which is doubtful. In ROPER ON LEGACIES (4th Edn., p. 262), it is stated that it is presumed that *Jeffreys* v. *Jeffreys* (1) cannot be considered of any authority. By the more modern text-writers—JARMAN and THEOBALD—the same view is taken as to the soundness of the principle decided in that case. As I have said before, in principle I cannot see the distinction between the testatrix holding a round sum, say £300, in Queensland stock and giving that and owning a sum of, say £948 3s. 11d. of Queensland stock and giving that. I think there is a great deal to be said in both those cases that there ought to be sufficient room for holding those legacies to be specific. But on the authorities, the rule being now old-established and well known, I think it would be drawing too fine a distinction to say that the rule was only applicable where the sum was a round sum and not where it was one in which there were shillings and pence.

The other point which is taken is that the testatrix gives the remainder of her real and personal estate to her husband. In this case it is to be noticed that the only bequests which she makes are the bequests in question in this case, and no doubt there is a good deal to be said for it that the words which she uses, "the remainder of my real and personal estate," point to the fact that she is thinking of her investments when she is making the bequest which precedes the ultimate gift. But I think it would be attaching too much importance to those words to say that by reason of this user the general rule, which I have said is binding on me, does not apply. Counsel for the plaintiffs has pointed out to me that the old case of *Purse* v. *Snaplin* (2) is even stronger in that way because the gifts there were preceded by a direction of the testator showing that he disposed of his estate

"in manner following," the manner following including amongst other things a gift of stock. However that may be, I do not think that the words "the remainder of my real and personal estate," which are apt to describe the residue whether the legacies are general or specific, constitute sufficient context to exclude the general rule that a gift of stock is general and not specific.

Solicitors: *Sydney James*, for *Coulter, Hancock & Thrall*, Truro; *Vizard, Oldham, Crowder & Cash*, for *Jackson & Sons*, Ringwood.

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

Re WALKER. GOODWIN *v.* SCOTT

[CHANCERY DIVISION (Russell, J.), April 13, 1921]

[Reported [1921] 2 Ch. 63; 90 L.J.Ch. 433; 125 L.T. 764; 65 Sol. Jo. 534]

Will—Ademption—Residuary gift—Double portions.

Apart from the question of double portions there can be no ademption of a residuary gift.

Notes. The Lunacy Act, 1890 (see infra), has been repealed and replaced by the Mental Health Act, 1959. Section 107 (1) and (3) of the 1959 Act are in much wider terms than s. 123 (1) of the 1890 Act, to which they correspond, and so would apply in the circumstances of this case. However, this case remains authority for the proposition stated in the headnote.

Referred to: *Re Stillwell, Stillwell* v. *Stillwell*, [1936] 1 All E.R. 757; *Re Palmer, National Provincial Bank, Ltd.* v. *Boswell*, [1944] 2 All E.R. 406.

As to ademption of gifts by will, see 34 HALSBURY'S LAWS (2nd Edn.) 126 et seq.; and for cases see 44 DIGEST 403–416. As to preservation of interests in a mental patients' property see 21 HALSBURY'S LAWS (2nd Edn.) 349, and for the Mental Health Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 961.

Cases referred to in argument:

Re Wood, Anderson v. *London City Mission*, [1894] 2 Ch. 577; 63 L.J.Ch. 772; 8 R. 817; 33 Digest 221, *1302*.

Re Larking, Larking v. *Larking* (1887), 37 Ch.D. 310; 57 L.J.Ch. 282; 44 Digest 479, *2969*.

Re Hodgson's Trusts, Public Trustee v. *Milne*, [1919] 2 Ch. 189; 121 L.T. 268; 33 Digest 198, *1014*.

Re Freer, Freer v. *Freer* (1882), 22 Ch.D. 622; 52 L.J.Ch. 301; 31 W.R. 426; 33 Digest 221, *1301*.

Adjourned Summons.

By his will a testator gave (inter alia) all his stock, shares, or other investments to a specific legatee, and made a disposition of his residuary estate, which was to include any balance at his bank. The testator subsequently became of unsound mind, and on Jan. 15, 1919, an order in lunacy was made. By the order it was directed that a balance at the testator's bank amounting to £500 should be lodged in court and invested in India stock. This was done, and at the date of the testator's death the £500 in question was represented by a sum of £714 4s. 3d. India 3½ per cent. stock. This summons was issued for the determination of the question whether the residuary legatee was entitled to the stock as residuary legatee or whether it was included in the specific bequests.

By s. 123 (1) of the Lunacy Act, 1890 [repealed: see note, supra]:

"The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

Vaisey for the residuary legatee.
Underhill for the specific legatee.

RUSSELL, J., stated the facts, and said: The order of Jan. 15, 1919, constituted an order on the bank to bring into court £500 out of the balance then standing to the credit of the testator. At his death there was not anything remaining of the balance at the bank, the £500 having been invested and the rest paid to the receiver. So, if there were nothing else in the case, inasmuch as the will speaks from the death, the specific legatee would take the stock and the residuary legatee any residuary estate. However, it is said on behalf of the residuary legatee that s. 123 (1) of the Lunacy Act, 1890, applies so as to give him the stock. In my opinion, this case is not covered by that section. [His Lordship then gave his reasons for this conclusion. As these reasons were based entirely on the wording of s. 123 (1), and would not apply to the wording of s. 107 of the Mental Health Act, 1959 [see Notes], they are omitted. His Lordship continued:] With the exception of those statutory provisions—the object of which was to protect specific gifts and to prevent ademption of them—the old law still prevails. Apart from the question of double portions, there can be no ademption of a residuary gift. I make a declaration that in the events which have happened, the £714 4s. 3d. stock belongs to the specific legatee as legatee of the testator's stock, shares, and other investments.

Solicitors: *Hyman Isaacs, Lewis & Mills*, for *C. Burt Brill*, Brighton; *Greene & Underhill.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

Re PONDER. PONDER *v.* PONDER

[Chancery Division (Sargant, J.), March 17, 1921]

[Reported [1921] 2 Ch. 59; 90 L.J.Ch. 426; 125 L.T. 568; 65 Sol. Jo. 455]

Administrator—Administrator functus officio—Transformation into trustee—Appointment of new trustee to act with such trustee.

The office of an administrator functus officio is the same as that of an executor functus officio, i.e., it becomes changed into that of a trustee, and the court can appoint a new trustee to act together with an administrator so turned into a trustee.

Eaton v. *Daines* (1), [1894] W.N. 32, applied.

Notes. The Trustee Act, 1893, has been repealed and replaced by the Trustee Act, 1925, s. 41 (1) of which now contains the power of the court to appoint new and additional trustees, and s. 41 (4) of which prohibits the appointment of an executor or administrator as distinct from a trustee in the same way as did s. 25 (3) of the Act of 1893. This case must now be read subject to the provisions of the Administration of Estates Act, 1925, s. 33, and to the power to assent to the

vesting of any estate or interest of the intestate conferred on an administrator by s. 36 (1) of that Act. It seems that an administrator now becomes trustee when he has cleared the estate and assented, and new trustees may then be appointed, but his functions as administrator do not cease merely because of this: cf. *Re Yerburgh*, [1928] W.N. 208; *Harvell* v. *Foster*, [1954] 2 All E.R. 736; and *Re Cockburn's Will Trusts, Cockburn* v. *Lewis*, [1957] 2 All E.R. 522.

Considered: *Harvell* v. *Foster*, [1954] 2 All E.R. 736; *Re Aldous, Noble* v. *Treasury Solicitor*, [1955] 2 All E.R. 80. Applied: *Re Cockburn, Cockburn* v. *Lewis*, [1957] 2 All E.R. 522.

As to a personal representative becoming a trustee, see 16 HALSBURY'S LAWS (3rd Edn.) 142–145, and 33 HALSBURY'S LAWS (2nd Edn.) 155, 156; and for cases see 23 DIGEST (Repl.) 475; as to when the court will appoint a new trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 179–181, and for cases see 43 DIGEST 696.

Cases referred to:

(1) *Eaton* v. *Daines*, [1894] W.N. 32; 70 L.T. 761; 10 T.L.R. 594; 43 Digest 620, *598*.

(2) *Re Moore, McAlpine* v. *Moore* (1882), 21 Ch.D. 778; 30 W.R. 839; 23 Digest (Repl.) 44, *303*.

(3) *Re Willey*, [1890] W.N. 1, C.A.; 23 Digest (Repl.) 44, *304*.

(4) *Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch.D. 302; 58 L.J.Ch. 860; 61 L.T. 363; 37 W.R. 705; 23 Digest (Repl.) 469, *5408*.

(5) *Re Adams, Verrier* v. *Haskins* (1906), 51 Sol. Jo. 113; W.N. 220; 23 Digest (Repl.) 469, *5413*.

(6) *Re Howard* (Nov. 4, 1909), unreported.

Also referred to in argument:

Cooper v. *Cooper* (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 22 W.R. 713, H.L.; 23 Digest (Repl.) 480, *5474*.

Originating Summons by an administratrix asking the court to appoint the Public Trustee jointly with her to act as trustee of three funds forming the net proceeds of realisation of her husband's estate.

Letters of administration had been granted to her of her husband's estate on his death, and she had paid all the debts and expenses and cleared the estate, set aside one-third of the personal estate to which she was entitled, and divided the remainder into two parts for her two infant children, investing in her name the proceeds of sale of the real estate for the eldest son as heir-at-law. She required a person of business ability to assist her in managing these three funds, and applied to the Public Trustee for this purpose, but, as he doubted her power to appoint him, this summons was taken out by her.

By the Trustee Act, 1893, s. 25 (3) [now Trustee Act, 1925, s. 41 (4)]: "Nothing in this section shall give power to appoint an executor or administrator."

L. F. Potts for the administratrix.

J. H. Stamp for the infant defendants.

SARGANT, J. (after stating the facts).—That the court may appoint a new trustee to act with an executor where all the debts and the expenses of the estate have been paid, the estate has been cleared, and the executor is left merely a trustee for residuary legatees, seems quite clear. That is so because when the estate has been wound-up and the residue ascertained the executor has ceased to be an executor and has become a trustee for the persons entitled to the residue. I cannot see why the same reasoning should not apply to the administratrix in this case. The widow, as administratrix, has divided the personalty into three portions for herself and her two infant sons, and from the time she did this she became a trustee of his share for each son. The test is that either son could bring an action against the widow in respect of his share without joining the other son.

The difficulty has arisen from the introduction into the Trustee Act, 1893, of s. 25 (3). That provision was clearly inserted in view of the decision of KAY, J., in

Re Moore (2), which had been practically overruled by the Court of Appeal in *Re Willey* (3). But *Eaton* v. *Daines* (1), a decision of KEKEWICH, J., shows clearly that when an estate has been wound-up, and the trust property is in the hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee, and, therefore, a power exists to appoint a trustee. I see no reason why the same result should not follow in the case of an administratrix. The question is whether, by virtue of the separation of the estate, so that each child has become entitled to a share, a person who was administratrix has not ceased to be administratrix and become a trustee of the share of each child. *Re Smith* (4) and *Re Adams* (5) show that, when the estate has been cleared and the residue ascertained, an executor or an administrator holds the residue in trust for an infant legatee within the meaning of s. 43 of the Conveyancing Act, 1881, and, on the footing that he has become a trustee, is entitled to apply the income for the infant's maintenance as provided by that section.

In the result, therefore, there must be an order appointing the Public Trustee, jointly with the widow, a trustee of each of the three separate funds—namely, the two funds of personal estate constituting the two shares of the infants in the personalty, and the fund consisting the investments representing the proceeds of sale of the real estate. The order should be prefaced by words similar to those in SETON ON JUDGMENTS AND ORDERS (7th Edn.) p. 1174, which were used by JOYCE, J., in *Re Howard* (6). The three funds should be identified by being set out in three schedules to the order, which would be that, the court, being of opinion that the applicant has become and is a trustee (a) of the funds specified in sched. 1 for the infant R. M. Ponder; (b) of the funds specified in sched. 2 for the infant R. W. Ponder; and (c) of the funds specified in sched. 3 for the infant R. M. Ponder as heir-at-law of the intestate, subject to the applicant's right of dower, appoint the Public Trustee to be trustee, jointly with the applicant, of the funds in sched. 1; appoint the Public Trustee to be trustee, jointly with the applicant, of the funds in sched. 2; and appoint the Public Trustee to be trustee, jointly with the applicant, of the funds in sched. 3—the costs of all parties, as between solicitor and client, to come out of the funds in scheds. 1 and 2 equally.

Solicitors: *Ford, Lloyd, Bartlett & Michelmore.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re BOULTER. CAPITAL AND COUNTIES BANK *v.* BOULTER

[Chancery Division (Sargant, J.), October 27, 28, 1921]

[Reported [1922] 1 Ch. 75; 91 L.J.Ch. 250; 126 L.T. 653; 66 Sol. Jo. (W.R.) 14]

Will—Condition—Illegality—Public policy—Forfeiture if child resided "abroad" —Meaning of "abroad."

A will gave interests in a settled fund to infants "on the express condition that such children . . . are . . . at all times during their respective minorities (both before and after my decease) maintained in England and do not reside abroad except for periods not exceeding six weeks in each year. And on non-compliance with the foregoing condition in the case of any such child his or her share shall be forfeited. . . ."

Held: the condition, which was a condition subsequent and operative during the lives of the parents of the children, was contrary to public policy and void because the deprivation of the children of their interests if they went abroad with their parents would be liable to cause a parent to neglect them.

Per Curiam: "abroad" ordinarily means "outside the British Isles."

Notes. Referred to: *Re Leng, Dodsworth v. Leng*, [1938] Ch. 821.

As to conditions imposed by a will, see 34 Halsbury's Laws (2nd Edn.) 103–122, and for cases see 44 Digest 434–491.

Cases referred to:

(1) *Clavering* v. *Ellison* (1857), 8 De G.M. & G. 662; affirmed (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282, H.L.; 44 Digest 440, *2667*.

(2) *Partridge* v. *Partridge*, [1894] 1 Ch. 351; 63 L.J.Ch. 122; 70 L.T. 261; 44 Digest 478, *2960*.

(3) *Re Borwick's Settlement, Woodman* v. *Borwick, Re Woodman*, [1916] 2 Ch. 304; 85 L.J.Ch. 732; 115 L.T. 183; 32 T.L.R. 583; 60 Sol. Jo. 567; 28 Digest (Repl.) 598, *1100*.

Also referred to in argument:

Re Sandbrook, Noel v. *Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 Sol. Jo. 721; 44 Digest 444, *2686*.

Wilkinson v. *Wilkinson* (1871), L.R. 12 Eq. 604; 40 L.J.Ch. 242; 24 L.T. 314; 19 W.R. 558; 44 Digest 454, *2762*.

Mitchel v. *Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, *59*.

Originating Summons to determine whether a condition in a will prohibiting residence of children abroad was void either (i) for uncertainty, or (ii) as being contrary to public policy, or (iii) as being impossible to comply with.

On Sept. 14, 1916, S. C. Boulter made his will whereby he directed that one equal sixth part of his residuary estate should be appropriated for the benefit of his son, S. J. Boulter, and should be held by his trustees upon trust to pay the income to his said son during his life, and from and after his decease upon trust for the children of his said son as he should by deed or will appoint, and in default equally between them at twenty-one or marriage. This was followed by the usual hotchpot clause and a proviso in the following words:

"Provided also that the gifts hereinbefore and in this present clause declared in favour of the children or child of the said S. J. Boulter are given upon the express condition that such children or child are or is at all times during their respective minorities (both before and after my decease) maintained in England and do not reside abroad except for periods not exceeding six weeks in each year. And on non-compliance with the foregoing condition in the case of any such child his or her share shall be forfeited and form an accretion in

equal proportions to the shares or share of the remaining children or child of my said son."

With a further gift over in case of non-compliance with the condition by all the children of S. J. Boulter. On Jan. 5, 1917, the testator died, and his will was duly proved on Feb. 21. At the date of his will and his death his son, S. J. Boulter, was on active service with the army. His wife, whom he had married in 1910, was a native of Germany, and there were two children of the marriage, aged respectively nine and ten.

Jolly for the plaintiffs.
J. W. F. Beaumont for the infant defendants.
Hart for the defendants entitled under the gift over.

SARGANT, J.—I have to determine here whether a condition with regard to the residence and education and maintenance of certain children is void or not.

The first question on the summons is whether the condition in question has come into operation now or whether it will only come into operation on the death of the children's father. As to that I do not think there is any doubt. The will is the will of a Mr. Stanley Carr Boulter. He had, I think, several sons and several daughters, and he first of all provides a fund for the children of one of his sons, Cyril Stanley Carr Boulter, a fund of some £8,000 stock, and he provides that that fund which he calls his "grandchildren's fund" shall be applicable for the benefit of his son Cyril's children, and then in case of failure to those children he says that the fund is to be held on trust

"for the children of my daughter Ethel Gladys May Bendall and of my son, Stanley John Boulter, for their absolute benefit," but subject in the case of the infant defendants "to the conditions as to their maintenance, education, and residence in England, contained in cl. 10 of this my will."

That is a contingent interest which may fall into the trust fund which I have already dealt with, and it is suggested that the language of that gift may have some influence on the language of that gift with which I had to deal. In my judgment, however, there is nothing in that which casts any light upon the trust contained subsequently in that will with reference to the main fund with which I have to deal. By cl. 10 of the will the testator directed that his trustees were to hold the settled fund of his son Stanley John Boulter (that settled fund was as a matter of fact a share of the residue of the testator's estate)

"upon trust to pay the income thereof to him during his life, and from and after his decease, and whether he should survive me or die in my lifetime, upon trust as to both corpus and income for the children of my said son S. J. Boulter or of any such children or any of their issue (if more than one) and in such manner as he shall by any deed or deeds or by his will or any codicil thereto appoint, and in default of such appointment and so far as any such appointment shall not extend in trust for the children of his same son who being male should attain the age of twenty-one years or being female should attain that age or marry,"

and then there is a hotchpot clause. Then comes the proviso on which the present question turns. The present position of affairs is this. The son, Stanley John Boulter, was married in or about 1910 to a German lady, and at the time the will was made he was away in the war fighting. No doubt the condition of the will had some reference to those facts. Since the conclusion of the war he has returned to England; he had been engaged on the Stock Exchange; he finds that his employment is failing him. He has a certain gift or knowledge of foreign languages and he thinks that the best plan of employment that he can engage in is to go abroad and make use of that special knowledge. He now desires to know whether if he goes abroad and takes his wife and children with him, which he would naturally desire to do, the result would be that his children would forfeit the interest given to them under cl. 10.

A The first question to determine is whether the condition in question is a condition precedent or a condition subsequent. As to that I have no doubt whatever. There is a clear gift to the children which vests the property in them on their attaining twenty-one or marrying in the case of daughters. There is superadded to that gift a gift which is described by the testator himself as being a gift over on forfeiture. In my judgment, the condition in question is a clear condition sub-
B sequent. That being so, it is said that I ought not to favour the condition subsequent if the gift is liable to fail on any one of several grounds. Three grounds have been suggested as grounds on which this gift may fail. The first is uncertainty, the second is that it is contrary to public policy, and the third is that there is an impossibility in the children electing whether to comply or not to comply with the condition. With regard to uncertainty I feel considerable difficulty. The
C gift is certainly not as uncertain as in the great case of *Clavering* v. *Ellison* (1) where there was a difficulty in determining what was meant. But at the same time I think this will is not by any means a clear one. When the testator talks of the children being maintained in England, I think there is no reasonable doubt, but then he says "and do not reside abroad except for a period not exceeding six weeks in each year." Now what does that mean? Is "abroad" within England,
D or has the word "abroad" the ordinary meaning in the English language. Counsel for those entitled under the gift over says that "abroad" means anywhere out of England, so that, if the children went for eight or ten weeks to Scotland, there would be a forfeiture. I do not think that can be right. The word "abroad" is not satisfied by a transference to some other part of these islands, although it may be that the children are taken out of the English jurisdiction. The word "abroad"
E can never be used by anybody in talking of a person who has gone to Scotland; nor, I think, of a person who has gone to Ireland rebus sic stantibus. There is, therefore, some little difficulty in deciding whether "abroad" means out of England, or means, as it ordinarily means, outside the British Islands. There is a certain degree of uncertainty, and certainly it is uncertain enough to make me uncertain whether it is certain or not, and if I had no other ground on which
F to decide the case I think I should have reserved judgment and taken a good deal of time and trouble in thinking that matter out.

However, there is a second point, the question of public policy. Is it contrary to public policy that children to whom interests are given should be deprived of those interests in case they follow the fortunes of their parents should the parents go abroad? In my judgment, such a condition is clearly a condition contrary to
G public policy. It seems to me very liable to cause a father to neglect to perform his duties towards his children in such a case as has arisen in the present case, and a circumstance that I do not neglect is the children coming by their next friend to the court and putting the case to the court whether they should go abroad with their father and lose the property or remain in England, retaining the property, and lose the advantages of being with their parents. It seems to me
H that the whole tendency of this provision is one which in many sets of circumstances, including the set of circumstances that appear to be here, might have a very prejudicial effect indeed on the position of the infants and upon the judgment that has to be exercised by their parents for their benefit.

The third objection that is put is that the clause seeks to take away something from the infants on an exercise by the infants of a judgment or determination
I which they are not capable of exercising. In support of that contention, several cases have been referred to, including *Partridge* v. *Partridge* (2). On this point I agree there is difficulty. If the "non compliance with the foregoing condition" is meant to be a non-compliance on the part of the father or parent, it appears to me that the argument that the clause is void as contrary to public policy is considerably strengthened. But in any case, even if that be so, even if the non-compliance originally had to be the non-compliance of the father or the parent, it is clear that non-compliance on the part of the children is not aimed at or pointed to after the death of the father and mother. Here again this is not anything like so strong a

ground as the second ground that I have mentioned, and I prefer with regard to that to withhold my judgment. Counsel for those entitled under the gift over said a great deal about the mother being a German mother, and it being undesirable for anybody to leave England and become subject to German culture and all that sort of thing. However, I am not aware that there is any question of that kind which can be usefully considered here. The clause is not limited in any way to Germany, it is the whole world against the British Islands, and I do not think that in determining the matter I ought to have any regard to the fact that some part of the world outside the British Islands is subject to German culture. Very great stress was laid by counsel for those entitled under the gift over on a decision of EVE, J., *Re Borwick* (3). I intimated to counsel when he cited the case that it did not seem to me to apply because the question there was not a question of a condition subsequent, and, having looked at the case again, I am confirmed in that opinion. The learned judge there had to deal with something entirely different from a condition subsequent, namely, a defined period during which a certain power might be exercised. That is all. The considerations applicable to a question of that kind seem to me to be totally different from the considerations applicable to such a case as the present where there is a clear original vested gift in certain defined persons, and there is then a clear condition subsequent taking the benefits away from them on specified conditions. The conditions in the present case are clearly operative during the life of the parent, in view of the words of the clause which speak of "either before or after my death."

I declare that although the conditions are operative during the life of the parent they are void.

I am asked to say that because the plaintiffs are trustees of a particular class—namely, a corporation—the court ought to give them extra costs. I am surprised to hear that the taxing-masters disallow trustees costs of opinions in such cases, but I cannot make any different order in the case of a bank from that of any other trustee.

Solicitors: *Stanley, Hedderwick & Co.*; *Budd, Johnson, Jecks & Colclough.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

Re WELSH HOSPITAL (NETLEY) FUND. THOMAS *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (P. O. Lawrence, J.), February 22, 1921]

[Reported [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 65 Sol. Jo. 417]

Charity—Cy-pres doctrine—General charitable intent—Fund raised by voluntary subscriptions for hospital for sick and wounded Welsh soldiers—Hospital no longer needed for this purpose—End of war—Proposal to use fund for benefit of soldiers still sick or wounded.

In 1914 an appeal was made for subscriptions to a fund for establishing a hospital for sick and wounded Welsh soldiers, which was described as "The Welsh Hospital Movement." Monies were received from private individuals, and collections made in the streets and churches, and from the proceeds of concerts and entertainments, with which a hospital was built and equipped. Throughout the years 1914–1918 further appeals were made for subscriptions for the maintenance and upkeep of the hospital, and large sums were

subscribed, in the same manner. In March, 1919, the hospital, being no longer required for the object for which it had been built, was disposed of and the staff disbanded. After all liabilities had been met there remained in the hands of the trustees of the fund a surplus, which the trustees proposed to apply in the foundation of scholarships for the encouragement of the study of medicine and surgery by persons of Welsh nationality in the University of Wales.

Held: a donor to a fund raised in this manner could have had no intention that the money should be returned to him if the immediate object for which the collection was made should come to an end; the main underlying object was to provide money for the comfort of sick and wounded Welshmen; and, therefore, there was a general charitable intent and the court was at liberty to apply the fund cy-près; the trustees' proposal came directly under this object, but it might be practicable to apply the surplus in a way which carried out the intent of the subscribers more immediately (e.g. by applying the fund for the benefit of those Welsh soldiers who were still sick and wounded as a result of the 1914–1918 war), and so a scheme should be directed, to be settled by a judge.

Re British Red Cross Balkan Fund, British Red Cross Society v. *Johnson*, [1914] 2 Ch. 419, explained and distinguished.

Notes. Applied: *Re North Devon and West Somerset Relief Fund Trusts, Hylton (Baron)* v. *Wright*, [1953] 2 All E.R. 1032; *Re British School of Egyptian Archaeology, Murray* v. *Public Trustee*, [1954] 1 All E.R. 887. Considered: *Re Hillier, Hillier* v. *A.-G.*, [1954] 2 All E.R. 59. Distinguished: *Re Ulverston and District New Hospital Building Fund, Birkett* v. *Barrow and Furness Hospital Management Committee*, [1956] 3 All E.R. 164. Referred: *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor*, [1958] 1 All E.R. 37.

As to when an intention to relieve poverty will be inferred so as to render a gift charitable, see 4 Halsbury's Laws (3rd Edn.) 217, as to charitable funds raised by voluntary subscription, see ibid. 266, as to the continuance of a general charitable trust despite failure of its objects, see ibid. 286, 306, 319–322. For cases see 8 Digest (Repl.) 467.

Cases referred to:

(1) *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson*, [1914] 2 Ch. 419; 84 L.J.Ch. 79; 111 L.T. 1069; 30 T.L.R. 662; 58 Sol. Jo. 755; 43 Digest 657, *907*.

(2) *Re Princess Mary Fund, Revelstoke* v. *A.-G.* (Nov. 1919), unreported.

(3) *Re Cotton Control Board's Levies Fund, Dixon* v. *A.-G.* (Jan. 1921), unreported.

Also referred to in argument:

Re Campden Charities (1881), 18 Ch.D. 310; 50 L.J.Ch. 646; 45 L.T. 152; 30 W.R. 496, C.A.; 8 Digest (Repl.) 467, *1678*.

Ironmongers' Co. v. *A.-G.* (1844), 10 Cl. & Fin. 908; 8 E.R. 983, H.L.; 8 Digest (Repl.) 464, *1643*.

Pease v. *Pattinson* (1886), 32 Ch.D. 154; 55 L.J.Ch. 617; 54 L.T. 209; 34 W.R. 361; 2 T.L.R. 306; 8 Digest (Repl.) 511, *2376*.

Originating Summons.

In September, 1914, an appeal was made throughout Wales for subscriptions to enable a Welsh hospital to be established to relieve and comfort sick and wounded Welsh soldiers. Subscriptions were received from private individuals, from street collections, and from collections in churches and other public places, and also from the proceeds of concerts and entertainments. A hospital at Netley was built and equipped, and from time to time similar appeals were made and subscriptions received from the same sources and by the same means during the years 1914 to 1918, and the upkeep of the hospital was defrayed thereout. In March, 1919, the hospital was closed down and the staff disbanded, the property being disposed of

to the War Office, and it was found that after all liabilities had been met there remained in the hands of the trustees of the fund a sum of about £10,000. After consideration the trustees decided to apply this surplus from the Welsh Hospital Fund for the purpose of establishing scholarships in the University of Wales for the encouragement of the study of medicine and surgery therein by persons of Welsh nationality. The trustees of the fund took out this originating summons to have it determined whether in the events which had happened the trustees of the fund were at liberty to give effect to the proposal to so dispose of the surplus of the fund. The judge directed the summons to be amended by adding a subscriber on whose behalf it should be argued that there was a resulting trust in favour of the subscribers or that the proposed scheme was not a proper way to dispose of the surplus of the fund, but that some other scheme should be suggested which would be more direct to the immediate object of the original fund. The facts are more fully dealt with in his Lordship's judgment.

Owen Thompson, *K.C.*, and *W. J. Whittaker* for the trustees of the fund.

H. O. Danckwerts for the Attorney-General.

W. A. Greene for the defendant, John Griffiths Jones, appointed to represent the subscribers to the fund.

P. O. LAWRENCE, J.—In this case the court is asked to decide whether the plaintiffs, who are trustees of the surplus funds raised during the war for the support of the Welsh Hospital at Netley, are at liberty to give effect to a proposal which has been made that those surplus assets should be applied for the purpose of establishing scholarships in the University of Wales for the encouragement of the study of medicine and surgery by persons of Welsh nationality. In order to determine that question, the court has first of all to be satisfied that this fund is devoted to charity and can be applied under the doctrine of cy-près, and that depends on what the court infers to have been the true intention of the subscribers to that fund when they gave their subscriptions or donations.

The fund was started in September, 1914, by the Lord Mayor of Cardiff issuing an appeal for subscriptions towards a Welsh hospital for service with the Expeditionary Force. I have before me an appeal dated Sept. 1, 1914, and I do not propose to read it through again, but I would call attention to the fact that the first idea was that the hospital should be one serving with the Expeditionary Force at the front in France. The appeal issued also shows that six months' service in France is estimated to cost £15,000, and it continues:

> "But the sum subscribed is not limited to this amount, as further subscriptions can be used for prolonging the service or increasing the accommodation of the hospital,"

and the appeal winds up with this expression:

> "We believe that Wales will rise to the full height of its responsibilities in this great national crisis and by subscribing the necessary sum within a few days prove that it is foremost in seeking to relieve and comfort by the hands of their own fellow countrymen our sick and wounded across the seas."

It is to be observed that the slip which was to be returned by the subscribers to the fund describes the object of the appeal as "The Welsh Hospital Movement." That appeal was responded to generously by the inhabitants of Wales, and from time to time further appeals were issued. The scheme as originally contemplated of providing a hospital for service with the Expeditionary Force in France was eventually altered and instead a hospital was established at Netley in order to receive the wounded and sick Welsh soldiers who were sent from the battle-front back to England. In support of the Netley Hospital various appeals were issued, and the hospital itself was built and fully equipped by Nov. 3, 1914, and thenceforward was carried on by means of the voluntary subscriptions and donations entirely, with this exception, that for the last two years the staff was rationed by the War Office. Now, dealing with the further appeals that were issued, I need

A only call attention to two of them, and they run very much on the same lines, but we find that the appeals are those of the president and chairman of the executive committee and honorary treasurer of the fund. They are headed, "The Welsh Hospitals," and underneath that general heading is, "The Welsh Hospital, Netley," and then "No 34 (the Welsh) General Hospital," the latter being the unit abroad at the front of the Welsh Division. The General Welsh Hospital, as I B call it, was not run by this charity, but this charity contributed to comforts for the unit abroad. The appeals which were issued contain statements showing what had been done up to the time of those appeals in the way of relieving the sick and wounded and also showed how the funds had been applied, and asked for funds to enable the good work to be further continued. I think I am right in saying that all the appeals are appeals for the special object of continuing the good work of C relieving the sick and wounded Welshmen, inhabitants of Wales, who arrived on these shores from the front. That is the main and particular object with which these appeals are concerned. In response to all these appeals a very large sum of money was subscribed. There has been put in evidence the account of the fund, which shows that a total sum of £80,445 0s. 1d. was subscribed. That was expended in the ordinary way on building, equipping and running the Welsh D Hospital at Netley, and a comparatively small sum of £125 10s. was spent in providing comforts for the overseas hospital. The hospital was closed down in March, 1919, the staff was disbanded, and the property was disposed of to the War Office. When the affairs of the hospital were wound-up, it was found that there was a surplus of £9,472 13s. 8d. Part of this sum, namely, £9,360, was invested in the purchase of £11,700 4 per cent. Funding Stock 1960–90, and the E balance of £112 13s. 8d. was cash standing to the credit of the hospital at its bank. I ought to mention that there is a further sum of £108 7s. mentioned in the evidence which stands on an entirely different footing, and to dispose of that once and for all I may say that that sum was subscribed by Mr. Jenkins subsequently to the promulgation of the present scheme of having medical scholarships at the University of Wales. It therefore stands on an entirely different footing, and I F need not discuss what is to be done with that sum on the present occasion. The trustees of the fund, having the surplus money in their hands, considered what would be the best way of dealing with it, and came to the conclusion that it should be applied in the foundation of scholarships for the encouragement of the study of medicine and surgery by persons of Welsh nationality at the University of Wales.

The first question that I have to determine is whether this fund in their hands G can be applied cy-près or whether there is a resulting trust in favour of the subscribers. When the case first came before me there was no one before the court to argue the point of view of the subscribers to the fund. I stood the summons over with a view to having a subscriber added who should represent the general subscribers. That has been done, and the summons has been amended by adding Mr. John Griffiths Jones, whom I propose to appoint to represent the subscribers H to the fund. He has appeared by counsel on the present occasion, who has argued on behalf of the subscribers that there is a resulting trust to them, and that the fund ought to be paid back to the various subscribers. All the other parties, that is to say, the plaintiffs, the Attorney-General, and the defendant, Mr. James Robinson, who was keenly interested in the fund, being a subscriber himself, have argued that on the facts proved there is a general charitable intent and that the I court is at liberty to apply the fund cy-près. In my judgment that contention is well founded. In this case it must be observed that the fund was created by subscriptions from various sources and in varying amounts, partly by private individuals giving more or less large amounts and partly by concerts, entertainments, and collections in streets and at churches and other public places all over the towns and villages of Wales. In so far as they were donations and subscriptions of substantial amounts made by private individuals, those donors or subscribers knew that the fund was being raised in this way by collections in streets and churches, and at these entertainments, and they knew that their subscriptions would go to a

fund constituted in this manner; there were flag days arranged and street collections took place. It would be impossible, to my mind, to think that the donor to a fund of that kind, giving his coin into a street collecting-box, would have an intention to have that money returned to him if the immediate object for which the collection was made should come to an end. Similarly, take the person who goes to an entertainment or to a concert, the proceeds of which are to be given to a fund having for its immediate purpose the relief of the sick and wounded coming back from France. There, again, it is to my mind difficult to imagine that when that immediate object was over the person paying for his ticket at the concert or entertainment should require to have that money handed back to him when the immediate object was attained.

I think the true inference to draw from the facts of this case is that although the subscriptions and moneys were paid in view of the particular purpose of first of all building, equipping and then running a hospital at Netley, the main underlying object was to provide money for the comfort of sick and wounded Welshmen. It is true that the parties had in view those who were rendered sick and were wounded in the war that was then taking place. I cannot but infer that the persons who gave those moneys intended far above any particular purpose to devote that money to the benefit of their sick and wounded countrymen, and I think the true inference is that the gift being parted with for good and all was intended to be a gift to be applied for the benefit of sick and wounded Welshmen. If I am right in that inference the court is at liberty to apply the fund cy-près, and I am fortified in my opinion by the recent decisions of PETERSON, J., and RUSSELL, J. PETERSON, J., in *Re Princess Mary Fund, Revelstoke* v. *A.-G.* (2), came to the conclusion under analogous circumstances that he had power to apply the surplus of that fund which had been collected for the purpose of making Christmas presents to the troops abroad cy-près by a different method altogether. RUSSELL, J., similarly in *Re Cotton Control Board's Levies Fund, Dixon* v. *A.-G.* (3), came to the conclusion that the very large surplus which there existed was applicable cy-près, and sanctioned a scheme under which that fund was applied. Of course those decisions, as far as they are decisions of fact, do not govern the present case, but in both those cases the learned judges deciding them had no difficulty in drawing the inference that the donors in the one case, and the persons on whom the levy was made in the other, had devoted the funds, although subscribed for the immediate particular object in the one case, and levied for the immediate particular object in the other, to charity. There was one case to which my attention has been called which in my judgment is distinguishable and that is the case decided by ASTBURY, J., *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson* (1). That is not a decision on the point at all. In that case funds had been subscribed for the purpose of assisting the sick and wounded in the Balkan war. There was a large surplus, and in that case it was admitted that the surplus belonged to some or all of the subscribers by way of resulting trust. Whether that admission was one which was justified in the circumstances was not considered at all. The whole case was founded on how the fund was to be distributed, and the learned judge decided only the point how that fund should be distributed amongst the subscribers. Therefore that case affords no assistance at all in coming to the determination whether or not the particular fund subscribed in the way I have described is applicable cy-près.

The next question that has to be decided is whether the principle of the particular application which the trustees seek to make of the funds in their hands, is one which is justified under the doctrine of cy-près. It was argued by counsel for the defendant James Robinson that the suggested application was one which was not a diversion from the particular object for which the fund was raised. It was said, and I think there is great force in the argument, that if one subscribes a fund for the benefit of sick and wounded, that benefit includes the training of a person who would attend to the sick and wounded, and I do not agree with the contention of counsel for the defendant John Griffiths Jones that this scheme is so far removed

from the objects for which the money was immediately wanted, as to make it inapplicable under the cy-près doctrine. The training of medical men is one of the first ways of relieving the sick and wounded; they must have doctors who must be trained, and doctors are the persons who relieve the sick and wounded. Therefore I think it comes directly under the immediate object of the general charitable intent which I have inferred. But there may be a more immediate object than that. Counsel for the defendant John Griffiths Jones has rightly pointed out that the fund might be more immediately applied for the benefit of the sick and wounded who are still sick and wounded from the effects of the present war, and that of course is a more immediate way of carrying out the general charitable intent.

On the other hand, I have nothing before me in the nature of a scheme to enable me to say whether such an application would be feasible or would be beneficial. The fund is one which does not admit of any very large expenditure in any particular direction, and it is a matter I think to be considered by the Attorney-General and by those more immediately concerned, the trustees, as to whether this method that is now proposed, of scholarships, is or is not the best and the nearest possible practicable purpose for which the fund can be applied. I have the assurance of counsel on behalf of the Attorney-General that if I make a general declaration that the fund is applicable cy-près, he will communicate with the War Office and others whom he might desire to consult with a view to seeing what is the nearest possible practicable way in which this fund can be applied. In what I have said I do not want it to be inferred that I in any way throw cold water on the scheme which has been put forward; it may very well be that that is the very best way the fund could be applied.

I think that the Attorney-General is well advised to tell the court that he will make some further inquiries before going into the details of that scheme. Of course, I have not considered the scheme in its details at all—that is to say the scheme of scholarships; that would be a matter for chambers. If such a scheme is adopted then the details should be inquired into and they may be or may not be approved as they are set out in the evidence.

Order accordingly.

Solicitors: *Wrentmore & Sons*, for *Trevor Edward Harris*, Cardiff; *Treasury Solicitor.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

A

JOHNSTONE *v.* PEDLAR

[House of Lords (Viscount Finlay, Viscount Cave, Lord Atkinson, Lord Sumner and Lord Phillimore), April 12, 14, June 24, 1921]

[Reported [1921] 2 A.C. 262; 90 L.J.P.C. 181; 125 L.T. 809; 37 T.L.R. 870; 65 Sol. Jo. 679; 27 Cox, C. C. 68]

B

Alien—Constitutional law—Act of State—Alien friend—Seizure of personal property by official—Alien resident in British territory—Ratification of seizure by government—Action against official—Defence of act of State—Competency.

C

An alien friend resident in British territory is a subject of His Majesty by local allegiance and is normally regarded as a British subject for the time being. Accordingly, where such an alien brings an action for trover and detinue against an officer of the Crown in respect of the seizure and detention of his personal property the officer cannot avail himself of the defence that his act has been adopted and ratified by the Crown as an act of State. An alien takes his character from his State, and, if his State is friendly to Great Britain, it is immaterial that the alien is individually hostile and has rendered himself liable to prosecution for an offence against this country, e.g., treason.

D

The respondent, an American citizen, was convicted in Ireland of being engaged in illegal drilling. When he was arrested he had in his possession £124 in cash and a cheque for £4 15s. 6d. This money was taken from him and detained by an officer of the Crown as an act of State for the defence of the realm and the prevention of crime, and this seizure and detention was ratified, adopted, and confirmed by the Chief Secretary for Ireland. In an action by the respondent for the return of the money seized:

E

Held: the defence of act of State could not be made good as the respondent was within the King's dominions when the seizure was made, and, therefore, he was entitled to maintain the action and to have his money returned.

F

Decision of Court of Appeal in Ireland, [1920] 2 I.R. 450, affirmed.

Notes. The references to the remedy open to persons who have suffered damage at the hands of servants of the Crown must now be read in the light of the provisions of the Crown Proceedings Act, 1947 (6 Halsbury's Statutes (2nd Edn.) 46).

G

Considered: *R.* v. *Joyce*, [1945] 2 All E.R. 673. Referred to: *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271; *Joyce* v. *D.P.P.*, [1946] 1 All E.R. 186

As to the rights and disabilities of alien friends, see 1 Halsbury's Laws (3rd Edn.) 500–503, and as to acts of State see ibid., vol. 7, p. 279 et seq. For cases see 2 Digest (Repl.) 169 et seq., and 11 Digest (Repl.) 613 et seq.

H

Cases referred to:

(1) *Buron* v. *Denman* (1848), 2 Exch. 167; 3 New Pract. Cas. 62; 6 State Tr. N.S. 525; 10 L.T.O.S. 523; 154 E.R. 450; 11 Digest (Repl.) 621, *478*.

(2) *Walker* v. *Baird*, [1892] A.C. 491; 61 L.J.P.C. 92; 67 L.T. 513, P.C.; 11 Digest (Repl.) 618, *452*.

I

(3) *Tobin* v. *R.* (1864), 16 C.B.N.S. 310; 4 New Rep. 274; 33 L.J.C.P. 199; 10 L.T. 762; 10 Jur.N.S. 1029; 12 W.R. 838; 2 Mar. L.C. 45; 143 E.R. 1148; 38 Digest 66, *411*.

(4) *Feather* v. *R.* (1865), 6 B. & S. 257; 35 L.J.Q.B. 200; 12 L.T. 112; 29 J.P. 709; 122 E.R. 1191; 38 Digest 64, *391*.

(5) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P.C. 22; 7 Moo. Ind. App. 476; 19 E.R. 388; sub nom. *East India Co.* v. *Kamachee Boye Sahiba*, 7 W.R. 722, P.C.; 11 Digest (Repl.) 617, *442*.

(6) *Anon.* (1514), 1 Dyer, 2 b.; 73 E.R. 6; 2 Digest (Repl.) 171, *14*.

A (7) *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272; 60 L.J.P.C. 28; 64 L.T. 378; 7 T.L.R. 378, P.C.; 2 Digest (Repl.) 180, *98.*

(8) *A.-G. for Canada* v. *Cain*, *Same* v. *Gilhula*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757, P.C.; 2 Digest (Repl.) 180, *99.*

(9) *Re Adam* (1837), 1 Moo. P.C.C. 460; 12 E.R. 889, P.C.; 2 Digest (Repl.) 196, *170.*

B (10) *Calvin's Case* (1608), 7 Co. Rep. 1a; Jenk. 306; 2 State Tr. 559; 77 E.R. 377; sub nom. *Union of Scotland and England Case*, Moore, K.B. 790; 11 Digest (Repl.) 560, *2.*

(11) *De Jager* v. *A.-G. for Natal*, [1907] A.C. 326; 76 L.J.P.C. 62; 96 L.T. 857; 23 T.L.R. 516, P.C.; 15 Digest (Repl.) 766, *7055.*

C (12) *Porter v. Freudenberg, Kreglinger* v. *S. Samuel and Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 213, *275.*

(13) *Poll* v. *Lord Advocate* (1899), 1 F. (Ct. of Sess.) 823; 11 Digest (Repl.) 455, **480.*

D (14) *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102; 49 L.J.P.C. 20; 41 L.T. 629; 28 W.R. 373, P.C.; 11 Digest (Repl.) 622, *486.*

(15) *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613; 75 L.J.K.B. 418; 94 L.T. 858, C.A.; 11 Digest (Repl.) 613, *426.*

(16) *Cook* v. *Sprigg*, [1899] A.C. 572; 68 L.J.P.C. 144; 81 L.T. 281; 15 T.L.R. 515, P.C.; 11 Digest (Repl.) 627, *502.*

E (17) *Ex-Rajah of Coorg* (*Veer Rajundur Wadeer*) v. *East India Co.* (1860), 29 Beav. 300; 54 E.R. 642; sub nom. *Veer Rajundur Wadeer* v. *East India Co.*, 30 L.J.Ch. 226; 3 L.T. 646; sub nom. *Wadeer* v. *East India Co.*, 7 Jur.N.S. 350; 9 W.R. 247; 11 Digest (Repl.) 619, *460.*

(18) *Sirdar Bhagwan Singh* v. *Secretary of State for India* (1874), L.R. 2 Ind. App. 38; 11 Digest (Repl.) 618, *450.*

F (19) *Napper Tandy* v. *Earl of Westmorland* (1800), 27 State Tr. 1191; 11 Digest (Repl.) 614, **371.*

(20) *Luby* v. *Lord Wodehouse* (1865), 17 I.C.L.R. 618; 38 Digest 60, *359 vii.*

(21) *Sullivan* v. *Lord Spencer* (1872), I.R. 6 C.L. 173; 38 Digest 60, *359 viii.*

(22) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 87 E.R. 1157; 2 Digest (Repl.) 222, *328.*

G (23) *The Johanna Emilie* (1854), 1 Ecc. & Ad. 317; Spinks. 12; 23 L.T.O.S. 322; 18 Jur. 703; 2 Digest (Repl.) 222, *334.*

(24) *Wells* v. *Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 171, *12.*

(25) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 11 Digest (Repl.) 638, *618.*

H (26) *Boulton* v. *Dobree* (1808), 2 Camp. 163, N.P.; 2 Digest (Repl.) 242, *441.*

(27) *The Hoop* (1799), 1 Ch. Rob. 196; 11 Digest (Repl.) 637, *614.*

(28) *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284; 85 L.J.K.B. 374; 113 L.T. 949; 32 T.L.R. 133; 60 Sol. Jo. 105, C.A.; 2 Digest (Repl.) 242, *445.*

I Also referred to in argument:

Heddon v. *Evans* (1919), 35 T.L.R. 642.

Seaman v. *Burley*, [1896] 2 Q.B. 344; 65 L.J.M.C. 208; 75 L.T. 91; 60 J.P. 772; 45 W.R. 1; 12 T.L.R. 599; 40 Sol. Jo. 684; 18 Cox, C.C. 403, C.A.; 14 Digest (Repl.) 609, *6037.*

Chambers v. *Jennings* (1702), 7 Mod. Rep. 125; 2 Salk. 553; Holt, K.B. 597; 87 E.R. 1139; 16 Digest 193, *978.*

Pisani v. *Lawson* (1839), 6 Bing.N.C. 90; 8 Dowl. 57; 8 Scott, 182; 9 L.J.C.P. 12; 3 Jur. 1153; 133 E.R. 35; 2 Digest (Repl.) 171, *19.*

Appeal by the Chief Commissioner of the Dublin Metropolitan Police from an order of the Court of Appeal (RONAN and O'CONNOR, L.JJ., O'CONNOR, M.R., dissenting), reported [1920] 2 I.R. 450.

The respondent brought an action for trover and conversion against the appellant, Lieut.-Col. W. Edgeworth Johnstone, the Chief Commissioner of the Dublin Metropolitan Police. He alleged in statement of claim that the appellant had detained a sum of £124 cash, and a cheque for £4 15s. 6d. both the property of the respondent, and refused to give them up, and he claimed the return of the goods or their value and £10 damages for their detention, or in the alternative damages for their conversion. The defence was a general denial that the money and the cheque were the property of the respondent, and, further, that the respondent was an alien and that the moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of State for the defence of the realm, and for the prevention of crime. At the trial of the action before PIM, J., the learned judge directed the jury to find for the appellant, and entered judgment for him accordingly. The respondent moved the Divisional Court (DODD, GORDON, and MOORE, JJ.) to have the judgment set aside and judgment entered for the respondent, but the motion was refused. The respondent appealed from that order to the Court of Appeal, where the decision was reversed (RONAN and O'CONNOR, L.JJ., O'CONNOR, M.R., dissenting), and judgment was entered for the respondent for payment of the money and delivery up of the cheque.

A. M. Sullivan, *K.C.*, *McSweeney*, *K.C.*, *Cecil Fforde*, *K.C.*, and *Lipsett* (the last three of the Irish Bar) for the appellant.

T. M. Healy, *K.C.*, and *John O'Byrne* (of the Irish Bar) for the respondent.

The House took time for consideration.

June 24. The following opinions were read.

VISCOUNT FINLAY.—The appellant is the Chief Commissioner of the Dublin Metropolitan Police. He was the defendant in an action in which the respondent sued for the detention of £124 in cash and a cheque for £4 15s. 6d. The respondent was convicted of being engaged in illegal drilling and there was found upon him at the time of his arrest the cash and cheque now claimed. The respondent is a naturalised citizen of the U.S.A. and the detention is alleged by the appellant to be an act of State. A certificate given by the Chief Secretary for Ireland was put in at the trial and is as follows:

> "It appearing that Richard H. Boyle, inspector of the Dublin Metropolitan Police, on May 1, 1918, arrested one William Pedlar (an alien) at Blackrock, co. Dublin, on a warrant dated May 1, 1918, signed by Mr. Swifte, K.C., Divisional Justice, for an offence under the Defence of the Realm Act, and that the said Inspector Boyle searched the said William Pedlar after said arrest, and that there were found upon him (inter alia) a sum of £124 cash and a cheque for £4 15s. 6d., both of which were taken and detained by an officer of the Crown (who still detains same) as an act of State for the defence of the realm and for the prevention of crime. Now I, the Right Hon. Ian MacPherson, M.P., Chief Secretary for Ireland, in my capacity as a Minister of the Crown and officer of State and official superior of the said officer, do hereby formally ratify, adopt, and confirm the said seizure of the said cash and cheque and the detention of same by the said officer on the grounds aforesaid.—Dated this 19th day of June, 1919.—(Signed) IAN MACPHERSON."

The action was tried before PIM, J., with a jury. The learned judge, after argument, directed the jury to find for the defendant. The Divisional Court, consisting of DODD, GORDEN, and MOORE, JJ., dismissed a motion on behalf of the plaintiff that the verdict and judgment should be set aside. The Court of Appeal were divided in opinion. The Master of the Rolls held that the appeal should be dismissed, being of opinion that the plaintiff was in the position of an alien enemy and that no action was maintainable in respect of the seizure of the cash and cheque,

as that had been adopted by the Crown as an act of State. Ronan and Connor, L.JJ., however, held that as a subject of a State at peace with His Majesty, the plaintiff was in the position of a friendly alien, against whom the defence of act of State could not be raised. In accordance with the opinion of the majority of the court the appeal was allowed, and judgment was entered for the plaintiff for £124 and the delivery up to him of the cheque. On the present appeal your Lordships are asked to restore the judgment of Pim, J.

The plaintiff was born in Ireland. When very young he went first to Glasgow and afterwards to America, where he was naturalised as a citizen of the United States in January, 1916. In March of the same year he returned to Scotland and thence to Ireland, and took part in the rebellion of 1916 in Dublin. He was deported to Frongoch and on his release in May, 1917, returned to Ireland and continued to reside there. On May 1, 1918, he was arrested on a charge of illegal drilling. He was convicted and remained in Belfast gaol under sentence for six months. When he was arrested he had with him the money and cheque, which were seized by the police. When he was in gaol his solicitor wrote to the Chief Commissioner asking that the money should be returned to his wife. He was informed by letter of Sept. 2, 1918, that the Chief Commissioner was advised that the money should be retained for the present by the police. The present action was then brought by a writ dated Nov. 15, 1918. The statement of claim alleged detention and conversion of the cash and cheque and claimed their return and damages. The statement of defence was delivered on Dec. 18, 1918, and was as follows:

> "1. The defendant denies each of the several acts in the statement of claim alleged. 2. The defendant denies that the money or cheque mentioned was, or is, the property of the plaintiff as alleged. 3. The defendant says that the said moneys and cheque were the property of an illegal association and were in plaintiff's possession for the illegal purpose of the said association at the time of the acts complained of. 4. The plaintiff is an alien and the said moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of State for the defence of the realm and for the prevention of crime, which is the detention and conversion complained of."

The following particulars were delivered under para. 3:

> "Defendant was a member and organiser of an association by whatever name known whose objects were to arm and drill disaffected persons in Ireland in order to promote resistance to lawful authority by force and violence, and the moneys mentioned were the moneys of said association in plaintiff's possession for the purpose of organising the arming and drilling of the members of the association as aforesaid."

A motion was made on behalf of the plaintiff to have the words alleging that the plaintiff was an alien struck out from para. 4 of the defence. The substantial question which this motion was intended to raise in a summary way was that it was immaterial that the plaintiff was an alien, as he was in Ireland and a citizen of a State at peace with His Majesty. This motion was refused by order of Jan. 28, 1919. On Feb. 11, 1919, the plaintiff's reply was delivered joining issue and submitting that para. 4 of the defence was bad in law. The certificate of the Chief Secretary which I have already set out was given on June 19, 1919, and the trial took place before Pim, J., with a common jury, on July 3.

The plaintiff was called as a witness. He proved the facts as to his history which I have already stated. In the course of his evidence he stated that he was a member of the Clan na Gael; that the money did not belong to that or to any other organisation; that the £100 was a grant or loan made to him by the National Aid Association, which was an organisation for assisting those who had taken part in or were victimised for the part they had taken in the rebellion of 1916; that the grant was made by cheque, which he cashed, getting in exchange a bank note for £100, part of the money taken by the police; and that the other money seized

formed part of his earnings in business in Ireland. He admitted that he had been engaged in drilling and that he had advised the men to have bicycles, and that he did say that "they might be able to get arms, that there were chances." The Crown Solicitor was called, and produced the certificate of the Chief Secretary above set out. PIM, J., asked the jury whether the sum of £124, or any part of it, was the property of the plaintiff. The jury answered "Yes" as to the £24, but could not agree as to the balance of £100. As directed by the learned judge, they found a verdict for the defendant, but in the Court of Appeal, as I have said, judgment was entered for the plaintiff.

The case turns upon the question whether the defence of "act of State" is available as against the present plaintiff. Paragraph 3 of the defence was not proved. It is the settled law of this country, applicable as much to Ireland as to England, that, if a wrongful act has been committed against the person or the property of any person, the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be. This rule of law has, however, been held subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British courts in such a case it is open to the defendant to plead that the act was done by the orders of the British government, or that after it had been committed it was adopted by the British government. In any such case the act is regarded as an act of State of which a municipal court cannot take cognisance. The foreigner who has sustained injury must seek redress against the British government through his own government by diplomatic or other means. This was established in 1848 in the well-known case of *Buron* v. *Denman* (1). The defendant in that case, Captain Denman, was a British naval officer engaged on the coast of Africa in measures for the suppression of the slave trade. The plaintiff was a Spaniard engaged in that trade. The acts in respect of which the action was brought were the destruction by the defendant of the barracoons in which the plaintiff kept slaves for shipment and the release of the slaves. The case was tried at Bar, and the summing-up was delivered by PARKE, B. He laid down the law with regard to acts of State as I have above stated it, and the jury found for the defendant. This doctrine has no application to any case in which the plaintiff is a British subject. If authority be wanted for the proposition that a British subject's right of action for any wrong to his person or property is not subject to this qualification with regard to acts of State it is enough to refer to *Walker* v. *Baird* (2). In that case the officers of the Crown had, with the authority of the government, seized a lobster factory in Newfoundland belonging to British subjects. An action was brought in the courts of Newfoundland against the officers engaged. The Superior Court of Newfoundland held that, in an action of this description, in which the plaintiffs were British subjects, for a trespass within British territory in time of peace, it was no answer to say in exclusion of the jurisdiction of the municipal courts that the trespass was an act of State. An appeal to His Majesty in Council was dismissed. LORD HERSCHELL said that the suggestion that these acts could be justified as acts of State was wholly untenable.

The cases in which the defence of "act of State" has hitherto been recognised have been cases in which the acts complained of were committed out of British territory. The plaintiffs have been foreigners, and no question arose as to their being in any sense subjects of the British Crown as it might have arisen if the wrongs complained of had been done in British territory. An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance and it is for this reason that in dealing with the defence of "act of State" it is often said that the act must have been abroad as well as against a foreigner in order that the defence should succeed. The plaintiff is not a subject of the British Crown, but he was, at the time of his arrest, within British territory. It was contended for him that he must be treated for the purposes of the present case as a British subject, inasmuch as he was at the time resident in Ireland. LORD

A HALE, in his PLEAS OF THE CROWN (Vol. 1, p. 541), after discussing a statute of Henry 8 (21 Hen. 8 c. 11) giving to any of the King's subjects whose goods have been taken away the right to a writ of restitution on conviction of the thief, says:

> "Though the statute speaks of the King's subjects it extends to aliens robbed, for though they are not the King's natural subjects they are the King's subjects
B when in England by local allegiance."

The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance, and may be convicted of high treason in respect of acts committed here.

The proposition put forward on behalf of the appellant was that residence in this country does not put an alien in the same position as a British subject in respect
C of acts of State of the government and does not entitle him to bring an action against a tortfeasor, whose act has been ordered or adopted by the government. I am quite unable to accept this proposition as a correct statement of our law. On such a view of the law aliens in this country instead of having the protection of British law would be at the mercy of any Department entitled to use the name of the Crown for an "act of State." It would have effects upon aliens in this
D country of a far-reaching nature as to person and property. If an alien be wrongfully arrested, even by order of the Crown, it cannot be doubted that a writ of habeas corpus is open to him, and it would be surprising if he has not the right to recover damages from the person who has wrongfully imprisoned him. He has corresponding rights as regards his property. I am unable to find any ground either of principle or of authority for a proposition so sweeping, which would profoundly
E modify the position in this country of many aliens whose conduct, while resident here, has been quite without reproach. But it does not necessarily follow that an alien who abuses for treasonable purposes the permission of the Crown to reside in this country, will still be at liberty to claim the rights of a British subject as against the servants of the Crown who have carried out any act of State affecting him or his property. While he is in this country the alien as a matter of law is
F in the allegiance of the Crown, and he cannot get rid of this "local allegiance," so as to acquire while here any immunity for crimes committed against the State. It would be a somewhat startling proposition that an alien who is engaged in acts of rebellion can claim as against the Crown or its agents that he enjoys the immunity of a British subject in respect of acts of State. While repudiating all the obligations, can he retain as between himself and the Crown all the benefits
G attaching to the status of a British subject? One who is by birth or by naturalisation a British subject and commits treason still, of course, remains for all purposes a British subject, and must be treated as such in every respect. But the alien in this country remains an alien still although for the time also a British subject in virtue of local allegiance. If he be guilty of treasonable acts, can he be permitted to assert for his own benefit, against the servants of the Crown, the status of a
H subject of the government which he is endeavouring to subvert? Primâ facie the subject of a State at peace with His Majesty is, while resident in this country, entitled to the protection accorded to British subjects, but if it be proved in the court before which the question arises that the alien is by overt acts showing that he is in active hostility to the government, though he does not thereby lose the protection of the law for his person and property as against private individuals, can
I he further claim all the privileges of a British subject as against the Crown and its servants?

These questions may arise in some other case. They cannot be decided in the present. I have touched upon them to show that the decision of the Irish Court of Appeal in this case does not necessarily involve consequences which might be described as "fantastic." But no such defence has been attempted in the case now under appeal. There is no allegation in the defence that the plaintiff was concerned in treasonable acts while in Ireland. Paragraph 4 of the defence is confined to the assertion that he is an alien, and is bad in law. This is not a mere

matter of pleading. We were informed by the counsel for the appellant that he had advisedly taken up the position that allegation of alienage was a good defence to an action in respect of an act of State in Ireland. There may have been serious difficulties which prevented the appellant from taking on himself the burthen of proving treasonable acts by the respondent while in Ireland. But the defence of act of State cannot be made good as to acts in the King's dominions on a bare averment that the plaintiff is an alien. It follows that this appeal must be dismissed with costs.

VISCOUNT CAVE.—Counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of State, the alien is without legal remedy. In my opinion, this proposition cannot be sustained.

When a wrong has been done by the king's officer to a British subject, the person wronged has no legal remedy against the sovereign, for "the king can do no wrong"; but he may sue the king's officer for the tortious act, and the latter cannot plead the authority of the sovereign, for "from the maxim that the king cannot do wrong it follows as a necessary consequence that the king cannot authorise wrong": *Tobin* v. *R.* (3); *Feather* v. *R.* (4). On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the sovereign as an act of State, the alien is without redress except by diplomatic action through the government of his own country: *Buron* v. *Denman* (1); *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (5). But there is a third case—namely, where the person aggrieved is an alien amy resident here; and I think that it is the established law that such a case falls within the first and not within the second of the above categories. In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by LITTLETON (s. 198) that an alien could bring no action, real or personal; but as regards an alien amy this proposition was disputed by COKE, who said:

> "In this case the law doth distinguish between an alien that is subject to one that is an enemy to the king, and one that is subject to one that is in league with the king, and true it is that an alien enemy shall maintain neither real nor personal action donec terræ fuerint communes, that is, until both nations be at peace. But an alien that is in league shall maintain personal action; for an alien may trade and traffick, buy and sell, and therefore of necessity he must be of ability to have personal actions, but he cannot maintain either real or mixt actions": Co. Litt., 129b.

Certainly LITTLETON's rule was not recognized by the law merchant or in Chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject (*Anon.* (6)). No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given: *Musgrove* v. *Chun Teeong Toy* (7); and having landed, he may be deported, at least if a statute authorises his expulsion: *A.-G. for Canada* v. *Cain* (8); and see *Re Adam* (9). But so long as he remains in this country with the permission of the sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligation: HALE's PLEAS OF THE CROWN, vol. 1, p. 542; *Calvin's Case* (10); *De Jager* v. *A.-G. for Natal* (11); *Porter* v. *Freudenberg* (12), per LORD READING. C.J., [1915] 1 K.B. at p. 869, including the right to sue the king's officer for a legal wrong. Some observations by LORD KYLLACHY in *Poll* v. *Lord Advocate* (13) (1 F. (Ct. of Sess.) at pp. 827, 828), if taken generally, might appear to be inconsistent with this view; but they were directed to the case of an alien who had been prevented from landing in Scotland and not to that of an alien resident there. Further, an alien resident in this realm is entitled by statute to hold personal property here in the same

manner in all respects as a natural born British subject: British Nationality and Status of Aliens Act, 1914, s. 17; and it would be a serious derogation from that right if it were held that his property might be seized by an agent of the Crown without legal authority and without redress.

The above observations are sufficient to cover the present case, which your Lordships were invited to determine on broad lines. If it were necessary to go into the particular facts of this case, it would have to be considered whether the seizure by a police officer of money found on a person arrested within the realm can properly be described, even though ratified by a Minister, as an "act of State." It has been said that such an act must be done outside British territory: COBBETT'S LEADING CASES ON INTERNATIONAL LAW (Edn. 1909), vol. 1, p. 18; see *Musgrave* v. *Pulido* (14), 5 App. Cas. at p. 112, and again that the expression "act of State" denotes a catastrophic change constituting a new "departure": per MOULTON, L.J., in *Salaman* v. *Secretary of State for India* (15), [1906] 1 K.B. at p. 640; but it is unnecessary in the present case to determine whether the meaning of the term is so restricted. It is enough to say that in this case the defence of "an act of State" cannot prevail. I should add that the judgment of O'CONNOR, M.R., in the Court of Appeal was mainly founded upon the view that the right of a resident alien to protection is contingent on his observing the duty of allegiance while in the realm, and that the respondent, having been guilty of treasonable acts, had thereby forfeited his right to the protection of the King's courts. But this question was not raised in the defence, and (either for that reason or because a decision on the wider question was desired) was not seriously argued in your Lordships' House, and, accordingly, I think it best to express no opinion upon it. For the reasons given above I am of opinion that this appeal fails and should be dismissed.

LORD ATKINSON.—It does not appear to me that the defendant either in the fourth paragraph of his statement of defence, or in the evidence given at the trial, or in the argument addressed on his behalf to your Lordships on the hearing of this appeal, ever meant to insist that the Crown or the defendant, on behalf of and by the authority of the Crown, had the right to acquire the beneficial interest in the money taken from the plaintiff. The right relied upon was the right by virtue of an act of State, and for the defence of the realm to take possession of and detain the respondent's property. Observations, therefore, as to absence of any right in the Crown to confiscate the property of a subject or of a friendly alien living within the realm, or as to the necessity for inquisition and office found to entitle the Crown to the ownership of property, appear to me to be rather irrelevant.

It is on the authorities quite clear that the injury inflicted upon an individual by the act of State of a sovereign authority does not by reason of the nature of the act by which the injury is inflicted cease to be a wrong. What these authorities do establish is that a remedy for the wrong cannot be sought in the courts of the sovereign authority which inflicts the injury, and that the aggrieved party must depend for redress upon the diplomatic action of the State, of which he is a subject. The best definition of an act of State, as well as the descriptions of the consequences flowing from it, is that given in the judgment of LORD KINGSDOWN in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (5). In this case, the rajah of Tangore, a native independent sovereign, who was, by virtue of certain treaties, under the protection of the East India Co., died without leaving issue male. Thereupon, the East India Co., in exercise of their sovereign power and in trust for the British government, seized the Raj of Tangore, and the whole property of the deceased rajah as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir, and that his property lapsed to the British government. It was held first, as it was held in *Buron* v. *Denman* (1), that an act done by an agent of the government, though in excess of his authority on being ratified and adopted by this government, was of the same authority as if it had originally been directed by the government—that the effect of the ratification is, in the language of PARKE, B., in *Buron* v. *Denman* (1), that it only leaves a remedy

against the Crown (such as it is), and exempts from all liability the person who commits the trespass, and, second, that the seizure made by the British government acting as a sovereign Power through its delegate, the East India Co., was an act of State to inquire into the property of which a municipal court had no jurisdiction. LORD KINGSDOWN, in delivering the judgment of the Privy Council, said (13 Moo. P.C.C. at p. 77):

> "acts of State done in execution of sovereign powers are not subject to the control of the municipal courts either in India or Great Britain."

He cited several authorities in support of this proposition, and proceeds (ibid., at p. 86):

> "The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State—an act not affecting to justify itself on ground of municipal law—or was it in whole or in part a possession taken by the Crown under colour of legal title to the property of the late rajah of Tangore in trust for those who by law might be entitled to it on the death of the last possessor? If it were the latter, the defence set up [i.e., that the seizure was an act of State], of course, has no foundation. If there had been any doubt upon the original intention of the government, it has clearly ratified and adopted the Act of its agent which, according to the principle of the decision in the case of *Buron* v. *Denman* (1), is equivalent to a precise authority. The result of their Lordships' opinion is that the property now claimed by the respondent has been seized by the British government acting as a sovereign Power through its delegate, the East India Co., and that the Act so done with its consequences is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act neither the court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, an opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole to those whose interests are affected. These are considerations into which your Lordships cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no municipal court can afford a remedy."

That statement has been many times approved of, especially in *Musgrave* v. *Pulido* (14) (5 App. Cas. at p. 112); *Cook* v. *Sprigg* (15) ([1899] A.C. at p. 579). In this latter case the paramount chief of Pondoland had granted certain valuable concessions to the plaintiffs, including mineral rights and forest lands, certain railway and trading rights, etc. The grantees had spent large sums in developing the property so granted. Pondoland was annexed by Her Majesty Queen Victoria, and the action was brought against the Prime Minister of Cape Colony for a declaration that as against the Crown the plaintiffs were entitled to the property so granted to them, and for £5,000 damages sustained by them by reason of the defendant's interference with them in the exercise and enjoyment of their claimed rights. LORD HALSBURY delivered the judgment of the Judicial Committee, composed of LORDS WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS and himself. He said (ibid., at p. 578):

> "It is a well-established principle of law that the transaction of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by ordinary principles of international law private property is respected by the sovereign who accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can properly be meant by such a proposition is that, according to the well-established rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the acting potentate and the government to which the cession

A is made that private property should be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

He then quotes with approval the second passage from LORD KINGSDOWN's judgment which I have already quoted. The last words of LORD HALSBURY's judgment clearly suggest that the government of this country cannot rely as a defence against B one of their own subjects that an act done to the latter's injury was an act of State, since such a subject clearly could not rely on his own sovereign, bringing diplomatic pressure against himself to right the subject's wrong. In conformity with this principle it was held in *Walker* v. *Baird* (2) that where the plaintiffs are British subjects in an action for trespass committed within British territory in time of peace it is no answer that the trespass was an act of State, and that thereby C the jurisdiction of the municipal courts was ousted. And even where the person aggrieved was an independent rajah, against whom the East India Co. made war, and having made him prisoner, seized his property, it was apparently considered by SIR JOHN ROMILLY, M.R., in *Ex-Rajah of Coorg* v. *East India Co.* (17), that the company, notwithstanding that this act was an act of State, could have been sued in respect of any property seized by them which belonged to the rajah in his private D capacity as his personal property and not in his character of rajah. *Sirdar Bhagwan Singh* v. *Secretary of State for India* (18) is a good example of a case falling within the second member of LORD KINGSDOWN's definition of an act of State. The question remains whether a friendly alien resident within Great Britain with the implied permission, and under the protection of the sovereign, is in respect of acts of State in the same position as a British subject, with many of whose rights he is under E the existing state of the law undoubtedly clothed.

The following three Irish cases, in each of which the plaintiff was a British subject, would at first sight appear to establish that an act of State can be pleaded by the Crown as a defence to an action brought by a subject for a wrong done to him. The cases are *Napper Tandy* v. *Earl of Westmoreland* (19); *Luby* v. *Lord Wodehouse* (20); and *Sullivan* v. *Lord Spencer* (21). In the second of these cases F it was urged, and apparently to some extent admitted, that the first was badly reported. I, therefore, confine my remarks to the second and third of them. The second was an action of trespass brought against the lord-lieutenant (a viceroy, not as in *Musgrave* v. *Pulido* (14), merely a governor) while he held that position for an act of State alleged to have been directed by him personally in discharge of the duties of his office. The third was an action for assault, also brought against a G lord-lieutenant personally while he was lord-lieutenant for injuries received by the plaintiff in the dispersal of a public meeting which it was alleged the lord-lieutenant had in discharge of the duties of his office personally directed to be dispersed. In each case it was decided that an action cannot be brought in an Irish court against an existing Irish viceroy personally for an act done by him while he was viceroy in the discharge of the duties of his office, and the writ was in each case ordered H to be taken off the file. The cases turned upon the fact that the lord-lieutenant was sued personally and were decided on the ground that he could not be so sued for his administrative act in the court of the country of which he was the viceroy. I do not think, therefore, that these cases are in conflict with *Walker* v. *Baird* (2).

By the common law of this country an alien enemy had no rights. He could be seized or imprisoned and could have no advantage from the laws of this country. I He could not obtain redress for any wrong done to him in this country: *Sylvester's Case* (22). The Crown may no doubt grant a licence to an alien enemy to reside in this country which imports a licence to trade here, but in the absence of such a licence the property of an alien enemy may be seized for the use of the Crown: *The Johanna Emilie* (23), but while in this country with a licence any alien enemy may bring an action: *Wells* v. *Williams* (24); *Janson* v. *Driefontein Consolidated Mincs, Ltd.* (25). A mere non-interference with an alien enemy does not imply a licence to reside and trade. It is necessary for him to show that he resided in this country with the full knowledge and sanction of the government: *Boulton* v.

Dobree (26). Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it: 1 BLACKSTONE'S COMMENTARIES, 259; *A.-G. for Canada* v. *Cain* (8). And at any time the Crown may revoke its licence expressed or implied to an alien to reside: *The Hoop* (27), 1 Ch. Rob. at p. 199. In VATTEL ON LAW OF NATIONS, book 2, s. 108, it is stated

> "that a friendly alien can at any time leave the country, the government have no right to detain him, except for a time and for very particular reasons, as, for instance, the apprehension in war, lest such foreigners acquainted with the state of the country and of the fortified places should communicate knowledge to the enemy."

A friendly alien resident in this country can undoubtedly be prosecuted for high treason: *De Jager* v. *A.-G. of Natal* (11), because it can then be averred that he acted contra ligentiæ suæ debitum: *Calvin's Case* (10). For the same reason an alien enemy can be prosecuted for high treason if he has accepted the protection of the sovereign, but not otherwise: FOSTER'S CROWN CASES (3rd Edn.) 185.

I cannot find any authority for the proposition that if the property of a friendly alien resident in this country under the protection of the Crown and not violating in any way the allegiance he owes to the Crown which protects him be seized and detained by an act of State of the sovereign authority the alien cannot sue the officer of the Crown by whose Act he is aggrieved in one of the municipal courts of the country. The major proposition for which the Crown contends, that in such a case the alien could not sue here, is not, I think, sustainable. No authority was cited in support of it, and it is not in harmony with the principles laid down in many cases as to the rights of a friendly alien such as I have described. The respondent in the present case is in a position wholly different from the friendly alien whom I have mentioned. The question is: Does his conduct deprive him of the remedy which would be open to a well-conducted friendly alien resident peaceably within the realm? I concur in the careful judgment of the Irish Master of the Rolls save as to what he says in the last four lines of it. These lines run thus:

> "I refuse to treat the plaintiff in this action who seeks to enforce civil rights as an alien friend. I treat him as an alien enemy, and in my opinion his action ought to be dismissed."

I cannot think that in the circumstances of this case the conclusion of the Master of the Rolls is sound. It is true that the respondent flagrantly violated his allegiance. It is true that he abused the rights which the protection of the King secured for him. It is true that he might presumably have been tried for high treason. It is certain that he might have been expelled from the country. But none of those things has been done. The protection to a resident alien is given by the Crown. The Crown alone can withdraw it. The appellant is still the subject of a State at amity with Great Britain. He does not come within the definition of an alien enemy, and the Crown has given no indication whatever that it has withdrawn his implied licence to reside within this realm. The fact that he has shown himself unworthy of the sovereign's protection, has abused his privileges and violated his allegiance, cannot, in my view, ipso facto terminate the protection with all the rights which flowed from it which the sovereign extended to him, or ipso facto withdraw the implied licence which the sovereign gave to him to reside in this country. The internment of the respondent was a measure of precaution against the commission of crime or of disloyal action. It was not a punishment for crime that had been committed, and it did not operate as a revocation of the implied licence he had to remain in this country: *Schaffenius* v. *Goldberg* (28). He states in his evidence, which is uncontradicted, that he took part in the rebellion in 1916 in Dublin. It does not appear that any proceedings were ever taken against him for that crime. It does appear that he was interned in Frongoch (why, is not stated) and was released at Christmas, 1916, that he returned to Ireland in March, 1917, and was again deported, this time to Oxford; that he was released in May,

1917, returned to Ireland, and after an entire year's residence there, was arrested in May, 1918, for illegal drilling, was prosecuted, convicted and sentenced to four months' imprisonment, so that from April, 1916, when the Irish rebellion took place, till May 18, 1918, about two years, he was only absent from Ireland for about nine months. During the rest of the time he was resident in Ireland, his presence being apparently as unobjected to by any of the government authorities as that of any ordinary citizen, though they must, I think, be taken to have been aware of his presence. There was no evidence given to show that he had in his possession the money taken from him for the purpose of devoting it to procuring the commission of crime. In these circumstances I think it is impossible to treat the appellant as an enemy alien resident in this country without or even with the express or implied licence of the Crown. I think, on the contrary, he must be treated as a friendly alien resident in the month of May, 1918, in this country with the implied licence and permission of the Crown, and clothed with all the rights the protection of the Crown gave him. I cannot find any authority which justifies the taking from a person in the position which I think the respondent occupied at the date of his arrest of the money found upon his person, and detaining it, and, if that be so, it follows, from *Porter* v. *Freudenberg* (12), and the many authorities therein cited, that the respondent is entitled to sue for and recover his money. I, therefore, think the appeal fails, and should be dismissed with costs.

LORD SUMNER.—Unless and until the Chief Secretary purported to ratify the appellant's conduct this was admittedly an undefended action of tort, but it is said that this ratification on behalf of the Crown affords a good defence. That the contention is anomalous and unsupported by authority counsel frankly admitted. When Pedlar issued his writ, he was still no worse off than a British subject would have been, and this defence could never have been raised at all, if he had not become a citizen of the United States of America. There may be some poetic justice in such a result, for the respondent was naturalised in January, 1916, on his own statement that he meant to reside permanently in the United States, but in March he was resident in Glasgow and in April he was a rebel in arms in Dublin, and even after regaining his liberty he did not use it to return to America. The question, however, is whether this result is according to law.

In 1844 the law, as generally understood, was clear, that an alien amy could bring all personal actions in English courts, and was liable to actions and to prosecutions as if he were a subject born. He was under certain disabilities as to holding property, and, of course, was under many political and public disqualifications. It is true that this view of the law mainly rested upon statements made by institutional writers and not upon actual decisions, but they were of high and often of the highest eminence, and their tenor was uniform. That a difference existed between the alien's right of suit, when the Crown could be said to have an indirect concern in the defence, and that right, when the Crown had none, was nowhere decided, for it had never arisen for decision, but, I think, it would be too much to assume that the point can be treated as open now. If your Lordships have now the power to declare the law to be subject to an exception, hitherto unnoticed or unsuspected, and if all the authoritative statements of it made since the Stuarts first came to the throne have been unconsciously defective and incomplete, I am sure that it is a power not to be exercised except under the constraint of convincing and unanswerable argument. The question has been treated very ingeniously as depending on the legal theory, which underlies the rights of action of the alien amy, such as they are, and their wide scope is admitted. As a judicial reason for recognising the right of the alien amy to the same position before a court as that of a subject, in so far as the defence of his rights may require, I think LORD COKE's words are entirely satisfactory (Co. Litt. at p. 129):

> "An alien that is in league shall maintain personal actions, for an alien may trade and traffic, buy and sell, and therefore of necessity he must be of ability to have personal actions."

How far, as a commentary on the text of LITTLETON (s. 198), this represents the law or the reason for it in LITTLETON's time is another matter, but, taking the law as he found it in his own, I think LORD COKE gives a better explanation of it than any other. No writer or judge, so far as I know, has ever advanced the appellant's theory—namely, that the real origin of these rights is to be found either in the grace of the Crown permitting aliens to sue subjects so long as the Crown does not think fit to intervene, but permitting them thus far and no farther, or in some constitutional struggle, quite unrecorded, by which aliens wrung these conditional rights from a reluctant sovereign, but failed to obtain all that subjects had previously obtained.

In 1844 an Act (7 & 8 Vict. c. 66, s. 4) relating to aliens [repealed by Naturalisation Act, 1870] was passed which enacted that an alien amy

> "shall and may take and hold by purchase, gift, bequest, representation or otherwise every species of personal property, except chattels real, as fully and effectually to all intents and purposes and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom."

By the next section capacity was given to hold lands for twenty-one years. It is plain on the language of this Act (and the history of the legislation fully confirms it) that it was an amending Act, dealing with the two respects in which for private purposes the position of an alien amy was less advantageous than that of a subject born. The Naturalisation Act, 1870, and the British Nationality and Status of Aliens Act, 1914, have since completed this emancipation, giving the alien power to hold and dispose of all kinds of property in the same manner in all respects as a natural-born subject. [The words "natural born" were repealed by the British Nationality Act, 1948.] I think that the legislature thus recognised a pre-existing quality for private purposes between the alien amy and the subject born, except for those disabilities as regards the holding of property which it proceeded by successive steps to remove. The Act says, in effect, that this respondent is entitled to hold and dispose of his money, as if he had never ceased to be a British subject; the appellant says that he is not—that, on the contrary, he, the appellant, is entitled to hold it indefinitely, and so to prevent the respondent from disposing of it by delivery; that at most the barren title remains to the respondent as its owner. The result is that, till the Chief Secretary intervened, Pedlar, the citizen of the State of Pennsylvania, held that property in the same manner as Pedlar, the British subject, would have held it, which is what the Act says; but that, after that intervention, he held it quite otherwise—namely, precariously, and only so far as the Crown might suffer him to enjoy it. The point that these Acts do not name the Crown and so do not affect its rights, in my opinion, does not arise. No claim is made here to prevent the Crown from ratifying the respondent's action in detaining the money, but only to prevent the respondent from personally pleading that ratification as an effective defence to a private wrong, which he has committed personally. The rights of the Crown remain unaffected, but their exercise is less beneficial to Col. Johnstone than might otherwise have been the case. I think that is all.

The language of LORD KYLLACHY in *Poll* v. *Lord Advocate* (13) was relied on as supporting the appellant's contention, which doubtless in terms it seems to do. The words are

> "except in a question with its own subjects the sovereign power, the supreme executive of every State, must be held to be absolute. An alien . . . cannot sue the State or the head of the State; at least, he cannot do so in respect of a wrong done or threatened in the national interest,"

and, more important still, the plea sustained by the judgment was in these words,

> "no action lies in the courts of this country at the suit of a foreigner either against the Crown or the servants of the Crown in respect of an act of State by command of His Majesty's government."

The actual issue raised and decided in that case is not germane to the present appeal. It is not disputed that no alien is entitled as of right to enter the realm, from which it follows that no action lies for excluding him, and neither in *Poll's Case* (13) nor since has it been said that by crossing the limit of territorial waters and reaching Aberdeen Harbour for a purpose which the officers of the Crown were instructed to prevent, Poll put himself in a better position than if he had been turned back at the unmarked boundary three miles out to sea. As applied to the present case both the language of the plea, which LORD KYLLACHY sustained, and that of his judgment appear to me to be in conflict with the whole current of prior authority.

The appellant relied on *Buron* v. *Denman* (1) and in effect contended that the rule there laid down by PARKE, B., is equally applicable when the alien amy is resident within the realm at the time of acts in question and himself suffers them within the realm. It was argued, as I understood, that *Buron* v. *Denman* (1) shows that the executive has as against aliens a general right to commit by its agents what would be actionable wrongs in private persons, and, as a necessary consequence, to shelter those agents themselves from liability under the ægis of the Crown's authority. How else, it was asked, could this right be effectually enjoyed? That Buron was injured in a savage part of Africa was an accident. Accordingly, it was incumbent on the respondent to show how and when that right became limited to acts done without the realm. No constitutional change could be traced in favour of aliens, either historically or as a development of legal theory, such as that by which the King's courts assumed or obtained jurisdiction to review the acts of his servants in favour of subjects upon the principle of the maxim that the King can do no wrong. The speculation is interesting, but, as I think fallacious. *Buron* v. *Denman* (1) is a case rather of the inability of the court than of the disability of the suitor. Municipal courts do not take it upon themselves to review the dealings of State with State or of sovereign with sovereign. They do not control the acts of a foreign State done within it own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification. What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction. As soon as it appeared that it was based on such an act of the Crown, Buron's claim was one which an English court could not support, although only a subject was made party to the suit. To consider the steps, by which long ago the King's courts held that they had jurisdiction to try such claims against private persons or persons in a private capacity and to require that their acts should be justified, not under the ægis of the Crown, but under the shield of the law, is, equally with the steps by which they came to entertain any suit by an alien at all, no longer a relevant inquiry. As soon as it is found to be settled, as the law of our courts, that they are open to aliens as well as to subjects, I think it follows that they are presumably equally open to them, so far, that is, as actions are brought in support of such civil rights as are recognised in aliens from time to time. The foundation of these rights of action is that the courts have defined their jurisdiction so as to admit them, not that the Crown has granted a right of suit, with or without restriction on the prerogative. A historical inquiry into the steps by which alien friends were admitted to sue in the King's courts would be of great interest, though I doubt if all the necessary material is yet available. I assume that there was a time when the goods of the alien friend were at the King's mercy. It seems to have been so at the time of the Great Charter and even in 1295, by command of the King, a sheriff seized all the wool and other merchandise of alien traders and kept them as forfeited to the king's use, and all the remedy asserted was an action for the return of the price, which the aliens had paid to the English subjects, who had sold the wool: SELECT CASES BEFORE THE KING'S COUNCIL, Selden Society, vol. 35, p. 13. From this to *Calvin's Case* (10) is a far cry, but until the appellant can establish that the alien's right to bring the police officer to book is in the nature of a grant by the Crown or a derogation from the prerogative, the inquiry is of

historic interest only. It is to be observed that the form, which the right of the Crown took in *Buron's Case* (1), like the plea in the present case, is a right to legalise a wrong, that is to say a right not merely to shelter its servant from the consequences of his wrong, as might be done by pardoning him after conviction of a crime, but by its ratification to make that right which had been done as a wrong. Had Captain Denman burnt Buron's barracoons under a prior command, Buron would all along have stood face to face with the Crown, and if he was to sue at all must have sued the Crown. In an English court that cannot be done. For action taken abroad the Crown would not be in the position of being obliged to shelter its servant, but would be unassailable in respect of its own act, and no theory of a grant by the Crown of access to the courts would touch the point, for such a grant goes only to admitting the alien to be heard, not to subjecting the Crown itself to the jurisdiction. When admitted to sue in the courts the alien would get no higher right than the subject and the subject cannot sue the Crown, but why should he get any less right?

The appellant also laid some stress on a narrower contention, namely, that, in this case at any rate, Pedlar's hostile attitude towards the authority of the Crown and the peace of the realm disentitled him to occupy the position of a subject, if he would otherwise have enjoyed it in this litigation. Reliance was placed, as it was also by O'Connor, M.R., on the passage in *Calvin's Case* (10) (7 Co. Rep. at p. 2a):

> "So long as he is here he oweth unto the king a local obedience or ligeance, for that the one (as it hath been said) draweth the other."

On this foundation was raised the argument expressed in the words of the Master of the Rolls:

> "There is mutuality in the obligations . . . total allegiance, which gives the right to the king's protection, must of necessity be the allegiance of the individual and, if the latter refuses it, he has no claim to the rights or privileges which flow from it."

Personally, I do not think that either Lord Coke's language or the maxim to which he refers—protectio trahit subjectionem et subjectio protectionem—points to such a conclusion. The matter, which he had in hand, is the contrast between ligeantia localis, which begins no earlier than and continues no longer than the presence of the alien amy within the realm and the lasting allegiance of the subject born. I do not think that Lord Coke conceived of it as quasi-contractual or as involving mutuality. The principle that the sovereign can refuse the alien permission to enter the realm and that the alien has no right to enter is inconsistent with the existence of any such basis for local ligeance. It is clear that the obligation to obey the laws and that civil and criminal liability in case of disobedience to them are not dependent on anything in the nature of an actual grant of protection or recognition of the alien's presence or licence to him to remain, and if, his entry having been prohibited, he should contrive to enter surreptitiously and for a time be undetected, I conceive that during that interval he would still be liable to suit or prosecution for his acts done in defiance of the ordinary law. There seems, therefore, to be no foundation for the theory of mutuality, and the argument must really be either that the alien's conduct may give to the Crown a right to forfeit his protection or that it may be so inimical to the peace of the realm as to warrant exceptional action towards him under the Crown's authority and by the hands of its servants, on the principle that salus reipublicæ suprema lex, and because the Crown is the supreme defender of the realm. No such case, of course, is pleaded, but, if defect of pleading were the only difficulty, as the point has been cosidered in at least one judgment below and was argued at your Lordships' Bar, I think your Lordships would not be bound to refuse to consider it. The respondent, regardless of the burden of proof on the pleadings as they stood, gave evidence against himself in chief, which, I imagine, he would not have been compellable to give in cross-examination, evidence which showed that, by his own

account, he had been a rebel, who might justly have been sent to the scaffold for high treason. This would seem to have been mere bravado on his part, but, if he had thus proved such facts as the appellant requires to raise his contention, I do not think the respondent would have been entitled to have the contention dismissed on the mere ground that it had not been pleaded.

The necessary facts, however, are not proved. Forfeiture, if a tenable basis at all, at least involves some election made on the Crown's behalf to withdraw the alien's protection. There had been nothing of this kind before action brought. Ratification here only amounts to an indirect attempt to deprive the respondent of his money temporarily, a thing which could not have been done, except directly and permanently, when forfeitures were still legal, and since their abolition cannot be done at all. I suppose, further, that, if illegal drilling had been a felony, Pedlar would have been a convict, and an administrator of his property under the Forfeiture Act, 1870, might have been appointed who could and should have brought detinue against the appellant and, being a British subject, would have been at once entitled to succeed. There is, accordingly, no evidence that the Crown has, in fact, forfeited the plaintiff's right to protection in respect of his chattels, even if in law it could do so in any circumstances. On the other hand, the evidence does not establish the existence in 1918 of any exigency, if such there be, to warrant the exercise of a supposed right to deal with an alien amy of hostile intentions otherwise than in accordance with the law. The prerogative of the Crown for the defence of the realm in time of war is one thing; the powers of the Executive for the maintenance of order and the punishment of crime quite another. The difference does not disappear merely because the offence is an offence against public tranquillity or because it is committed in time of war. The Executive, which holds office and wields power thanks to the support of Parliament, ought constitutionally to seek wider powers from Parliament, if the existing law is insufficient, nor, if so, would the exactment of wider powers be refused. If it has not taken that course, we must presume that no such necessity had arisen, but that the existing powers sufficed. The acts of the Executive and its officers have to be justified within these powers as they existed. Accordingly, I agree that the appellant's second contention does not arise for decision on the present occasion. I will only add, without purporting to decide the question, that I share the noble and learned viscount's doubt as to this police action being an "act of State" in any circumstances. I think I should use a very different term, but as the question does not arise I refrain from attempting to qualify it affirmatively. I agree that the appeal should be dismissed.

LORD PHILLIMORE.—This case has merited, and has received, ample discussion; but at the conclusion I think I can put my reasons for a decision into a short compass.

When a subject sues another subject for a supposed tort, the defendant cannot plead as a defence that he did the act that is said to be a tort by authority of the King. The maxim "the King can do no wrong" is to be applied to litigation in this way: No one complained of for an act which is said to be a tort can withdraw the cognisance of that claim from the courts of the land by averring that he did the act by command of the King, because, if it was a lawful act, such averrment is unnecessary, and, if it was an unlawful act, he cannot be admitted to say that he was told to do it by the King. The defence set up in the present case is sometimes called the defence of an act of State. As regards this way of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council in *Walker* v. *Baird* (2): "Because between Her Majesty and one of her subjects there can be no such thing as an act of State." This proposition was finally accepted in *Walker* v. *Baird* (2). The next matter, then, that remains for inquiry is whether the subject for this purpose must be a natural-born or naturalised subject or whether the word also comprehends a temporary subject, that is the

citizen or subject of a friendly State residing in this country. As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. If his State is at war with ours his individual friendliness avails him nothing unless it ensures to procure for him the special favour of licence from the King. If his State is in amity with ours he is considered an alien amy even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his individual hostility disentitle him to the rights conferred by law upon an alien amy, once he has entered this realm with permission from the King. The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in *Musgrove* v. *Chung Teeong Toy* (7); and that permission may be conditioned. Every State may, according to international law, make special laws regulating the acts and property of aliens within the realm. By the common law of England and Ireland an alien could not hold real estate, not even chattels real, of more than a short term. The droit d'aubaine existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts.

But an alien amy is never ex lege, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text-books, or in decided cases. The alien amy, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject. The only indication of a difference that I have found is that in *Walker* v. *Baird* (2) one of the judges of the court in Newfoundland, PINSENT, J., when delivering his judgment in agreement with that of the Chief Justice that the supposed defence could not avail, treated the case as the argument of a point of law and assuming for that purpose certain facts, says that he assumes that the plaintiffs in that case are British subjects, as in fact they almost certainly were. On the other hand, in *Musgrave* v. *Pulido* (14) the successful plaintiff, whose name was wholly Spanish, and against whom security for costs was obtained on the ground that he was resident in Venezuela, was, I think, for these and other reasons, almost certainly an alien. I may here say that I have had access to and have perused the original cases and appendix, as preserved at the Privy Council, in *Musgrave* v. *Pulido* (14) and *Walker* v. *Baird* (2).

From these propositions it would seem to follow that an alien amy complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong, done by command of the King or was a so-called act of State. From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance. Then is there anything special in this case? The respondent has indeed no merits. On his own admission, he might have been tried, convicted, and executed for high treason. His conduct shows evidence of much hostile feeling. He has since been expelled and rightly expelled from the country. But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection. The case of an alien who would be refused admission to the country if his entrance had been known and who lands surreptitiously and continues to be in the country surreptitiously might give rise to other considerations. This is not such a case.

Also, I can conceive a case where an alien, though a citizen of a friendly State, might land on our shores with private hostile intent, and continue in our country

with that same intent so that his whole stay was one transaction, and a continuous act of high treason. To such an alien, suing for a tort or possibly some particular class of tort, or possibly suing a public officer, it might be pleaded that he was disentitled to sue, or that the act was specially warranted, inasmuch as he had not the ordinary right to protection accorded by the King to an alien amy. I should not, however, like to do more than reserve my opinion till I had before me the precise language of the plea. But, again, that is not the case before your Lordships' House. Counsel for the appellant desired to rest their case on the fourth paragraph of the statement of defence, and in that paragraph, the only character attributed to the plaintiff is that he was an alien. For the reasons given in the earlier part of my opinion this defence cannot stand. If it should be necessary as counsel for the appellant suggest, that in the disturbed state of Ireland, there should be special provision in respect of aliens, this must be effected by legislation. As things are this citizen of the United States is entitled to our judgment, and the appeal should fail.

Solicitors: *Treasury Solicitor*, for *Sir Henry Arthur Wynne*, Chief Crown Solicitor for Ireland, Dublin; *Herbert Z Deane*, for *Edmund J. Duggan*, Dublin.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

ADMIRALTY COMMISSIONERS *v.* VOLUTE (OWNERS). THE VOLUTE

[House of Lords (Viscount Birkenhead, L.C., Viscount Cave, Viscount Finlay, Lord Shaw and Lord Phillimore), December 15, 1921]

[Reported [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 38 T.L.R. 225; 66 Sol. Jo. 156; 15 Asp.M.L.C. 530]

Negligence—Shipping—Collision—Contributory negligence—Negligent acts of both ships closely connected—Ship guilty of earlier act partly to blame for damage.

The question of contributory negligence must be dealt with somewhat broadly and on common sense principles as a jury would probably deal with it. In a case where there are acts of negligence by the parties, the one following the other and a clear line can be drawn, the subsequent negligence is the only one to look to, but there are cases in which the two acts come so closely together and the second act of negligence is so much mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame, might invoke the prior negligence as being part of the cause of the damage so as to make it a case of contribution.

Accordingly, in a case where, notwithstanding the negligent navigation of one ship a collision could have been avoided if proper action had been taken by the other ship concerned, there not being a sufficient separation of time, place, or circumstance between the later act of negligence and the earlier act to make it right to treat the later act as the sole cause of the collision,

Held: the ship guilty of the earlier act of negligence was partly to blame.

Notes. The common law rule that contributory negligence was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provided for the apportionment of loss according to their share in the responsibility for the damage.

Considered: *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation*

Co., [1924] A.C. 406; *Dew* v. *United British S.S. Co.* (1928), 139 L.T. 628; *The Vectis*, [1929] P. 204; *The Eurymedon*, [1938] 1 All E.R. 122. Referred to: *The Manorbin Castle* (1922), 129 L.T. 31; *S.S. Singleton Abbey* v. *S.S. Paludina*, ([1926] All E.R.Rep. 220; *Service* v. *Sundell* (1929), 99 L.J.K.B. 55; *The Chatwood*, [1930] P. 272; *The Otranto*, [1930] P. 110; *Swadling* v. *Cooper*, [1930] All E.R.Rep. 257.

As to negligence as the effective cause of damage and as to contributory negligence, see 28 Halsbury's Laws (3rd Edn.) 27–33, 87 et seq.; and for cases see 36 Digest (Repl.) 33 et seq., 169 et seq. As to negligence causing collisions at sea, see 30 Halsbury's Laws (2nd Edn.) 819 et seq., and for cases see 41 Digest 768 et seq.

Cases referred to:

(1) *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217; 44 L.T. 589; 29 W.R. 761; 4 Asp.M.L.C. 406, H.L.; 36 Digest (Repl.) 178, *952*.

(2) *Cayzer* v. *Carron Co.* (1884), 9 App. Cas. 873; 54 L.J.P. 18; 52 L.T. 361; 33 W.R. 281; 5 Asp.M.L.C. 371, H.L.; 41 Digest 783, *6441*.

(3) *The Bywell Castle* (1879), 4 P.D. 219; 41 L.T. 747; 28 W.R. 293; 4 Asp.M.L.C. 207, C.A.; 41 Digest 771, *6267*.

(4) *Stoomvart Maatschappy Nederland* v. *Peninsular and Oriental Co.* (1880), 5 App. Cas. 876; 43 L.T. 610; 29 W.R. 173; 4 Asp.M.L.C. 360, H.L.; 36 Digest (Repl.) 23, *99*.

(5) *The Margaret* (1881), 6 P.D. 76; 50 L.J.P. 67; 44 L.T. 291; 29 W.R. 533; 4 Asp.M.L.C. 375, C.A.; 41 Digest 697, *5287*.

(6) *The Monte Rosa*, [1893] P. 23; 62 L.J.P. 20; 68 L.T. 299; 41 W.R. 304; 7 Asp.M.L.C. 326; 1 R. 557; 41 Digest 782, *6430*.

(7) *Dowell* v. *General Steam Navigation Co.* (1855), 5 E. & B. 195; 3 C.L.R. 1221; 26 L.J.Q.B. 59; 25 L.T.O.S. 158; 1 Jur.N.S. 800; 3 W.R. 492; 119 E.R. 454; 41 Digest 780, *6414*.

(8) *Davies* v. *Mann* (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 36 Digest (Repl.) 177, *945*.

(9) *The Peter Benoit* (1915), 85 L.J.P. 12; 114 L.T. 147; 32 T.L.R. 124; 60 Sol. Jo. 88; 13 Asp.M.L.C. 203, H.L.; 41 Digest 764, *6166*.

(10) *The Westernland*, [1885] 24 Fed. Rep. (Amer.) 703.

(11) *The Andalusian* (1877), 2 P.D. 231; 46 L.J.P. 77; 41 Digest 686, *5154*.

(12) *The George Roper* (1883), 8 P.D. 119; 52 L.J.P. 69; 49 L.T. 185; 31 W.R. 953; 5 Asp.M.L.C. 134; 41 Digest 686, *5162*.

(13) *The Sans Pareil*, [1900] P. 267; 69 L.J.P. 127; 82 L.T. 606; 16 T.L.R. 390; 9 Asp.M.L.C. 78, C.A.; 41 Digest 746, *5977*.

(14) *The Hero*, [1912] A.C. 300; 81 L.J.P. 27; 106 L.T. 82; 18 Asp.M.L.C. 108; 56 Sol. Jo. 269; 28 T.L.R. 216, H.L.; 41 Digest 759, *6115*.

(15) *The Ovingdean Grange*, [1902] P. 208; 71 L.J.P. 105; 87 L.T. 15; 9 Asp.M.L.C. 295, C.A.; 41 Digest 764, *6173*.

(16) *Cork Steamship Co.* v. *Kiddle* (1920), 2 Lloyd, L.R. 505, H.L.

Appeal by the Lords Commissioners of the Admiralty from an order of the Court of Appeal affirming a decision of Duke, P.

Raeburn, *K.C.*, and *Balloch* for the commissioners.
Stephens, *K.C.*, and *Carpmael* for the respondents.

The House took time for consideration.
Dec. 15. The following opinions were read.

VISCOUNT BIRKENHEAD, L.C.—This action was brought by the Lords Commissioners of the Admiralty against the owners of the steamship *Volute* for damage suffered in a collision between H.M.S. *Radstock*, a destroyer, and the *Volute*, an oil tank ship, which occurred shortly before 4 a.m. on April 12, 1918, off the west coast of Scotland. On the occasion in question, the *Radstock* was one of two destroyers in charge of a convoy of three oil tank vessels, and the ships were

proceeding in the following order. The *Volute* was the leading merchant vessel, having one of her consorts on the port hand and one astern. The *Radstock* was the escort on the starboard hand, and the *Undine*, another destroyer, was the escort on the port hand. The station distances between the merchant vessels were two cables, and between the destroyers and the merchant vessels three cables. The *Volute* was made the leader of the convoy and had instructions when to alter her course. She was to be responsible for the alteration and was to sound the necessary short blast helm signals when altering course. She was directed to alter course to port a little before midnight, and she starboarded her helm and blew the appropriate signal of two blasts, which was answered as intended by the other vessels of the convoy, and the course was altered without mishap. On this altered course, N. 44 degrees W., the vessels then proceeded till a particular bearing of the Oversay Light was reached, when it would be right for the course to be altered about seven points to starboard, from N. 44 W. to N. 32 E., and this the *Volute* proceeded to do. She ought to have signified this very striking alteration by the blowing of a short blast of her whistle. Whether she did so was a serious matter in dispute at the trial. The night was dark, and no lights were being carried except that each vessel in the convoy carried a shaded stern light. The *Radstock*, whose officer and crews said that they heard no whistle, did not alter course when the *Volute* ported her helm and the result was that a position of danger arose. Only the master of those on board the *Volute* was examined, and he, though awake and in the chart room, was not on the bridge till the last moment. Their Lordships do not precisely know at what stage and in what circumstances those on board the *Volute* realised that there was going to be a collision. But there was some evidence which will be dealt with later that she stopped and reversed her engines before the collision. She also pleaded that she hard-a-starboarded. Her master says that when he came to the bridge the helm was amidships, but it is hardly possible that she checked her port helm as the collision is agreed at a right-angled blow, and the *Radstock*, though her helm jammed, had ported somewhat. So far as the *Radstock* is concerned, the evidence was that the first they knew of the approach of the *Volute* was a report about two minutes before the collision from the port look-out that the *Volute* was altering to starboard. She was then seen to be at a good distance—three to four points on the port bow; the helm of the *Radstock* was altered hard-a-port, but jammed when it had got to ten degrees, and the officer in charge then gave the order to increase the speed of the *Radstock*, which had been proceeding at the convoy speed of eight knots, up to a speed of twenty knots. It was agreed that the two vessels came into collision at about right angles, the port side of the *Radstock* in the engine room, just abaft amidships, and the stem of the *Volute*, the *Radstock* having at the time of the collision attained to a speed of about eighteen knots. Great damage was done to the *Radstock*, but she did not sink, and ultimately got into port.

As the trial of the case proceeded, it became clear that there were only two questions of fact in dispute, though there might be much discussion as to the actual or probable consequences of the various manœuvres. These two facts were whether the *Volute* did or did not blow a whistle as the appropriate helm signal, and whether she did or did not stop and reverse her engines and if she did, when. I will take the latter point first. It was urged on behalf of the *Volute* that she must have reduced her speed and reduced it considerably. Otherwise, with her momentum and a right-angled blow, and the not very stout scantling of the *Radstock*, she would have cut so far as to cause the *Radstock* to sink. This is a very unsafe point to rely on, unless there has been some careful scientific calculation of forces, and one of the assessors who assisted your Lordships has stated on consideration that he thinks no conclusion could safely be drawn from the fact that the *Radstock* was not sunk. But there is the evidence of the master of the *Volute*, who says that he heard the telegraph ring before the collision, and that of the captain of the *Radstock*, who says, in answer to question 78: "The *Volute* appeared to me to be stopped, nearly stationary, and I believe going astern." It was

suggested, and is possible, that as he came on deck on the impact, he may have meant to refer to her action after the blow was struck, but upon the whole, I think it would be safer for your Lordships to conclude that the *Volute* did stop and reverse her engines in sufficient time to save her from blame in this respect, particularly as this was the view both of the learned President who tried the case and of the members of the Court of Appeal. As to the other issue of fact about the whistle signal, the matter stands in this way. The President believed that the signal was given, and he, therefore, held the *Radstock* to blame. He also held that she was to blame for going full speed ahead. The judges of the Court of Appeal were evidently in great difficulty on the subject of the whistle. The Master of the Rolls dealt with the case on the assumption that the whistle was not sounded, while at the conclusion of his judgment he thought it best to express no opinion as to the conclusion of fact which the President came to on that point. The lords justices did not decide the point, but gave a very strong indication of their opinion that the whistle was not blown. It became unnecessary, however, in the opinion of all three members of the Court of Appeal, to come to a decided conclusion as to the whistle, because they thought that, even if it was not blown, nevertheless the *Radstock* was to blame and alone to blame for the collision.

Your Lordships, after a careful examination of the evidence, are all, I believe, convinced that the signal was not given. The only witness for the *Volute* was the master. He no doubt said that the second officer, whom he had left in charge, had instructions to blow one blast, to listen to the other steamships to see that they answered before the course was altered and to port slowly, and that he in his chart room heard one blast blown and answered by the other steamships. He further says that after the impact he stopped his engines, which were working astern to keep the two ships together, and then when he backed out he blew three short blasts, the appropriate signal for going astern, no such signal having been given before the collision. There is no entry of any whistle signal in his log book. On the other hand, seven witnesses were called from the *Radstock*—the officer of the watch, the captain, who was in the chart house and had just received a signal from the wireless operator, and therefore was awake, the signal man, one of the look-out men, the helmsman, and two other seamen on deck, who all said that there was no port helm signal and no whistle blown till just after the collision, when there was a prolonged blast. Some of them also said, in agreement with what was said by the master of the *Volute*, that she blew three short blasts when she was backing out. Others did not mention these three blasts, but counsel for the *Volute* intimated in the course of the trial that he conceived what happened after the collision to be immaterial. There was an eighth witness, a leading seaman on deck, who did not speak to the long blast but only to the three short blasts. The learned president thought that this imported some discrepancy between the witnesses of the *Radstock*. I think your Lordships have failed to find any such discrepancy. There were no witnesses from either of the other convoy ships, but one witness, the officer of the watch, was called from the other destroyer. He was expecting a short blast. He never heard one, but he did hear a long blast, and as he expected the convoy to alter course about that period, he began to turn under his port helm, when he saw a morse light flash as a signal from the *Radstock* and went up to her assistance. As he did not hear the shock of the collision all that he can say is that the long blast preceded the signal with the Morse lamp, and that it was the only signal he heard. The log books of the *Radstock* were put in and they did not help the case of the *Volute* on this point. As the learned president said in his judgment that he believed that the witnesses from the *Radstock* came to tell the truth, the matter resolves itself into an inference which can be nearly as well drawn by your Lordships as if you had seen the witnesses yourselves. As I have already stated, there can be no doubt in your Lordships' minds, when the matter comes to be carefully considered, that the conclusion on this point at which the learned president arrived was incorrect. And here it should be observed that, though the destroyers were supposed to look after themselves, and

A the convoy ships to pay no attention to their movements in a general way as they might wish to range ahead, or astern, converge or diverge, yet the captain of the *Radstock* had protected himself by instructing the other vessels of the convoy to answer the signal of the *Volute*, and was entitled, therefore, to expect a triad of short blasts. In fact, no blasts were sounded. Your Lordships will therefore, I apprehend, hold that the *Volute* was negligent and to blame in not blowing a short B helm blast. Whether it was negligence which should be held in law to have contributed to the collision or not is a matter of greater difficulty. As regards the alleged negligence of the *Radstock*, the president, while exculpating her on the charges of not stopping and reversing, did, with the concurrence of his assessors, find her to blame for increasing her speed which, as has been stated, reached eighteen knots at the time of the collision. The Master of the Rolls, with the C concurrence of the lords justices and following the advice of their assessors, came to the same conclusion, and your Lordships have been advised by your assessors to the same effect. There is no doubt that the officer in charge was influenced by the fear lest he should be struck forward, where he carried depth charges, or in the boiler room. But it seems that, if he had not increased his speed, there would have been no collision at all; and though, no doubt, he was put in a position of D some difficulty by the action of the *Volute* in porting and bringing herself on a crossing course without whistling, it is, in the eyes of all nautical men who have dealt with this matter, so patent that it was wrong to put the engines full speed ahead, that your Lordships cannot do otherwise than agree with both courts below and hold the *Radstock* at least partly to blame for the collision.

The matter, therefore, rests in this way. On the one hand, if the *Volute* had E signalled or had postponed her porting unless and until she signalled there would have been no collision. On the other hand, if the *Radstock* had not gone full speed ahead after the position of danger brought about by the action of the *Volute*, there would have been no collision. In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negli- F gence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full: see, among other cases, *Spaight* v. *Tedcastle* (1) and *The Margaret* (*Cayzer* v. *Carron Co.*) (2). At the other end of the chain, A.'s negligence makes collision so threatening that, though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be G guilty of any negligence and A. wholly fails: *The Bywell Castle* (3); *Stoomvart Maatschappy Nederland* v. *Peninsula and Oriental Co.* (4). In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing [but now see Law Reform (Contributory Negligence) Act, 1945, s. 1 (1)], while in Admiralty damages are divided in some proportion or other. Lord Blackburn, in *The Margaret* (5), was of opinion that H the area of this middle space was the same for Admiralty as for common law, and his opinion may be accepted subject to a possible qualification arising out of the subsequent passing of the Maritime Convention Act, 1911. How, then, are its limits to be ascertained? Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negligence is contemporaneous? Is it to be the rule in all cases I if the tribunal can find a period at which A.'s negligence has ceased and after which B.'s negligence has begun that then the negligence of A. is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few. If two roads intersect each other at right angles and there is a large building at the point of intersection, and two people are running or riding or driving at a reckless pace, one down each street, and meet at the corner, it would be easy to say that both were in fault and equally so. If the courses of two motor-cars cross and there is no rule of the road such as that at sea requiring one to give way and the other to keep her course and both hold on both

are equally to blame. In *The Margaret* (5) a badly navigated barge came into collision with a schooner which was improperly carrying her anchor over her bows in a dangerous way contrary to the rule. An impact ensued which would have done no damage but for the fact that the fluke of the anchor knocked a hole in the barge. SIR ROBERT PHILLIMORE put the whole blame on the badly navigated barge, but the Court of Appeal thought that, though the collision was solely due to her, the damage was due to both, and divided it. But even this class of case was varied by the subsequent decision of GORELL BARNES, J., in *The Monte Rosa* (6), where he distinguished *The Margaret* (5), saying that the collision there occurred at night and the anchor could not be seen and held the badly navigated vessel alone to blame for the collision because those on board of her might have seen the dangerous position of the anchor.

It is very difficult, except in the cases just mentioned, to think of any cases where there is strictly synchronous negligence. And if that be the rule the application of the doctrine of contributory negligence to collisions, whether on land or sea, would be rare. Still rarer would be cases where the more minute calculations required by the Maritime Conventions Act could find place. In *Dowell* v. *General Steam Navigation Co.* (7), a collision between a sailing vessel which had taken in her light and a steamer, the questions put to the jury were:

> "(i) Was there negligence on the part of the plaintiff with respect to the light which led to the collision? (ii) Could the defendants have avoided the collision with ordinary skill and care? (iii) Was the damage occasioned by the accident the result of circumstances for which more blame attaches to the one side or the other?"

The jury answered

> "(i) We find there was fault on the part of the collier in not continuing the light till the danger was past. (ii) It is the opinion of the jury that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution; but that it was impossible to have avoided the accident when the steamer was within two or three of the collier's lengths. (iii) We are much inclined to think the preponderance of blame to be with the steamer."

On these answers the judge entered a verdict for the plaintiffs, giving the defendants leave to move. But the court set this aside and said that the answers of the jury to the questions put to them amounted, in point of law, to a verdict for the defendants. In the course of his judgment, LORD CAMPBELL, who delivered the judgment of the whole court (himself, COLERIDGE, ERLE and CROMPTON, JJ.), said:

> "The jury appear to have come to the conclusion . . . that the collier did show a light . . . but did not continue to show it for a reasonable time, and that while the danger still existed, and the light ought to have been shown, the collier was in fault and broke the regulations by not continuing to show it. We likewise think that the jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the Court of Admiralty in a case of collision if both vessels are in fault the loss is equally divided, but in a court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident [but see now Law Reform (Contributory Negligence) Act, 1945, s. 1 (1)]. . . . In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident, and in these cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident notwithstanding the negligence of the plaintiff as in the often-quoted donkey case, *Davies* v. *Mann* (8). There, although without the negligence of the plaintiff, the accident could not have happened, the negligence is not supposed to have contributed to the accident

A within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant to his gross negligence it is entirely ascribed he and he only proximately causing the loss. But in the present case the jury appear to have concluded . . . that the negligence of the master of the collier in not properly complying with the Admiralty regulations directly contributed to the accident although there was
B negligence on the other side, and the preponderance of blame was upon the steamer. We have further to consider whether the answer of the jury to the first question is at all neutralised or qualified by their answer to the second and third questions. On the contrary, by these the finding against the plaintiff seems to be strengthened. . . . To the second, the jury say that the steamer was going at too great a speed on so dark a night; in which respect there was
C want of caution; but that it was impossible to have avoided the accident when the steamer came within two or three collier lengths. While the jury here impute blame to the steamer they do not retract or vary anything they had before said about the non-observance of the Admiralty regulations by the collier and the concluding part of the answer beginning with the word 'but' may be explained by the jury having believed . . . that the collier was not seen
D by the steamer till within two or three lengths, and that this arose from the fault of the collier in not continuing the light till the danger was past. The answer to the third question is unequivocally unfavourable to the plaintiffs. . . ."

It was not necessary for the court to determine whether both vessels were in
E fault or only the sailing vessel, but the whole trend of the judgment seems to me to point to the idea that both were in fault and that if it had been a case in Admiralty, the damages would have been divided.

This case has been cited at length because it seems to be an instance of acts of negligence close together, but still in sequence. For the purpose of considering the Admiralty doctrine of both to blame a mass of cases occurs where both ships
F have been held to blame in collisions before the passing of the Merchant Shipping Act, 1876, which may be put on one side. That Act provided that if a collision occurred and a ship was found to have broken one of the regulations for preventing collisions at sea she should be deemed to be in fault, and the courts generally and this House in particular construed this as meaning that, if the bad navigation could be shown to have contributed to the collision, it was to be deemed contributory
G tory negligence. This, however, did not prevent the tribunals from determining where the real fault lay, and if they were of opinion that it lay with the other ship in holding both to blame. This law prevailed from 1876 till it was repealed by the Maritime Conventions Act, 1911. During the period from 1876 to 1911 the only cases useful to consider are cases at sea where, owing to the peculiar circumstances, no regulations applied, or cases in rivers and inlets to which neither the
H regulations nor the statute applied.

By the Maritime Conventions Act, 1911, s. 1, it is enacted that:

> "Where by the fault of two or more vessels damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. Provided
I that (a) If having regard to all the circumstances of the case it is not possible to establish different degrees of fault the liability shall be apportioned equally, and (b) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed."

Effect was given to this last provision in *The Peter Benoit* (9). In *The Westernland* (10), cited in Marsden on Collisions at Sea (7th Edn.), at p. 37, a schooner, contrary to regulations, brought up opposite a launching slip and refused to move. The launch attempted to get under way and fouled her, and both were held to blame. But on the other hand in this country in *The Andalusian* (11) and *The*

George Roper (12), the launch was held wholly in fault, and the American case probably goes too far.

The following are cases of negligence in sequence. In *The Sans Pareil* (13), where a tug with a vessel in tow was crossing the line of a squadron of warships, the tug and tow were held in the Court of Appeal to blame for persisting in trying to cross the Fleet. But, it having been admitted by the Attorney-General acting for the Queen's ship in the Court of First Instance that there was negligence in the management of the *Sans Pareil* in acting for the tug only and not noticing the tow as she was crossing, the *Sans Pareil* was held alone to blame. But, as one of your Lordships pointed out in the course of the present argument, the admission by the Attorney-General made in the way in which it was, might partly account for this decision. In *The Hero* (14) the House of Lords, in a not dissimilar case, held that without applying the penal clause of the Merchant Shipping Act both vessels must be held in fault, the *Hero*, because, having improperly ported, she ran across the bows of three destroyers and "in the ordinary plain common sense of this business the *Hero* not only contributed but mainly contributed to this accident." On the other hand, the King's ship was not held free from fault, because an order to port which had been given by the navigating officer and would have saved the vessels from collision was countered by an order to starboard given by the commander when he came on deck. This case was decided by the Court of Appeal upon the breach of the statute by the merchant ship, but the point was made that the statute did not apply, and your Lordships in this House appear to have decided upon common law principles. It would seem that in chronological sequence there would have been no collision but for the negligence either of the navigating officer in not informing the commander that the helm was a-port or of the commander in countering the port order. This, therefore, seems a case where the two acts of negligence were not synchronous but in sequence. In *The Ovingdean Grange* (15), a collision in the Thames where the statute did not apply, Sir Francis Jeune and the Court of Appeal held that a steamship proceeding down the river against the tide and having under the Thames rules to wait under the Point till the up-coming steamer passed clear, was partly to blame, although the actual fault was in the up-coming steamer, for not keeping a proper look-out and for turning without a proper regard to the passing traffic. There again the negligence seems to have been in sequence. In *Cork Steamship Co., Ltd.* v. *Kiddle* (16), there was a division of opinion among your Lordships on this question. But it was finally held by the House that it was a case where the subsequent negligence was the only material one to be considered. In that case, which happened during the war, the King's ship *Active* committed a negligent act in proceeding out of Dover Harbour on a cross-channel course with lights necessarily shaded, at great speed, thereby bringing about risk of collision with vessels proceeding down channel. But the *Ousel*, a vessel proceeding down channel, could, as it was held, if she had had a proper look-out, have seen the red light of the *Active* in time. Your Lordships disregarded the prior negligence of the *Active* and treated the two vessels as being, at the material time, however they had got into that position, ships crossing so as to involve risk of collision. This being so, the *Ousel* became the give way ship and ought to have ported; and for her failure to port and her bad look-out she was held alone to blame.

In this connection the numerous cases of collision between two steamships, where A. is held to blame for bad look-out and wrong helm action, but B. also to blame for not stopping and reversing, must not be disregarded. Some of them can be explained on the footing that A.'s action made the collision unavoidable, but B.'s speed increased the damage. This may well be if B. goes stem on into A.

But if B. is hit in the side or flank it is frequently the case that it will not even be suggested that B.'s speed had any effect on the damage. If these cases be analysed in chronological sequence, either A.'s action made the collision unavoidable or brought about such a sudden peril that B.'s people had not time to think out properly what they should do and A. is alone to blame (such decisions have

been given). Or, on the other hand, notwithstanding A.'s prior negligence it was the subsequent negligence of B. in not reducing speed which caused the collision and B. should be alone to blame. It would be difficult to find an instance of such a decision; but many decisions will be found of both to blame. Mr. Marsden, writing before the Maritime Conventions Act was passed, suggests as matters of contributory negligence, acts or omissions either concurrent in time or identical in character or equal in degree of fault. If this be correct, the acts of negligence need not be synchronous.

Upon the whole I think that this question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. While, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act that the party secondly negligent, while not held free from blame under *The Bywell Castle* (3) rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. The Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

Your Lordships have now to apply these considerations of law to the facts of the present case. As already stated, if the *Volute* had not neglected to give the appropriate whistle signal when she ported there would have been no collision. On the other hand, if the *Radstock*, in the position of danger brought about by the action of the *Volute* had not gone full speed ahead, there would have been no collision. The case seems to me to resemble somewhat closely that of *The Hero* (14). In that case, as in this, notwithstanding the negligent navigation of the first ship, the collision could have been avoided if proper action had been taken by the second ship. Indeed, that case is remarkable because the proper order was actually given, but unfortunately countermanded. In that case this House held both vessels to blame, apparently considering the acts of navigation on the two ships as forming parts of one transaction, and the second act of negligence as closely following upon and involved with the first. In the present case there does not seem to be a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision. The *Volute*, in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision. Accordingly, I move your Lordships to reverse the order appealed from, and to pronounce the *Volute* partly to blame for the said collision, with the usual consequential directions. I think that there should be no costs in the courts below, but that the plaintiffs should have the costs of the appeal to your Lordships' House, and I so move. **VISCOUNT CAVE** has signified to me his concurrence with the conclusions of this judgment.

VISCOUNT FINLAY.—I concur, and I have nothing to add beyond this one sentence, that I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence.

LORD SHAW.—I have had, in considering this case, much difficulty. In the end I have resolved my difficulties by adhering, as I now fully do, to the judgment which your Lordship has just read. I would venture to concur with my noble and learned friend on my left as to the quality of that judgment.

LORD PHILLIMORE.—I concur.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *Waltons & Co.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

A

BRITISH REINFORCED CONCRETE ENGINEERING CO., LTD. *v.* SCHELFF AND ANOTHER

[CHANCERY DIVISION (Younger, L.J., sitting as additional judge), July 19, 20, 21, 22, 26, 1921]

B

[Reported [1921] 2 Ch. 563; 91 L.J.Ch. 114; 126 L.T. 230]

Contract—Illegality—Public policy—Restraint of trade—Sale of business—Covenant by vendor against competition—Test of reasonableness—Protection of business sold in hands of purchaser—Not extent or range of any business of purchaser—Unreasonable scope of covenant—Part of covenant bad—Severance—Need of severed part to relate to area, subject-matter, or class of customer of business sold.

C

By an agreement under seal, dated July 16, 1918, a firm engaged in a small business of supplying steel reinforcement for concrete roads agreed to sell, and the plaintiff company agreed to buy, a patent belonging to the firm and the goodwill of the firm's business and certain stock. Clause 3 of the agreement contained the following covenant: "During the present war and for a period of three years after the date of the declaration of general peace in the present war the firm shall not nor shall any member of the firm either alone or jointly or in partnership with any other person or persons whomsoever and either directly or indirectly carry on or manage or be concerned or interested in or act as a servant of any person concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom." One of the firm, the first defendant, entered the service of the second defendants, a company, as manager of their reinforced material department. In an action by the plaintiff company to restrain a breach of this clause by the defendants,

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Held: it being admitted that the last words of the clause (relating to acting "as a servant of any person concerned . . .") constituted a prohibition which was not necessary for the protection of any business of the plaintiffs, and was, therefore, invalid, those words could not be severed from the covenant as a whole since they did not relate to area, subject-matter, or class of customer of the business sold: *Attwood* v. *Lamont* (1), [1920] 3 K.B. applied; but the words "manufacture or" could be severed as they related to the subject-matter of the restriction and the first defendant had never been concerned in manufacture; but, assuming that the part of the covenant unsuccessfully sought to be severed could be severed, in an agreement for the sale of a business the reasonableness of a vendor's restrictive covenant was to be judged by the extent and circumstances of the business sold and its need of protection in the hands of the purchaser and not by the extent or range of any business of the purchaser, and, so judged, that part of the covenant which remained after severance was wider than was necessary for the reasonable protection of the transferred business in the hands of the plaintiff company, who, accordingly, were not entitled to the injunction claimed.

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Notes. Considered: *Ronbar Enterprises, Ltd.* v. *Green*, [1954] 2 All E.R. 266. Referred to: *Routh* v. *Jones*, [1947] 1 All E.R. 179.

I

As to the restraint of trade by agreement, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., and for cases see 43 DIGEST 19 et seq.

Cases referred to:

(1) *Attwood* v. *Lamond*, [1920] 2 K.B. 146; 89 L.J.K.B. 965; reversed [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25, C.A.; 43 Digest 20, *131.*

(2) *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A.C. 118; 78 L.J.Ch. 77; 99 L.T. 943; 25 T.L.R. 178, H.L.; 43 Digest 50, *511.*

(3) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143.*

(4) *Gophir Diamond Co.* v. *Wood*, [1902] 1 Ch. 950; 71 L.J.Ch. 550; 86 L.T. 801; 50 W.R. 603; 18 T.L.R. 492; 43 Digest 46, *464.*

(5) *Smedley's, Ltd.* v. *Smedley* (1918), [1921] 2 Ch. 580, n.; 43 Digest 37, *332.*

(6) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, *154.*

(7) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139.*

(8) *Henry Leetham & Sons, Ltd.* v. *Johnstone-White*, [1907] 1 Ch. 322; 76 L.J.Ch. 304; 96 L.T. 348; 14 Mans. 162; sub nom. *Leetham & Sons, Ltd.* v. *White*, 23 T.L.R. 254, C.A.; 43 Digest 61, *634.*

(9) *Horner* v. *Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, *181.*

(10) *Leather Cloth Co.* v. *Lorsont* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 18 W.R. 572; 43 Digest 23, *147.*

(11) *Printing and Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 43 Digest 67, *705.*

Witness Action for an injunction to restrain breach of an agreement for sale of a patent and the goodwill of a business connected with it.

The facts are stated in the judgment.

Luxmoore, K.C., and *R. Moritz* for the plaintiffs.

Micklem, K.C., and *A. Adams* for the defendant Schelff.

Hereward and *Fanning* for the defendants Brown & Tawse, Ltd.

Cur. adv. vult.

July 26. **YOUNGER, L.J.**, read the following judgment.—This is an action to enforce by injunction a restrictive clause with reference to trading, contained in an agreement for sale of a patent combined with the goodwill of the business established for working it.

The plaintiff company has for some years organised as a separate department of its general business the application of steel reinforcements to the construction of concrete roads, and it introduced some years before the war, apparently from America, a form of steel fabric since manufactured by itself, which, although capable of being adapted, and although, in fact, used in every kind of concrete reinforcement work, has, particularly in certain sizes of mesh, been employed to a considerable extent in concrete road reinforcement. This form of road reinforcement has been extensively advertised by the plaintiff company among local authorities, road surveyors, and other persons interested in road construction throughout the United Kingdom, and the business of the department has become considerable if not yet, in the modern acceptation of the term, extensive. The plaintiff company claim to have done 90 per cent. of the reinforced concrete work executed up to the present, and, pioneer as it was in the industry, it has not yet in that branch of its work been called upon to face the competition of more than four or five rival organisations.

There are certain features of this business that may be conveniently emphasised here. The work done by the plaintiff company, and other firms occupying themselves in this field, is merely to supply to the contractors, or to road-making authorities, the variety of steel reinforcement required. No concrete or road construction is done by firms undertaking this work. Moreover, the steel reinforcements of the plaintiff company, as also those of the other firms concerned, can be and are used in every other form of concrete reinforcement work. Nor is the purpose for which on any occasion they are required, whether road purposes or other, necessarily stated when they are ordered, although it is true that advice to road authorities and others as to the mesh or strength of reinforcement most

suitable for particular roads is one of the services which those engaged in supplying this reinforcement are expected, if required, to render to their customers. Any firm of reinforced concrete engineers may at any time become suppliers of road reinforcements without difficulty, or even alteration, in their course of business. This circumstance is one which has to be borne in mind in considering the extent of the restriction imposed by the agreement here in question.

The agreement we are concerned with was entered into in July, 1918. Most of the circumstances leading up to it are to be found in the previous correspondence. It appears that in the year 1915 a patent was taken out by the defendant, Mr. Schelff, in association with a Mr. Allden, for improvements in or relating to ferro-concrete construction, and a partnership was constituted consisting of these two gentlemen and Mr. John Robinson, and Mr. Ralph Spencer for the purpose of owning and working it. Such business as was done by the firm was carried on under the style of the Loop Road Reinforcement Co. by, I gather, Mr. Schelff, and Mr. Allden, now deceased, as the more active members of the firm. Their course of business was to obtain from manufacturers the wire and bars required for working the patent, the bars being obtained mainly from the Spiral Bond Bar Co., a company in which Mr. Schelff and Mr. Spencer were interested, and the wire from different manufacturers. These were then supplied for the purpose of road reinforcement to those who had need of them, the parts being assembled, not by the firm, but by the contractors on the job itself. This patented reinforcement system, under the name of Loop Road Reinforcement, had been described in the Municipal Directory of 1916 and 1918, referred to at the trial as the "surveyor's Bible," and it was known as a system to the plaintiff company, but the entire operations of the Loop Road company with it had been on an exceedingly limited scale, 15,700 yards super. of the material only having been laid to fourteen different orders from different parts of England. The gross receipts of the firm from July 1, 1915, to July 30, 1917, amounted to £1,370 only, and its net profit for the same period was only £256. In 1915, moreover, owing, I do not doubt. to the cessation of luxury road-making during the war, the firm had to stop trading altogether for eighteen months; and the position at that time was that it possessed some stock in hand which it had purchased for the sum of £117, and it owed £500 for materials to the Spiral Bond Bar Co., who were apparently asking for payment. It was in these circumstances that in January, 1918, Mr. Schelff approached Mr. Hall, the chairman both of the plaintiff company and of Hall and Pickles, the plaintiff company's selling agents, with a view to the plaintiff company taking over the Loop patent system. In a letter of Jan. 18 Mr. Schelff said: "There is a great future before the system if properly financed and organised, and in the hands of an enterprising firm like Hall and Pickles, it would assuredly be a success." So regarding its prospects, Mr. Schelff pressed as a term of the plaintiff company's purchase, for an interest in the working rather than for a cash consideration. On Jan. 25 he wrote: "In the event of your company deciding to purchase I would prefer to have a direct interest in any company formed in preference to any cash consideration." On Jan. 29, however, in answer to that letter, Mr. Butler, who was then the secretary of the plaintiff company, after stating that he had to make a preliminary investigation, says: "I think you may take it we are interested and I shall be glad if you would state some definite terms and scheme of working. You mention for instance a direct interest in any company formed in preference to any cash consideration. I do not think this would be possible because if we were to buy up we should probably not form a new company for this purpose." On Feb. 5 Mr. Schelff replied with a definite proposal in these terms: "In reply to your letter of Jan. 29 I have consulted my colleagues on the matter of purchase of the Loop Road company and patents in connection with the same, and they, like myself, would prefer to accept about £1,500 and 1d. per yard royalty, and have the patents and business worked, rather than accept a larger sum for purchase right out. The company could be worked under the same title and we should be pleased to co-operate in any way towards the success of the business." There,

A again, Mr. Schelff suggests a royalty as part of the consideration, and in a letter to Mr. Hall of Mar. 4, 1918, Mr. Butler states the situation thus, as it presented itself to those concerned in the plaintiff company. He says: "I think it would be a good thing to buy out these people and suggest the following offer; £500 cash for goodwill and patents (clear of all existing liabilities which would be paid off by the vendors); £300 a year for each of the three years after the war (reckoning from B Jan. 1, after peace is declared) if the net profits from sales are not less than £300 in each year. None of the vendors to engage either directly or indirectly in the sale, or preparation for sale, of any other road reinforcement during the above-mentioned three years, except by permission of the British Reinforced Concrete Engineering Co., Ltd. Before making this offer it would be understood the vendors are not negotiating with anybody else for the sale and will not so negotiate C until our offer is definitely accepted or declined. We might decide to drop the sale of the Loop Reinforcement altogether. But I think it would be a good thing to keep it on from a small office in London." Then he states who the Loop people are, and asks for instructions from his chairman as to whether he will proceed on these lines. The point of that letter, which is of some relevance, is that the continuance of the business in the mind of Mr. Butler was its continuance as a D separate thing in a small office in London. On Mar. 20 Mr. Butler, having, no doubt, in the meantime obtained authority from Mr. Hall, makes to the defendant a proposal which he foreshadowed in that letter to Mr. Hall, and he says in a letter to Mr. Schelff: "I am in receipt of your letter of the 13th inst., and am now able to advise you that I think we could make you a formal offer on something like the following lines: Payment to you of £500 cash for the goodwill and patents E (clear of all existing liabilities which would be paid off by the vendors). Payment to you of £300 a year for each of the first three years after the war if the net profits from sales are not less than £300 in each of such years; if they are less such lesser figure to be paid over to you. The vendors to recommend the reinforcement wherever possible and none of them to engage either directly or indirectly in the sale or preparation for sale of any other road reinforcement during the above-F mentioned three years except with our permission."

There one finds what appears in the correspondence generally—the close interconnection between the payment of £300 a year in respect of profits, and the restrictive obligation imposed on the vendors. On Mar. 27 one finds that same idea borne out in the reply of Mr. Schelff, who says: "Your offer for purchase of Loop Road patents and goodwill has been laid before my co-partners and they have G decided that your offer in its present form would not be acceptable to them. In the first place the sum of £800 would not cover the liabilities, but they might consider an offer of £1,000 and 25 per cent. of the profits, or, if a limited company is formed, to be given 25 per cent. of the shares with the option of purchasing a further 25 per cent." He encloses the balance-sheet, from which I have taken the figures already referred to, and says: "This should convince you of the great H possibilities as soon as the business could be started again, also that the terms suggested in this letter are not extravagant. The present offer is all on your side as you give no guarantee to work the business and yet ask for an undertaking from ourselves not to engage either directly or indirectly in the sale or preparation for sale of any other road reinforcement for three years." He suggests a possible meeting with a view of arranging the transaction if the plaintiff company were I still willing to go on with it. To that, on April 4, Mr. Butler replies: "I have your letter of the 27th ult. and I am not sure there is any advantage in going on with the matter as I do not think we would consider any arrangement unless it provides for complete ownership by us either from the commencement or within three years. We could increase our offer of £500 a little and also make it plus 25 per cent. of net profits, but that would only apply for a limited period." On April 9 Mr. Schelff replies: "We do not contemplate working the company under the present proprietorship but to sell outright to you at a certain sum and a percentage of the profits to be agreed upon, you on your part undertaking to work the company.

There are no expenses at the present time accruing, the company simply lying, as it were, dormant." On April 15 we have an important letter from Mr. Butler in answer to that of the 9th. He says: "I think you may take it there are three points in regard to which our offer must be considered as quite definite—namely, (a) £1,500 is the maximum total payment we are able to offer, which would be partly in cash down and partly in annual payment. A part cash payment and part annual payment was suggested in my letter of the 20th ult., but we would discuss a variation in the proportions of the amount, provided the total amount is not more than £1,500. (b) We would not bind ourselves to work the company and this must be left to our choice, but it would be our intention to work it. (c) We should require that the vendors do not engage in the sale of any other road reinforcement for a period of three years, except with our permission, and should recommend loop reinforcement if they have the opportunity." Then he states that, if they are able to accept the terms, an appointment for the purpose of further discussion can be arranged. On May 7 Mr. E. B. Hall writes to Mr. Schelff confirming that proposal, and he says: "With reference to my conversation with you last week about the loop road reinforcement I beg to confirm the offer I made to you on Friday last for the entire purchase of the loop road reinforcement patent for £1,500 in cash and for the goodwill and patents clear of all existing liabilities, which will be paid off by the vendors, none of the vendors to engage either directly or indirectly in the sale, or preparation for sale, of any other road reinforcement during the period of three years except by the permission of the British Reinforced Concrete Engineering Co., Ltd." On May 13 that proposal is amended in one respect in regard to the three years mentioned in Mr. Hall's letter of the 7th: "This is understood to mean three years after peace is declared," but again a definite period of three years beginning from a later date. On May 15 a proposal with regard to commission, which had been mentioned in earlier letters, was restored in this letter of Mr. Hall: "We shall be quite willing to pay you 5 per cent. commission on any business introduced by the four partners, provided we have not already been in touch with it." On May 16 we have a letter from Mr. Allden to Mr. Schelff in which that juxtaposition, which I have already referred to, of commission with restriction is very strikingly set forth. Mr. Allden said: "I further agree, and also on behalf of Mr. Ralph Spencer, not to engage in the sale of any road reinforcement for a period of three years after termination of the war, and to recommend same if the opportunity arises, in consideration of which the said British Reinforced Concrete Engineering Co., Ltd., agree to pay a commission of 5 per cent. for any business introduced by the present partners constituting the Loop Road Reinforcement Co., such partners being" the four names mentioned. The effect of the correspondence prior to the agreement is to emphasise two points. The first is that the period of restriction mentioned throughout was a definite period of three years, fixed at first from the date of the agreement, and later from the end of the war. The second is that there is a close connection between the 5 per cent. commission and the restriction on trade. The two are treated together throughout, and it must have been recognised that the offer of commission was of no value had there not been a manifested intention to work the Loop. This was, indeed, quite frankly admitted in the plaintiffs' evidence.

The agreement so adjusted in the correspondence was put in the solicitors' hands to be drawn up in formal shape, and it was executed on July 16, 1918. That agreement was made between the four vendors therein described as carrying on business in co-partnership at 28, Victoria Street, in the city of Westminster, as reinforced concrete road engineers under the style or firm of the Loop Road Reinforcement Co., and thereinafter called "the firm," of the one part, and the plaintiff company, thereinafter called "the company," of the other part. By cl. 1 the firm agreed to sell, and the company agreed to purchase (i) the goodwill of the said business carried on by the firm as aforesaid; (ii) the letters patent, which are described; and (iii) the stock of reinforcements, which are also described. Clause 2 sets out the considerations in cash, and cl. 3 says:

A "During the present war and for a period of three years after the date of declaration of general peace in the present war the firm shall not nor shall any member of the firm either alone or jointly or in partnership with any other person or persons whomsoever and either directly or indirectly carry on or manage or be concerned or interested in or act as a servant of any person concerned or interested in the business of the manufacture or sale of road B reinforcements in any part of the United Kingdom."

In cl. 4 we have the provision for commission:

"If any of the parties hereto of the first part shall introduce to the company an order or orders for loop road reinforcement the company will pay to him a commission at the rate of five pounds per centum on the amount actually C received by the company in respect of such order or orders."

The commission agreement stands, it will be seen, as arranged in the correspondence, but the restrictive covenant is considerably altered and extended beyond the terms adjusted there. The explanation of the evolution of that clause in its present form does not appear. In one draft the restriction is extended to the wives and widows of the covenantors, and one really does not know why the bright spirit who D conceived that idea might not even have further extended it—for instance, to grandmothers. However, someone with a sense of humour struck out the wives and widows, and the clause remains in its present form embarrassing enough in its scope, as counsel for the plaintiff, as so often happens in these cases, has found. The only intention shown to work the patent referred to in Mr. Butler's letter is found in the very tentative proposals contained in his own letter to Mr. Hall. If E there ever was any more definite intentions to work the system entertained in any quarter by the plaintiff company, it was never carried out. The purchase of the patent has not so far affected the business or transaction of the plaintiff company by one iota. That Mr. Butler agreed in the witness-box was the case, the attitude of the plaintiff company in the matter being, I think, quite truly stated to Mr. Spencer in the conversation with Mr. Walters and Mr. Farrer, of the plaintiff F company, in July, 1919, which he thus gave in his evidence: "I asked Mr. Walters and Mr. Farrer together what opportunity there was of procuring loop reinforcements, and I was informed that the plaintiff company were not working it. They had bought the patent to put it in the safe and forget it, because it was a serious competitor to their B. R. C." The truth was that it was not to the interest of the plaintiff company to work the Loop patent so long as its own system, for which G it itself manufactured all the materials, served its purpose, and it is still doing so, I gather from the plaintiff company's evidence, as effectively as ever. This is the explanation of the letter of Mar. 19, 1920, of Mr. Hall, the chairman of the plaintiff company, addressed to an inquiry of Mr. Spencer, who, with a view to this commission stipulated for in the agreement, had asked Mr. Hall for a quotation of loop reinforcement. Mr. Hall's reply is as follows: "I am in receipt of your letter of H the 18th, but at the moment we are doing nothing at all in the loop reinforcements. The point is we cannot get any of the small bars required for this method and, therefore, have to leave it on one side." This policy of the plaintiff company, which is quite intelligible from their point of view, appears further from two departmental notes which were put to Mr. Butler in cross-examination. The first of these is dated May 12, 1920, and it is with reference to some road reinforce- I ments that were in competition with the plaintiff company from a firm in respect of a process called the Walker and Weston patent, and this departmental note says this: "I do not suppose you will come across this material except occasionally, but if you should you can tell your friends that we hold the original patent for the top and bottom reinforcement [the Loop patent] but we do not work it because we find it is unnecessary and there is no advantage in it. Ours is a very much simpler patent [that is, the competing patent, Walker and Weston's patent] but in spite of this it is much more complicated than using B. R. C. fabric which does all that is necessary. In any case we will not quote for the Loop material

at present." Again, on Feb. 17, 1921, there is a similar departmental note, in which, after referring to the Walker and Weston patent in similar terms, the note goes on: "At the same time we do not want to quote for Loop unless we are absolutely obliged to do so." The result is that, the Loop patent never in fact having been worked or in any way exploited or advertised by the plaintiff company, the agreement to pay a commission for the introduction of work has proved, in Butler's (the secretary of the plaintiff company) own words, to be an idle one. The defendant Schelff, to say nothing of his former partners, has had no advantage at all from that bargain, which, I am satisfied from the correspondence, was a substantial consideration offered as a return for the stringent restrictive covenant to which they submitted. The natural connection between two such clauses is neatly illustrated in the judgment of LORD ROBERTSON in *General Billposting Co.* v. *Atkinson* (2) ([1909] A.C. at p. 121); and the total failure of consideration on one side in this respect, while not, I agree, involving any breach of contract on the part of the plaintiff company, may well have an important bearing upon the question whether the case is one for an injunction to enforce performance of the defendants' corresponding restrictions.

But the complete failure to work the Loop patent is, perhaps, more important for another reason—namely, that the cessation of all business by the firm for eighteen months before the date of the agreement, and the complete withdrawal from the market since of the Loop system and everything connected with it, has, I cannot doubt, effectually killed any reputation, if any there ever was, made by that system during its short and very restricted active existence. At the date of the agreement, and for some time after the armistice, Mr. Schelff was employed at the Ministry of Munitions. Released from that employment, he sought work elsewhere. He applied to the plaintiff company. They had no suitable place for him. He then applied for employment to various firms of iron and steel merchants, and firms dealing in reinforced concrete. The only response was from Messrs. Brown and Tawse, by whom he was engaged as manager of their reinforced material department, and he has been in that employment since the beginning of this year. At the time when Mr. Schelff entered the employment of Messrs. Brown and Tawse they neither made nor supplied road reinforcement as such. The defendant's employment by them originally was, therefore, in no way in breach of his agreement. He had, in fact, no copy of the agreement. His belief, he said, was—and a reference to the correspondence I have read justified, I think, its reasonableness—that it precluded him from selling road reinforcements for three years from its date, and when in February or March, 1921, Messrs. Brown and Tawse decided to take up road reinforcement work, as they did, he informed them, he says, of his agreement and its effect as he understood it, with the result that they appointed a Mr. G. H. Hoyle to look after the road section of their business, the defendant, Mr. Schelff, remaining manager of the other sections of reinforced work. Thereafter Messrs. Brown and Tawse proceeded to exploit their system by advertising and otherwise, and the plaintiffs, knowing that Mr. Schelff was in their employ, at length took action.

After two earlier letters, which I need not pause to read, the plaintiffs' solicitors, on April 21, 1921, sent this letter to each of the defendants—first of all, to Mr. Schelff: "Dear Sir,—We are instructed by our clients the British Reinforced Concrete Engineering Co., Ltd., to call your attention to the agreement to which you and the company were parties of July 16, 1918. Our clients are informed that, notwithstanding the clear terms of cl. 3 of that agreement, you are at the present moment acting as manager for, or otherwise serving, Messrs. Brown and Tawse, of 3, London Wall Buildings, E.C.2, in their business of the manufacture and sale of road reinforcements in the United Kingdom. This is a flagrant breach of your undertaking, and we are instructed to call upon you forthwith to give an undertaking to abandon the employment of which our clients complain, and not, during the period limited by the clause, again to engage in any capacity in the same business. Failing a satisfactory reply before Saturday morning the 23rd inst.

A we shall have no option but to proceed against you without further notice." On the same day the plaintiffs' solicitors wrote to the solicitors of Messrs. Brown and Tawse: "Dear Sirs,—We have to inform you that our clients the British Reinforced Concrete Engineering Co. are informed that notwithstanding the clear warning addressed to Messrs. Brown and Tawse they are continuing to employ Mr. Schelff as their manager in the manufacture and sale of road reinforcements in the United B Kingdom. This firm have had ample warning of the express contractual undertaking not to engage in this business entered into by Mr. Schelff on July 16, 1918. Our instructions, therefore, are to call upon your clients forthwith to give an undertaking to cease from employing Mr. Schelff in any capacity in this business, failing a satisfactory reply by Saturday morning the 23rd inst. we shall be compelled to issue a writ and move for an injunction." These letters, which it will be seen C relate entirely to one branch of the restrictive covenant, were followed by the writ in the action on April 25.

The claim in this action, like the letters which preceded it, framed, as it is, against the defendant Schelff and Messrs. Brown and Tawse, is directed to the breach by Schelff of that part of his agreement which precludes him from acting "as a servant of any person concerned or interested in the business of the manu- D facture or sale of road reinforcements in any part of the United Kingdom." That is the only breach clearly assigned in the statement of claim from which the right to an injunction is alleged to flow, and in the allegations that the first-named defendant is an engineer and the second-named defendants are a limited company carrying on business as engineers who have quite recently entered upon the business of selling road reinforcements for concrete roads. Paragraph 3, after setting forth E the agreement for the restrictive clause, says this:

> "In breach of the said agreement the first-named defendant entered into the employment of the second-named defendants as their manager, and has engaged and threatens and intends to continue to engage in vigorously canvassing for orders for and pushing the sale of certain steel concrete road F reinforcements which the second-named defendants are widely advertising and endeavouring to sell in competition with the plaintiff"

in the manner particularised. The particulars say this:

> "The first-named defendant acting as the manager and servant of the second-named defendants has taken charge of and assisted in the said acts and has, inter alia, procured for them an order from the Acton Urban District G Council, and is now, in conjunction with the second-named defendants, tendering in competition with the plaintiffs for an order for road reinforcements for the Salford Corporation. The plaintiffs will be unable until they have obtained discovery in this action further to particularise the allegations in this paragraph set forth."

H The allegation against the second defendants, the company, is in para. 6:

> "The second-named defendants to whom full warning and notice of the restrictive cl. 3 in the said agreement of July 16, 1918, was given by the plaintiffs and their solicitors in writing on April 13, 1921, have continued to employ the first-named defendant as their manager in the manner in the last paragraph set forth and have declined to withdraw him from such employ- I ment."

The injunction which is asked for is based, to my mind, in substance upon these allegations, where the breach assigned is the breach of that particular part of the covenant to which I have referred. But when it had been pointed out that that part of the covenant would preclude the defendant from becoming the servant, say, of a trust company which, as part of its investments, held shares, say, in Brown and Tawse, Ltd., and that such a prohibition could in no way be necessary for the protection of any business of the plaintiffs, it was admitted by counsel for the plaintiffs in his reply that this part of the restriction was invalid, and could not

be supported by him. He then claimed to sever it from the rest of the clause, excluding any reference to it from the injunction; but declined, after consideration, to amend his statement of claim, which I intimated could only at that late stage be allowed on some terms as to costs.

The first question is whether, seeing that the action as framed rests on that part of the covenant now sought to be jettisoned, severance is possible. In my opinion, without amendment of the pleadings so as to make a proper assignment of breach in respect of some part of the covenant which after severance still survives, the action must fail. The plaintiffs have now arranged with Brown and Tawse, Ltd., by a consent order, but the position may be tested by enquiring how, on the present pleading, any case against them could be maintained if the clause in question were cut out of the restriction. As against that company, there appears clearly to be no case left. But I should be sorry to decide a case of such importance to the parties on a mere point of pleading, and, accordingly, I go on to consider whether this severance is permissible at all. In some respects the covenant is too wide to be supported. It is admittedly too wide in the respect I have just mentioned; and if the legitimate purpose of the covenant is the protection of the business sold, as distinct from the other business of the purchasers, it is too wide in area. It is also admittedly too wide in scope, in that it extends to the manufacture of road reinforcements as well as to their sale. The Loop firm never at any time manufactured reinforcements. In this last respect the covenant can, I think, quite properly be severed. This is a severance in respect of the subject-matter of the restriction which is fully justified by the authorities, but to cut out the servant clause from the agreement is another matter altogether.

All the cases on this subject were cited to the Divisional Court in *Attwood* v. *Lamont* (1), and BAILHACHE, J., stated their effect thus ([1920] 2 K.B. at p. 155):

> "Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject-matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the courts will not split up a single restriction expressed in indivisible terms. As Mr. Matthews put it, the courts will sever in a proper case where the severance can be performed by a blue pencil, but not otherwise."

While the desired severance here may be performed by a blue pencil, it is not sought either in respect of area, subject-matter, or class of customer, the only matters in respect of which this privilege has hitherto been permitted, and I cannot think that, after the observations of LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (3) ([1913] A.C. at p. 745), this process will be extended, even in the case of a vendor's covenant, to a case not hitherto covered by authority where the excess is not of trivial importance and is a part of the main purport and substance of the clause. To my mind, there is reason for not carrying the principle so far as is here required. Its application does not authorise the making of a new contract for the parties; and the particular clause now in question is really a principal, if not the main, approach to the business of the sale of road reinforcements, all access to which it is the purpose of the covenant to bar so as to prevent the covenantors from having any part or lot whatsoever in it during the period of restriction. Like the covenant in *Attwood* v. *Lamont* (1) it is merely a part of one entire covenant in mosaic, and to permit the severance asked would, I think, be to go further than has ever yet been permitted in such a case.

I will, however, contrary to my opinion, assume that the covenant may be severed as desired. The question then arises whether of the covenant that remains there has been any breach by the defendant. The effect of severing, by striking out with a blue pencil, the obnoxious part of a covenant is not to alter or affect the construction of what is left. That must be construed as if the portion struck out still remained; and so construing this covenant, I strongly incline to the view of the defendant's counsel that the words "managing or being concerned or interested

in the business" must be construed as meaning "managing or being concerned or interested otherwise than as a servant." It may well be that, if the severed clause had never stood part of the covenant, the expression "managing or being concerned" might prohibit the covenantor from becoming an employee in the business, but the word "interested" would not do so: *Gophir Diamond Co.* v. *Wood* (4) ([1902] 1 Ch. at p. 952); nor would the other expressions in this covenant necessarily do so, for, as pointed out by SWINFEN EADY, J., if it had been intended to extend them to cover agreements of service, it would have been easy for the parties to add the very clause which they have here made part of their agreement; and with that clause there all the words with which we are now dealing have a proper signification attributable to them, without importing into them any relation of service or employment, which is dealt with in a clause of its own. "Managing," in this view, whenever it occurs, is used to cover the active management otherwise than as servant of another, so that, even if management by Schelff of the sale of the road reinforcements of Brown and Tawse had in fact been proved, such management would not have involved any breach by Schelff of that part of the covenant. But having formed an opinion adverse to the plaintiffs on a further part of the case, it is unnecessary for me to decide this question one way or the other, and I will assume that, properly construed, the defendant Schelff has broken the severed covenant.

The question then arises whether that covenant, even after severance, was not still too wide for the reasonable protection of the plaintiffs at the time it was entered into. I am of opinion that it was. This raises the most important legal question in the case—namely, whether in an agreement for sale of a business the reasonableness of a vendor's restrictive covenant is to be judged by the extent and circumstances of the business sold, or by the extent and range of any business of the purchaser, of which, after the transfer to him, it is to form a part. The plaintiffs' claim here is based on the hypothesis that the legitimate subject of protection is the plaintiffs' business; and there can, I think, be no doubt that the restrictive covenant is framed with reference to the requirements of that business, and of no other. Its extravagance in range as applied to the altogether insignificant business sold, hardly requires statement. But for one unreported case before SARGANT, J.—*Smedley's, Ltd.* v. *Smedley* (5)—I should have thought that the law on this subject was clear. It is the business sold which is the legitimate subject of protection, and it is for its protection in the hands of its purchaser, and for its protection only, that the vendor's restrictive covenant can be legitimately exacted. A restrictive covenant by a grocer on the sale of his business in a country town, if it would be unreasonable and void when the purchaser was acquiring it as his sole business, does not become valid if the purchasers are, say, Messrs. Lipton, with branches everywhere. The point is, perhaps, most clearly brought out in those recent cases in the House of Lords, in which the essential distinction between vendors' and employees' restrictive covenants has been so clearly laid down. Take, for instance, the justification for a wider vendor's covenant in LORD SHAW'S speech in *Mason's Case* (3) ([1913] A.C. at p. 737):

> "If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to show that such a contract—in so far as it restrains the vendor from becoming a rival of a business whose goodwill he has sold and which he has bargained he shall not oppose—there may be elements showing that such a contract is enforceable, and, indeed, that a declinature by the law to enforce it would amount to a denial of justice."

Again, in *Herbert Morris, Ltd.* v. *Saxelby* (6) LORD PARKER says ([1916] 1 A.C. at p. 708):

> "In the *Nordenfelt Case* (7) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and

that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on." A

He does not say "going to be carried on." Take again LORD WATSON'S observations in the *Nordenfelt Case* (7) ([1894] A.C. at p. 552):

"I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially that in cases where the purchaser for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which, having regard to the nature of the business, are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether, when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold, a covenant imposing that restraint must be invalidated by the principle of public policy, is the substance of the question which your Lordships have to consider in this appeal." B C D

LORD HERSCHELL in the same case says (ibid. at p. 548):

"I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." E

In all these cases the business sold is treated as the subject of protection, and similar judicial utterances could be indefinitely multiplied.

In my judgment, when the matter is looked at on principle, these statements necessarily mean what they say. A covenant in gross against trading, however great the consideration, is void. A covenant only exacted for the protection of a business with which the covenantor has never had any connection is, for this purpose, no better than a covenant in gross. If authority for this be required it will be found in *Henry Leetham & Sons, Ltd.* v. *Johnstone-White* (8), a decision of the Court of Appeal given before *Mason's Case* (3), and, therefore, given before the essential difference between vendors' and employees' covenants had been expounded by the House of Lords. It follows that, although *Leetham's Case* (8) related to an employees' covenant, the principle laid down by the Court of Appeal remains applicable to all restrictive covenants of this kind. In that case the question was whether the employee could be bound by a covenant designed to protect a business of his employers in which he had never been employed, and FARWELL, L.J., says ([1907] 1 Ch. at p. 326): F G H

"It appears to me on the evidence that it is quite plain that, regarded as a contract for the protection of the Cleveland company alone, cl. 4 is manifestly unreasonable as being far wider than can possibly be required for the protection of that company. But it is argued that the true meaning is this, that the contract is entered into by the individual on behalf of a great number of companies, and it is said that the contract should be regarded as one for the protection, not of the Cleveland company, whose servant the defendant became, but of all or any of the Cleveland company or the companies, one of whom has indeed a very large business. It seems to me that such a contract is contrary to the very principle on which these contracts are allowed to be effected, notwithstanding that they are in restraint of trade, and therefore against public policy. The courts have gone on the footing that an individual who is dealing with a business which he has built up by his own exertions is entitled to protect that business so as to enhance its value, but a contract restraining trade is only good if and so far as it is for the protection of that I

business. For instance, it has been decided in *Horner* v. *Graves* (9) that you cannot have a covenant in gross—that is to say, a man who has no interest in the business at all cannot take a covenant from a man that he will not enter into that particular business; it does not concern him, and it is against public policy, because it restricts trading in the United Kingdom. In the same way it follows, to my mind, that a man whose business is a corn miller's business, and who requires to protect that, cannot, if he has also a furniture business, require the covenantor who enters into his service as an employee in the corn business to enter into covenants restricting him from entering into competition with him in the furniture business also, because it is not required for the protection of the corn business in which the man is employed, however much it may be beneficial to the individual person, the owner both of the corn business and of the furniture business."

It seems to me that every word of that judgment applies to the present case, and that the principle is as I have stated it.

But counsel for the plaintiffs relied strongly on *Smedley's, Ltd.* v. *Smedley* (5), decided on motion by SARGANT, J., on June 14, 1918, and he has supplied the court with a shorthand note of the learned judge's judgment. In that case the defendant, in 1915, was carrying on a dentist's business at 20, Camberwell Green, and 247, Camberwell Road, and on Oct. 11, 1915, he entered into an agreement to sell the business carried on at 20, Camberwell Green, to the plaintiffs. The agreement contained this clause:

> "The vendor undertakes that he will not commence or be concerned in any way with any business of a similar or competing nature within one mile of the covenantor's premises always excepting the premises now occupied by him and the business carried on by him at 247, Camberwell Road, or any premises he may take in substitution for such premises."

The plaintiff company at that date had a business at 27, Grand Parade, Brighton. The defendant thereafter opened a competing business within one mile of that Brighton address. The motion was to restrain him from carrying on that business. In the course of his judgment dealing with the motion the learned judge says:

> "The defendant merely contends that the covenant is wider than was reasonably necessary for the protection of the particular business sold. He contends that the court ought not to consider what was reasonably necessary for the protection of the three businesses actually carried on by the purchaser at the time of the sale, but should confine its attention only to the business actually sold and consider whether the covenant was reasonably necessary for the protection of the goodwill of that particular business. That is an entirely novel argument. I have never heard it before, nor have I been referred to any authority justifying it."

He read a passage from LORD ATKINSON's judgment in *Saxelby's Case* (6). I will refer to that passage in a moment. It appears from that judgment that on that motion the learned judge cannot have had the assistance which has been rendered to me. His attention was not called to *Leetham's Case* (8) nor definitely to the passages which I have read from the judgments in the House of Lords. His conclusion was based exclusively on the following passage from the judgment of JAMES, V.C., in *Leather Cloth Co.* v. *Lorsont* (10) (L.R. 9 Eq. at p. 354), which he extracted from the speech of LORD ATKINSON in *Saxelby's Case* (6) ([1916] 1 A.C. at p. 701):

> "The principle is this; Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to

enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract." A B

But if the *Leather Cloth Co.'s Case* (10) is looked at, it will be found that the only business in question there was the business sold by the defendant to the plaintiff company promoted and incorporated to acquire it and carry it on. The point now in question was, accordingly, in no way in issue. There are special circumstances in *Smedley's, Ltd.* v. *Smedley* (5), to which I have not alluded, and which, no doubt, amply justify the interlocutory injunction SARGANT, J., then granted, but if his decision depends on the principle enunciated by him, I am not, I think, at liberty to follow it, because it seems to me to be at variance, not only with principle, but also with previous decisions binding both on him and me. C

In my judgment, therefore, the covenant desired to be severed must be judged of only with reference to the goodwill of the business sold, and so judged it is far wider than is necessary for the reasonable protection of the plaintiffs. It was suggested that, without this covenant, the covenantors might on the next day have brought out a new and improved patented process, and so have deprived the plaintiffs of all advantage from the sale. But the answer is that the plaintiff company have neither purchased nor paid for any such process. The covenant here is not appropriate to secure them against its discovery—see *Printing and Numerical Registering Co.* v. *Sampson* (11), and was neither designed nor is it appropriate to give to the plaintiff company that kind of protection. It is true that the transfer of the patent ipso facto precluded the covenantors from carrying on, without the licence of the plaintiffs, the only business in which they had ever engaged; but this fact does not, in my judgment, justify a covenant wider in range than that which would have been permissible if the carrying on of their business, apart from the covenant, had still been open to them. I need not further consider whether the duration of the covenant is reasonable in relation to the plaintiff's business, the magnitude of which may hardly be sufficient to justify a covenant unrestricted in space for so considerable a term; nor need I consider the question whether, seeing that the business sold is in no sense being carried on, so that the only subject of protection is non-existent, and seeing also that thereby the defendant Schelff has lost all chance of earning the commission which was one consideration for his covenant, the case would, in any circumstances, have been one for injunction. D E F G

There are already sufficient grounds for holding that the plaintiffs' claim to an injunction has not been established, and I dismiss their action with costs.

Solicitors: *Church, Adams, Prior & Balmer*, for *Cobbett, Wheeler & Cobbett*, Manchester; *Stokes* and *Stokes*. H

[*Reported by* J. B. B. MACMAHON, ESQ., *Barrister-at-Law.*]

VERSCHURES CREAMERIES, LTD. *v.* HULL AND NETHERLANDS STEAMSHIP CO., LTD.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), March 3, 1921]
[Reported [1921] 2 K.B. 608; 91 L.J.K.B. 39; 125 L.T. 165]

Election—Carriage of goods—Misdelivery—Delivery to consignee after consignment instructions cancelled—Judgment for goods sold and delivered obtained by consignor against consignee—Judgment not satisfied—Claim against carriers for misdelivery—Approbation and reprobation.

The plaintiffs dispatched certain goods through the defendants, who were carriers and forwarding agents, to be delivered to consignees. During transit the plaintiffs instructed the defendants not to deliver the goods to the consignees but nevertheless they were delivered to one of them. The plaintiffs thereupon invoiced the goods to the consignee and ultimately recovered judgment against him for the price of goods sold and delivered, but, as the judgment was unsatisfied, they sued the defendants for negligence and breach of duty as carriers or forwarding agents.

Held: by suing the consignee for goods sold and delivered the plaintiffs had elected to treat the delivery to the consignee as an authorised delivery and they could not treat the same act as a misdelivery against the defendants; accordingly they were estopped from suing the defendants.

Notes. Applied: *Dexter* v. *Hill Crest Oil Co.* (*Bradford*), *Ltd.*, [1925] All E.R.Rep. 273. Referred to: *Anderson* v. *Equitable Assurance Society of United States* (1926), 134 L.T. 557; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to approbation and reprobation and the common law principle of election, see 15 Halsbury's Laws (3rd Edn.) 171, 172; and for cases see 21 Digest 225 et seq. As to misdelivery of goods by a carrier, see 4 Halsbury's Laws (3rd Edn.) 148; and for cases see 8 Digest (Repl.) 166 et seq. As to waiver of tort, see 32 Halsbury's Laws (2nd Edn.) 161; and for cases see 42 Digest 994 et seq.

Cases referred to:

(1) *Smith* v. *Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, *3875*.
(2) *Ker* v. *Wauchope* (1819), 1 Bli. 21; 4 E.R. 1; 20 Digest 405, *1429*.
(3) *Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224; 77 L.J.P.C. 64; 98 L.T. 509; 24 T.L.R. 344, P.C.; 20 Digest 433, *1610*.

Appeal by the plaintiffs from the judgment of Bailhache, J., sitting without a jury.

On Mar. 23, 1917, the defendants, who were carriers and forwarding agents, accepted from the plaintiffs in Rotterdam certain cases and boxes of margarine to be carried to Hull and to be forwarded thence as the plaintiffs should direct. The goods had been originally consigned partly to one R. Beilin in Manchester and partly to one S. Beilin in Liverpool; but during the transit the plaintiffs directed the defendants not to deliver them to the original consignees, but to deliver some of them—namely, thirty cases and fifty boxes—to another person. The defendants acknowledged and accepted the direction, but notwithstanding this these goods were in fact delivered to R. Beilin in Manchester. On Apr. 25, 1917, the plaintiffs wrote to the defendants:

> "We had good reasons for not wishing these goods to come into the possession of Mr. Beilin. We have accordingly invoiced the goods that Mr. Beilin received, but we hereby advise you that we must look to you to indemnify us should we fail to obtain payment from Mr. Beilin for the goods delivered to him contrary to our instructions."

The plaintiffs then brought an action against Beilin, and on June 28, 1917, they wrote to the defendants: A

> "We have instituted proceedings against Mr. Beilin for the amount due to us . . . which, however, does not relieve you of your responsibility to us in respect of our claim until we have secured payment for the moneys due to us. We shall, however, keep you informed as to the course of the proceedings we have instituted against Mr. Beilin." B

On Apr. 9 the plaintiffs wrote to the defendants stating that they had recovered judgment against Beilin "for the moneys owing to us in respect of margarine supplied to him"; but that they had failed to obtain payment and had instituted bankruptcy proceedings against him. The plaintiffs then sued the defendants for negligence and breach of duty as carriers or forwarding agents. The defendants C pleaded that after the delivery to Beilin and with knowledge thereof the plaintiffs elected to invoice all the goods mentioned in the statement of claim to Beilin and to debit him therewith and subsequently to sue him in the King's Bench Division for the price thereof, and that they obtained judgment against him on Jan. 18, 1918, and afterwards instituted bankruptcy proceedings against him in respect of the judgment debt. The defendants contended that the plaintiffs were by this D election precluded from bringing the present action, and on this ground BAILHACHE, J., gave judgment in their favour. The plaintiffs appealed.

Schiller, K.C., and *Addington Willis* for the plaintiffs.
Le Quesne, for the defendants, was not called upon to argue.

BANKES, L.J.—The plaintiffs attempted to blow hot and cold, as LORD ESHER used to say following LORD KENYON, C.J., in *Smith* v. *Hodson* (1) (see SMITH'S LEADING CASES, Vol. 2 (12th Edn.) 139–145 [see now Vol. 2 (13th Edn.) 140–159]) E or to approbate and reprobate. Certain margarine belonging to them was dispatched from Holland on board the defendant's vessel consigned to one Beilin in Manchester. For some good reason the plaintiffs desired that the goods should not be delivered to Beilin, so they instructed the defendants, who were acting as F carriers of the goods, to hold them at Hull and await further orders. The defendants acknowledged and accepted this order, but nevertheless they delivered the goods to Beilin. When the plaintiffs became aware of this, they had a right to elect; they could refuse to recognise the action of the defendants in delivering the goods to Beilin and sue them for conversion or breach of duty, or they could recognise and adopt the act of the defendants and sue Beilin for goods sold and G delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorised delivery, they cannot treat the same act as a misdelivery as against the defendants. That would be to approbate and reprobate the same act. The judgment of BAILHACHE, J., was right and this appeal must be dismissed.

SCRUTTON, L.J.—I am of the same opinion. Certain goods were delivered to H a wrong consignee. The owners of the goods might have sued for conversion. They did not do this. They "assumpsit bring and, godlike, waive the tort." They did not sue for the value of the goods, but for the contract price, alleging a contract to sell and a right delivery under it, and they recovered judgment on that basis. Now they propose to turn round and sue their agents on the basis that the agents had misdelivered; and counsel for the plaintiffs argues that they can do this. It is I not easy to see why this act of the owners should enure to the benefit of their agents, who were not parties to the action for goods sold and delivered, and who have in no way altered their position in consequence of any election exercised by the plaintiffs in bringing that action; but the principle is well established, that a plaintiff is not permitted to "approbate and reprobate." The phrase is apparently borrowed from the Scottish law, where it is used to express the principle embodied in our doctrine of election—namely, that no party can accept and reject the same instrument: (*Ker* v. *Wauchope* (2); *Douglas-Menzies* v. *Umphelby* (3)). The

doctrine of election is not, however, limited to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

ATKIN, L.J.—I agree. Forwarding agents having been instructed to deliver goods to one consignee delivered them to another. That person had been in contractual relation with the owners of the goods; had been their buying agent; he was the only person to whom they sent their goods in Manchester or Liverpool, and there was a course of dealing by which the goods were delivered to him at a particular price. When these goods came to his hands, as other goods had come, he treated them as having come in the course of dealing, and sold them to his customers. The owners treated the goods as having rightly come to his hands; they sued him for the price of them, recovered judgment against him, and made him a bankrupt. Thereby they affirmed and ratified the act of their forwarding agents. Having done that, they cannot afterwards sue the agents as having acted in breach of their mandate. Their attempted reservation of rights against the agents was ineffective. They were renouncing by their act the rights they were attempting to reserve. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Woodham, Smith & Borradaile*; *Botterell & Roche*, for *Hearfields & Lambert*, Hull.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN MAHMOUD AND ISPAHANI

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), February 22, 23, 1921]
[Reported [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; 37 T.L.R. 489; 26 Com. Cas. 215]

Contract—Illegality—Refusal of court to enforce—Breach of statutory order—Illegality raised by guilty party—Bona fide belief of other party that contract valid.

The court will not enforce a contract which is made illegal by a statutory Order, even though the question of illegality is raised by the party who has been guilty of it, and even though the other party honestly believed, as a result of statements made to him by the party guilty of the illegality, that no breach of the Order was being committed. The principle that, where a contract can be performed either lawfully or unlawfully and one party without the knowledge of the other elects to perform it unlawfully, that party cannot plead its illegality, does not apply to a case where the contract sought to be enforced is altogether prohibited.

Bloxsome v. *Williams* (1) (1824), 3 B. & C. 232, explained and distinguished.

Dictum of MCCARDIE, J., in *Brightman* v. *Tate* (2), [1919] 1 K.B. at p. 472, disapproved.

Notes. The Seeds, Oils and Fats Order, 1919, was revoked, with other Emergency Orders, after the 1914–1918 war.

Applied: *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46. Considered: *Berg* v. *Sadler and Moore*, [1937] 1 All E.R. 637. Applied: *Bostel Bros., Ltd.* v. *Hurlock*, [1948] 2 All E.R. 312. Referred to: *Anderson* v. *Daniel* (1923), 93

L.J.K.B. 97; *Siveyer* v. *Allison*, [1935] 2 K.B. 403; *Nash* v. *Stevenson Transport, Ltd.*, [1936] 1 All E.R. 906; *Woolfe* v. *Wexler*, [1951] 1 All E.R. 635.

As to contracts rendered illegal by statute or statutory Order, see 8 HALSBURY'S LAWS (3rd Edn.) 140–144; and for cases see 12 DIGEST (Repl.) 300 et seq.

Cases referred to:

(1) *Bloxsome* v. *Williams* (1824), 3 B. & C. 232; 1 C. & P. 294, 336; 5 Dow. & Ry.K.B. 82; 2 L.J.O.S.K.B. 224; 107 E.R. 720; 12 Digest (Repl.) 325, *2507*.

(2) *Brightman & Co.* v. *Tate*, [1919] 1 K.B. 463; 88 L.J.K.B. 921; 120 L.T. 512; 35 T.L.R. 209; 12 Digest (Repl.) 302, *2330*.

(3) *Bartlett* v. *Vinor* (1692), Carth. 251; Skin. 322; 90 E.R. 750; 12 Digest (Repl.) 304, *2336*.

(4) *Langton* v. *Hughes* (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest (Repl.) 302, *2327*.

(5) *R.* v. *Woodrow* (1846), 15 M. & W. 404; 2 New Mag. Cas. 1; 2 New Sess. Cas. 346; 16 L.J.M.C. 122; 10 J.P. 791; 153 E.R. 907; 14 Digest (Repl.) 36, *57*.

(6) *Cope* v. *Rowlands* (1836), 2 M. & W. 149; 2 Gale, 231; 6 L.J.Ex. 63; 150 E.R. 707; 12 Digest (Repl.) 305, *2345*.

Also referred to in argument:

De Begnis v. *Armistead* (1833), 10 Bing. 107; 3 Moo. & S. 511; 2 L.J.C.P. 214; 131 E.R. 846; 12 Digest (Repl.) 303, *2331*.

Holman v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404*.

Levy v. *Yates* (1838), 8 Ad. & El. 129; 3 Nev. & P.K.B. 249; 1 Will. Woll. & H. 219; 7 L.J.Q.B. 138; 112 E.R. 785; 2 Jur. 324; 12 Digest (Repl.) 303, *2332*.

Whitham v. *Lindley* (1920), 37 T.L.R. 75, D.C.; 30 Digest (Repl.) 138, *902*.

Smith v. *Mawhood* (1845), 14 M. & W. 452; 15 L.J.Ex. 149; 153 E.R. 552; 12 Digest (Repl.) 305, *2346*.

Re Anglo-Russian Merchant Traders and John Batt & Co., [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 61 Sol. Jo. 591, C.A.; 12 Digest (Repl.) 451, *3395*.

Brandt v. *Morris*, [1917] 2 K.B. 784; 87 L.J.K.B. 101; 117 L.T. 196, C.A.; 39 Digest 666, *2555*.

Appeal by the buyer from an order of ROWLATT, J., on the award of an umpire in the form of a Special Case.

By a contract of Aug. 27, 1919, made subject to the rules of the Hull Seed, Oil, and Cake Association of the Hull Incorporated Chamber of Commerce and Shipping, the seller, Mahmoud, sold and the buyer, Ispahani, bought 150 tons of linseed oil at 111s. per hundredweight to be delivered to craft or carts at Hull free of expense in buyers' casks, delivery 50 tons during each month, October, November and December, 1919. All disputes on the contract were to be settled by arbitration in Hull. When the contract was entered into there was in force an order issued on June 19, 1919 (which came into force on June 23, 1919) by the Food Controller under the Defence of the Realm Regulations and called the Seeds, Oils, and Fats Order, 1919, which provided by cl. 1 (a):

> "Until further notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in, or offer or attempt to buy or sell or otherwise deal in, any of the articles specified in the schedule hereto, whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller."

By cl. 3:

> "All parties to the purchase or sale of any of the articles specified in the schedule shall require or disclose (as the case may be) all such information as may be necessary or required by such parties or by or under the authority of the Food Controller, for the purpose of satisfying them or him that the provisions of this Order have not been contravened. . . ."

By cl. 4, "Infringements of this order are summary offences against the Defence of the Realm Regulations." Linseed oil was an article specified in the schedule to the order. On Oct. 29, 1919, the seller, who had obtained a licence under the Order from the Food Controller dated July 8, 1919, tendered delivery to the buyer against payment of the invoice price of the first instalment of 50 tons of linseed oil due under the contract; but the buyer declined to accept the linseed oil, stating that he did not admit he had made any binding contract. The seller thereupon gave notice to the buyer of his intention to sell, sold the oil at the best price obtainable, and rendered an account to the buyer for the difference between the contract price and the sale price. By letter dated Nov. 7 the buyer contended that the contract of Aug. 27, 1919, was illegal on the ground that no licence had been issued to him under the above-mentioned Order, and that he would be liable to penalties if he carried out the contract.

The umpire found the following facts that at an interview between the seller and the buyer some time in July, 1919, the seller asked the buyer if he had obtained a licence under the Order, and the seller informed the buyer that he had applied for one. At a subsequent interview before August, 1919, the buyer informed the seller that he personally and Messrs. Jules Karpeles and Co., Ltd., of which company the buyer was a director, had both obtained licences from the Food Controller under the Order. When the terms of the contract of Aug. 27, 1919, were arranged and before it was reduced to writing the seller inquired of the buyer whether he was buying for himself personally or on behalf of Jules Karpeles and Co., Ltd., and was informed by the buyer that he was buying for himself personally. The contract was thereupon made out by the seller in the name of the buyer, who confirmed it personally by signing the confirmation slip. The statement by the buyer that a licence under the Order had been issued to his company Jules Karpeles and Co., Ltd., was true, but his statement that he had obtained a licence was false and untrue to his knowledge at the time he made it. The seller was induced to enter into the contract by the representation made by the buyer that he had a licence, and the seller acted in good faith and in the honest belief that the buyer did have a licence entitling him to buy and deal in the goods covered by the contract. The seller was not guilty of any negligence in failing to require production of the buyer's licence for inspection before entering into the said contract. The umpire made an award, subject to the opinion of the court, that the buyer should pay to the seller the sum of £2,295.

The terms of the licence issued to the seller (so far as material) were as follows: Clause 1 related to purchases of articles situate outside the United Kingdom. Clause 2:

> "Sales: Sales by you under the authority of this licence shall only be made (a) related to delivery outside the United Kingdom. (b) For delivery within the United Kingdom to persons holding a licence issued under the authority of the Food Controller authorising them to purchase the articles sold for use in the United Kingdom and subject to any terms and conditions of such licence."

Rowlatt, J., held that the seller had not committed an offence against the Order, as he had a licence; nor did he aid and abet the buyer to commit an offence because he asked the buyer whether he had a licence and was told he had. He, therefore, affirmed the award, and the buyer appealed.

B. A. Cohen, *K.C.*, and *W. Frampton* for the buyer.
R. A. Wright, *K.C.*, and *Bernard Campion* for the seller.

BANKES, L.J.—The seller sold to the buyer 150 tons of linseed oil on Aug. 27, 1919, at which date there was in force the Order of June 19, 1919, made under the Defence of the Realm Regulations. The buyer refused to take delivery of the oil, and the seller made a claim against him for damages for his refusal to take delivery under the contract. The dispute went to arbitration, and the buyer set up that

the contract of sale and purchase was illegal and therefore unenforceable. The arbitrator stated his award in the form of a Special Case, the only question raised therein being whether the buyer's contention is good in law. ROWLATT, J., held that the contention was bad, and gave judgment for the seller.

The first question is, What is the true construction of the Order of June 19, 1919? Clause 1 provides:

> "Until further notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in . . . any of the articles specified in the schedule hereto [which included linseed oil], whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Food Controller."

The language of the clause is plain. It makes it illegal, on the part both of the buyer and of the seller, to enter into a contract prohibited by the clause. It is not material to consider, for the purpose of deciding this case, whether the seller has been guilty of an offence under the Order. It is said, as I understand it, that, provided a person complies with the requirements of cl. 3 and asks for information which would be "for the purpose of satisfying . . . him that the provisions of this Order have not been contravened," all the requirements of the Order have been complied with. I do not take that view of the Order. I think cl. 1 makes this contract illegal. Clause 3 is an additional requirement for securing that persons shall not enter into these contracts; but when one considers what is the effect of non-compliance with cl. 1, it seems to me immaterial whether they do or do not make the inquiries. The order is a clear and unequivocal declaration by the legislature in the public interest that this particular kind of contract shall not be entered into. The seller had a licence; the buyer had not. The seller contends that, as he had a licence, the buyer cannot be heard to say that in the circumstances he had not a licence. I cannot agree with that proposition. I do not think there is any authority for it, and as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the legislature has prohibited this contract, and, therefore, it is a case in which the court will not lend its aid to the enforcement of the contract.

The decision of MCCARDIE, J., in *Brightman* v. *Tate* (2) ([1919] 1 K.B. at p. 467) has been cited, where he referred to statements of the law upon the point by very learned judges. He referred to the language of HOLT, C.J., in *Bartlett* v. *Vinor* (3); and also to the statement of LORD ELLENBOROUGH, C.J., in *Langton* v. *Hughes* (4) (1 M. & S. at p. 596), namely, that

> "what is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action."

In addition to those statements of the law I will cite the statement by LE BLANC, J., in *Langton* v. *Hughes* (4) (1 M. & S. at p. 597):

> "It is an established principle, that the court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law."

Counsel for the seller have argued that this case does not fall within that rule of law. They cited a class of cases which say that where a contract may be performed either in a lawful way, or in an unlawful way, and if a party in the performance of his part of the contract, without the knowledge of the other party, elects to perform it in an unlawful way, he cannot be heard to allege his own wrong. I quite accept that proposition, and it is not in the least in conflict with the one to which I have been referring, because in a case of the kind suggested the contract is not ab initio illegal. Where there is a contract for the sale of goods which may be used either for a lawful or for an unlawful purpose, and the vendor at the time of the sale knows that they are going to be used for the unlawful purpose, the rule

applicable is the same as that where the contract is ab initio unlawful. *Langton* v. *Hughes* (4) is an illustration of that class of case. There a chemist sold drugs to a brewer knowing that they were going to be used by the brewer in making beer, which was prohibited by statute. I do not agree with what I understand to be the view of ROWLATT, J., because it does not seem to me that this contract could have been performed in a lawful manner. It is irrelevant that it might have been performed in a lawful manner if the defendant had had a licence. The question is whether, as the defendant had not a licence at the time when the contract was made, the contract is one which can be regarded as a lawful contract. In my opinion, it cannot.

I wish to refer to *Bloxsome* v. *Williams* (1), because I am not sure that I quite understand the language of BAYLEY, J. If the action was for damages for breach of contract, and if the contract was illegal, I do not understand the language of that learned judge; it seems to be at variance with the established rule of law. If, on the other hand, he was treating the case as one in which the plaintiff was seeking to recover back his money on the assumption that the contract was a void contract, then it seems to me that what he said is quite intelligible, and no criticism need be directed to it. I rather gather from the last words of his judgment that this latter must have been what was in his mind:

> "If the contract be void as falling within the statute, then the plaintiff, who is not a particeps criminis, may recover back his money, because it was paid on a consideration which has failed."

In this view of the case the suggestion by MCCARDIE, J., in *Brightman* v. *Tate* (2), that there is some qualification admissible to the established rule of law that the court will never lend its aid to the enforcement of a contract which is ab initio illegal, has no foundation. For these reasons, in my opinion the appeal must be allowed, and judgment entered for the buyer. I say nothing as to whether the seller may have a remedy in some other form of action against the buyer who is alleged to have deceived him by making a deliberately false statement. That does not arise in the present proceedings.

SCRUTTON, L.J.—As we are differing from the learned judge below I will express my opinion shortly in my own words. I should like to say at once that we are not dealing here with the commercial or business merits of the seller or of the buyer. If we were, there is obviously a great deal to be said for the commercial and business merits of the seller, and nothing whatever for those of the buyer. We are simply dealing with the legal position of the parties.

For public purposes and public reasons an Order was made by the Food Controller under the Defence of the Realm Regulations, which, in my view, absolutely prohibited the sale of any one of the specified articles within the United Kingdom to a person who had no licence to buy it. That is what happened in this case. The seller, who had a licence to sell, sold linseed oil to the buyer, who had no licence to purchase. It is clear that an offence under the Order was committed; an act prohibited by the Order had been done. There are cases where it has been discussed whether the word "knowingly" should be read into a statute, whether a person can be convicted of an offence against the statute who did not know that he was breaking it. It depends in each case upon the words of the statute. Where the prohibition is for public purposes as a general rule, unless there is the word "knowingly" or something to show that the offence can only be committed by a person who knows he is committing an offence, the person must take the risk. He must make such inquiries as will show him whether he is violating the prohibition in the statute. In this case the provisions of cl. 3 of the Order seem to make it quite clear that he is required to get the information necessary to see whether he is violating the Order.

There are many decisions upon mens rea. The nearest I have been able to find is *R.* v. *Woodrow* (5), which turned upon a statute which made it an offence for a dealer in tobacco to have in his possession a tobacco in which there should be found

on examination any other material. The person alleged to have infringed the statute purchased the adulterated tobacco of the manufacturer as genuine tobacco, and he honestly believed it was genuine. He was convicted, because the statute was passed for the protection of the public, and it was immaterial that he did not know that the tobacco was adulterated. He should have taken proper steps to see that it was not adulterated. If this contract is prohibited by what is equivalent to a statute, the fact that the person who entered into the contract honestly believed that he was not breaking the statute, because he was told by the other party that he had a licence, is no defence. I think the law is laid down in *Cope* v. *Rowlands* (6), where PARKE, B., delivering the judgment of the court, said (2 M. & W. at p. 157):

> "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: LORD HOLT, *Bartlett* v. *Vinor* (3). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?"

If so, the court is bound not to render assistance in enforcing an illegal contract.

As I understand, two reasons are given why the court should enforce this contract. First of all, it is said that the court will not listen to a person who says: "Protect me from my own illegality." In my view, the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract.

The other point is that, where a contract can be performed either lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That, in my view, does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the seller might lawfully contract with the buyer and chance his getting the licence before the seller delivered the goods. The contract was absolutely prohibited; and, in my view, if an act is prohibited by statute for the public benefit, the court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which PARKE, B., refers in *Cope* v. *Rowlands* (6), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules would apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public. The decision of ROWLATT, J., seems to have been founded upon his view that there was no illegality on the seller's part. For the reasons I have pointed out I think he misunderstood the Order. It was illegal for the seller to make this contract. The dictum of MCCARDIE, J., in *Brightman* v. *Tate* (2) ([1919] 1 K.B. at p. 472), founded on *Bloxsome* v. *Williams* (1), apparently lends support to the view of ROWLATT, J. In *Bloxsome* v. *Williams* (1) the defendant, a horse dealer, was prohibited from trading on Sunday, but there was nothing illegal in another person making a contract with a horse dealer, except that, if he knew that the person with whom he was dealing was a horse dealer and was guilty of breaking the law, he might be aiding and abetting him to break the law. But merely to make a contract with a horse dealer, without knowing he was a horse dealer, was not illegal. That was

A pointed out by BAYLEY, J., when he said: "It is not competent to the defendant to set up his own breach of the law," and it appears to me to distinguish *Bloxsome* v. *Williams* (1) from this case. Certainly I must not be taken as assenting to the dicta of MCCARDIE, J., which are based upon *Bloxsome* v. *Williams* (1).

Whether the seller has a remedy against the buyer who, on the finding of the umpire, has fraudulently deceived him, is a matter on which I express no opinion. B This court is confined to an award made upon the contract, and on the contract it appears to me that the umpire answered the question, which he put to himself, wrongly, when he enforced a contract which was prohibited by statute for the public benefit. For these reasons I think that the judgment of ROWLATT, J., should be reversed.

C **ATKIN, L.J.**—I agree. It is admitted that the Order of the Food Controller, made under the Defence of the Realm Regulations, has the effect of a statute, and the contention is that by that Order the contract in this case was prohibited. When the court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute D imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute. I prefer not to deal with the question of contracts forbidden by the common law as E being contrary to public policy, because, despite the great authority of PARKE, B. (*Cope* v. *Rowlands* (6), 2 M. & W. at p. 157), I think a question might be raised whether it is right to say that those contracts are prohibited by the common law. The right view may be that the common law refuses to enforce them. I think a different set of circumstances may arise in respect of such contracts as those, but here it appears to be plain that this particular contract was expressly prohibited F by the terms of the Order which imposed the necessity of a compliance with the licence. With great respect to ROWLATT, J., I think the underlying fallacy in his judgment is that he has not directed his attention to the terms of the licence or to the terms of the Order which says that no sale shall be made unless it complies with the terms of the licence. When one looks at the licence one finds an express prohibition against the seller selling to the buyer as the latter had not a licence. G I do not think it is necessary to pursue the matter any further so far as the statutory prohibition is concerned. Whether the seller would be liable to a prosecution does not appear to me to be necessarily the same point, and I desire to abstain from expressing an opinion upon it. All I desire to say is that I myself view with some trepidation any tendency to diminish the importance of the rule as to mens rea which has prevailed in respect of criminal charges. There are H cases where, no doubt, upon construction the statute makes it plain that an offence is created without a criminal intention on the part of the person who is charged, but those cases, where the court is dealing with a question of crime, are to my mind in themselves anomalous; and I should hesitate to increase their number without being satisfied upon argument that this is one of them.

The only other contention that I desire to refer to is that there is something I in the nature of an estoppel in this case. It seems to me that, when once it is appreciated that this prohibition is imposed for the public benefit, and is obviously made with the intention that the persons who are left in control of these goods shall only be entitled to deal with them if they are licensed by the proper authority and if they act in accordance with the terms of that licence, it would reduce the legislation to an absurdity to say that, notwithstanding such a statutory prohibition, if the seller is deceived into believing that his purchaser has a licence, he may then hand over the goods to that lying purchaser free from any restrictions whatever and leave him in control of the goods. The absurdity is made still

greater when one appreciates that, if two rogues each mutually deceive one another, apparently the legislation could be given the go-by altogether, and there would be unrestricted dealings in these particular commodities between such persons under contracts giving enforceable rights between one and the other. I cannot conceive that that can be the law, and I think that the express statutory prohibition prevents that state of law arising. I agree with my brothers in reference to *Brightman* v. *Tate* (2). If it is to be assumed, as was decided there, that there was in that case an express statutory prohibition against entering into the particular contract, the doubts expressed by McCardie, J., are unfounded. The result is that this appeal will be allowed. The umpire ought to have given effect to the buyer's contention, and ought not to have awarded any sum to be paid by the buyer to the seller.

Appeal allowed.

Solicitors: *C. J. Smith & Hudson*; *Hays, Roughton & Dunn.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

MENDIP RANGE (OWNERS) *v.* RADCLIFFE

[House of Lords (Viscount Haldane, Viscount Finlay, Lord Atkinson, Lord Wrenbury and Lord Phillimore, with Nautical Assessors), January 18, March 3, 1921]

[Reported [1921] 1 A.C. 556; 90 L.J.P. 209; 124 L.T. 706; 37 T.L.R. 474; 15 Asp.M.L.C. 242]

Shipping—Collision—Ship not under command—Test—Actual condition of ship, not belief of captain—Duty of captain—Duty of ship seeing prescribed signals.

By art. 4 of the Regulations for Preventing Collisions at Sea, 1910 (now Collision Regulations, 1948, r. 4): "(a) A vessel which . . . is not under command shall . . . by day carry . . . where they can best be seen, two black balls or shapes. . . . (d) The . . . shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and therefore cannot get out of the way. . . ."

The test whether a vessel is "not under command" so as to justify her captain in hoisting the prescribed signals is (Lord Atkinson dubitante) whether in fact she is out of command and not whether her captain bona fide and reasonably believes that she is out of command. Such a belief may affect the question of the blame to be attributed to his actions, but it has no bearing on the question whether he took the proper course under art. 4. If the special signal is justified by the condition of the ship, the captain's control over her course having ceased to be effective, she is exempted from the duty of carrying out the provisions of the collision regulations as to ships on crossing courses, and the duty of the captain is no more than the common law duty of care in navigating his ship in the condition in which she is. If a vessel is in such a condition that she can only get out of the way of another after great and unusual delay she must be considered to be "not under command" for the purpose of art. 4. When another ship has seen the special signal she is under an obligation to keep out of the way of the ship giving the signal, but the latter is not a stand-on ship within art. 21 of the regulations of 1910 (now r. 21 of the regulations of 1948).

Decision of the Court of Appeal, sub nom. *H.M.S. Drake*, [1919] P. 362, affirmed by a majority of the House.

House of Lords—Jurisdiction—Review of finding of fact—Concurrent findings of courts below—Findings must be clearly erroneous—Form of finding by judge.

The House of Lords will not review a finding of fact which has been concurred in by both courts below unless that finding is clearly erroneous. In deciding whether or not there has been agreement between the lower courts it is not necessary that the decision of a judge in one of those courts should be couched in any particular form of words. It is sufficient if he uses language which clearly conveys that he decides an issue of fact one way or the other. A judge finds on an issue of fact if he clearly expresses his concurrence with the decision of another judge on that issue.

Notes. Considered: *The Albion, Thomas Stone Shipping, Ltd.* v. *The Admiralty*, [1953] 1 All E.R. 978. Referred to: *Re A Solicitor*, [1945] 1 All E.R. 445.

As to art. 4 of the regulations of 1910, see 30 HALSBURY'S LAWS (2nd Edn.) 691–693, and as to the jurisdiction of the House of Lords on questions of fact, see ibid. (3rd Edn.), vol. 9, p. 363. For cases see 41 DIGEST 718, 719, and 36 DIGEST (Repl.) 373, 374.

Cases referred to:

(1) *P. Caland and Freight* (*Owners*) v. *Glamorgan Steamship Co.*, *The P. Caland*, [1893] A.C. 207; 62 L.J.P. 41; 68 L.T. 469; 9 T.L.R. 309; 7 Asp.M.L.C. 317; 1 R. 138, H.L.; 41 Digest 718, *5551*.

(2) *The Beryl* (1884), 9 P.D. 137; 53 L.J.P. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.L.C. 321, C.A.; 41 Digest 742, *5941*.

(3) *Lebanon* (*Owners*) v. *Ceto* (*Owners*), *The Ceto* (1889), 14 App. Cas. 670; 62 L.T. 1; 6 Asp.M.L.C. 479, H.L.; 41 Digest 733, *5757*.

(4) *Baker* v. *Theodore H. Rand* (*Owners*), *The Theodore H. Rand* (1887), 12 App. Cas. 247; 56 L.J.P. 65; 56 L.T. 343; 35 W.R. 781; 6 Asp.M.L.C. 122, H.L.; 41 Digest 707, *5415*.

Also referred to in argument:

The Hawthornbank, [1904] P. 120; 73 L.J.P. 18; 90 L.T. 293; 9 Asp.M.L.C. 535; 41 Digest 736, *5820*.

Appeal by the plaintiffs in a collision action from an order of the Court of Appeal, reported [1919] P. 362, which affirmed a judgment of ROCHE, J.

The plaintiffs were the owners of the steamship *Mendip Range*, and the defendant was Captain Stephen H. Radcliffe, R.N., commanding H.M.S. *Drake*. The two vessels were in collision at about 11 a.m. on Oct. 2, 1917, near Rathlin Island. On that morning the *Drake* had been torpedoed and seriously damaged, and she was making for a place of safety. The case for the plaintiffs was that the *Mendip Range* was in Rathlin Sound, on a course of S.E. ¾ E. magnetic, making about ten knots, when the *Drake* was observed about three miles away and three points on the port bow of the *Mendip Range*, in the company of some destroyers and enveloped in smoke-clouds, steering south-west, and that shortly afterwards she exhibited two discs, indicating that she was not under command. When the vessels were about a mile distant the helm of the *Mendip Range* was starboarded and two short blasts sounded; and, while she was going off under starboard helm, the *Drake*, being then on the starboard bow of the *Mendip Range*, was seen turning to starboard. As it had become impossible to clear by porting the *Mendip Range*, her helm was put hard-a-starboard, her engines full speed astern, and three short blasts were sounded. The *Drake*, however, continued to turn to starboard, struck with her ram the starboard side of the *Mendip Range*, and rendered it necessary for the *Mendip Range* to be beached. The plaintiffs alleged that the defendant and those on board the *Drake* (inter alia) failed to keep their course and speed, improperly exhibited the "not under command" signals, and ported her helm or allowed her head to go to starboard after displaying those signals. The case for

the defence was that the *Drake* was south-east of Rathlin Island after being torpedoed, and was heading southward in a disabled and damaged condition, with a heavy list to starboard. She was then making about five or six knots, and swinging under a port helm with the object of rounding Rue Point and reaching, if possible, Church Bay. The *Mendip Range*, one of the *Drake*'s convoy before she was torpedoed, was seen about three or four miles distant, and about six points on the starboard bow. The *Drake* then exhibited two black discs to show that she was not under command, and kept her helm a-port, and, her whistle having been damaged in the explosion, sounded a short blast on the foghorn. The *Mendip Range*, when crossing ahead of the *Drake*, altered her course to port, and, although the *Drake* signalled by flags and waved to her to keep clear, the engines were stopped and put full speed astern, and the helm put amidships, the *Mendip Range* came on with considerable speed under starboard helm, re-crossing the bows of the *Drake* from port to starboard, and with her starboard side struck the stem of the *Drake*. It was alleged by the defendant that those on board the *Mendip Range* were negligent in (inter alia) starboarding and not keeping clear of the *Drake*. ROCHE, J., found that neither ship was to blame for the collision, with the result that he gave judgment for the defendant, each party to bear their own costs. The plaintiffs' appeal to the Court of Appeal was dismissed on the ground that the evidence established that the case was one of inevitable accident, and that the judgment of ROCHE, J., was therefore right. The plaintiffs appealed to the House of Lords.

By the Regulations for Preventing Collisions at Sea, 1910, provide:

"Article 4. (a) A vessel which from any accident is not under command shall carry [lights] . . . and shall by day carry in a vertical line one over the other, not less than 6 ft. apart, where they can best be seen, two black balls or shapes each 2 ft. in diameter . . . (d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and therefore cannot get out of the way. . . . Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

[See now Collision Regulations, 1948, r. 4a (in which "from any accident" is omitted) and r. 4 (e) (f), and r. 21, in terms similar to those of art. 21].

Laing, *K.C.*, and *Lewis Noad* for the appellants.
Butler Aspinall, *K.C.*, and *Dunlop*, *K.C.*, for the respondent.

The House took time for consideration.

Mar 3. The following opinions were read.

VISCOUNT HALDANE.—The evidence in this case shows that the *Drake*, the cruiser commanded by the respondent, came round the northern side of Rathlin Island, and was compelled, as the result of the damage done by the torpedo which struck her, to abandon her original intention to try to proceed on a south-east course to Belfast. It was finally determined to take her round the island at its southern point, and to bring her to anchor in shoal water in Church Bay, on the west side of the island. This the cruiser endeavoured to do, first turning round, east or south-east of the island, under starboard helm, so as to get into position, and thereafter being navigated under port helm. Her condition was bad. Two of her boiler rooms were out of action and full of water, and her speed had been reduced by a half. The steam steering gear had been carried away, as had been also the telephonic communication to the hand steering gear, which was in the after-part of the ship, below the water line. The steering orders from the bridge had consequently to be given by transmission through a row of men, probably about twelve, and the management of the helm was, therefore, slow and ineffective. She had also a list to starboard, and was not under anything approaching to normal effective control, but had a tendency to yaw. The captain seems to have decided that he must somehow get her round the southern point of the island,

which is known as Rue Point. Her syren or whistle had been rendered useless by the explosion. She was kept under port helm as soon as she was got into position, and she continued to be so kept, the helm being about 20 degrees to port. She was thus approaching Rue Point slowly, at a speed of about seven knots. As she was so approaching the point she exhibited two black shapes, to indicate that she was not under control or command, and these were seen by those on board the *Mendip Range*, which was approaching to near Rue Point from the other side of the island. At this time the *Mendip Range* was about three miles distant from the *Drake*. This was on Oct. 2, 1917. In the end a collision took place between the two ships somewhere between 10.25 and eleven in the forenoon of that day. The *Mendip Range* was directing her course so as to pass between Rue Point and the mainland of Ireland, which was about two miles off. The scene of the collision was somewhere midway between the island and the mainland, possibly nearer to the former. The *Mendip Range*, which had been among a group of vessels which the *Drake* had convoyed until they were near Rathlin Island, was proceeding westwards at a speed of about ten knots. It was prudent for her to go at this speed because there was reason to suppose that more German submarines might be in the vicinity. The courses of the *Drake* and the *Mendip Range* were in the first instance respectively roughly south-west and south-east. The collision took place at about right angles, the ram of the *Drake* striking the starboard side of the other vessel. By this time the *Drake* was veering in her direction to a little north of north-west, and the *Mendip Range* to about north-east.

The action was brought by the appellants as owners of the *Mendip Range*, against the respondent as officer in charge of H.M.S. *Drake*, for damages caused by his negligent navigation. The defence was no negligence on his part, but negligence on the part of those on board the *Mendip Range*. The trial judge (ROCHE, J.) held that there was no negligence in the navigation of either ship, so that neither was to blame. The Court of Appeal took the same view. There was no counterclaim, for an obvious reason. The captain of the *Drake*, who could only be sued personally [see now Crown Proceedings Act, 1947: 6 HALSBURY'S STATUTES (2nd Edn.) 46], had suffered no damage individually. There could, therefore, be no cross-appeal as to the finding of ROCHE, J., that the *Mendip Range* was not to blame. Having regard to the form of the proceedings and of the judgment, I do not think that this causes any difficulty. The only point which the respondent has to establish is that he was not to blame, and he is not estopped, in my opinion, from raising any argument which is relevant to this point, even though it may involve some reproach to those on board the other ship. However, no such question, in the view which I take, arises.

It must be assumed that those on board the *Mendip Range*, having seen the special signal, knew that the *Drake* was not under control or command, and that an obligation, therefore, rested on themselves to keep out of her way. I think that if the special signal was justified by the condition of the *Drake*, it exempted her captain from the duty of carrying out the provisions of the collision regulations as to ships on crossing courses. That the facts warranted the giving of the signal I entertain no doubt. The state of the steering gear and of the shattered cruiser generally was such that the captain was warranted in thinking that he could at least do little more than get round the Point before she was in danger of foundering. His control over her course had ceased to be effective. I think that, as a consequence, his duty was no more than the common law duty of care in navigating his ship in the condition in which she was.

The case made against the *Drake* was that the master of the *Mendip Range* observed her to be so heading that it was not safe to attempt to pass across her bows, and that in order to pass astern of her he starboarded his helm. It is said that after he had so starboarded for an appreciable time, two or three minutes, the *Drake* suddenly ported her helm, with the result that she rammed the other ship. Both of the courts below have found the facts differently from this. The view they took was that the *Drake* had been, since the time when she was first

sighted, continuously under a port helm without alteration, and was keeping her course. She could steer only imperfectly, and she was not in a position to alter her helm rapidly. Her object was, by keeping a port helm, to manage to get round the Point to the bay, taking care, as she could not deflect her course, excepting very slowly, and might yaw, not to approach too closely to the land. Her case is, in short, that such as her course was, it was one already adopted when she was first sighted by the *Mendip Range*, and that from this course she never deviated. ROCHE, J., found that she did not, after the *Mendip Range* had committed herself in the final minutes to a starboard helm, herself turn her helm to port. If her direction altered at all at the last moment, and this is not clear, it was not as the result of a change of helm, but would, if it happened, be due to uncontrollable yawing. This is a concurrent finding, and even if I felt myself free to dissent from it, there is nothing in the evidence which inclines me to do so. I think further that the fact so found is a cardinal one, which disposes of the real foundation of the argument of the appellants. Those on board the *Mendip Range* may have been justified in taking the steps they did just before the collision, although they did not succeed in averting the collision. But those on board the *Drake* were not shown to have been in any way to blame. I am, therefore, of opinion that the appeal fails.

VISCOUNT FINLAY.—In this case a collision took place on Oct. 2, 1917, in Rathlin Sound, between the steamship *Mendip Range* and H.M.S. *Drake*. An action was brought by the owners of the *Mendip Range* to recover damages on the allegation that the collision was caused by the negligence of those in charge of the *Drake*, the commanding officer being the nominal defendant. The defendant denied negligence on the part of the *Drake*, and pleaded that the collision was caused solely by the negligence of those on board the *Mendip Range*. The case was tried before ROCHE, J., with the Elder Brethren, and it was found by him that there was no negligence in the navigation of either of the vessels. His decision was affirmed in the Court of Appeal. The present appeal is brought by the owners of the *Mendip Range* to have it decided that the collision was caused by negligence in the navigation of the *Drake*. There was no appeal against the decision that the *Mendip Range* was not to blame. Counsel for the respondent, while submitting that he was at liberty to attack for the purposes of this appeal the finding that there was no negligence in the navigation of the *Mendip Range*, disclaimed doing so.

The collision took place at a point distant from half a mile to a mile in a southerly direction from Rue Point in Rathlin, an island off the north-east coast of Ireland. The *Mendip Range* was bound for Glasgow from Philadelphia, and was on a course of S.E. $\frac{3}{4}$ E. magnetic, making about ten knots, when she sighted the *Drake* distant about three miles on the port bow, and with her starboard side open to the *Mendip Range*. In this position it would ordinarily have been the duty of the *Drake* to keep out of the way, and the duty of the *Mendip Range* to keep her course (arts. 19 and 21 of the Regulations for Preventing Collisions at Sea: see now Collision Regulations, 1948, rr. 19, 21), but the *Drake*, after sighting the *Mendip Range*, displayed two black balls or shapes, which, under art. 4 of these regulations [r. 4 of 1948], are required to be carried by a vessel which from any accident is not under command. The *Drake* was a cruiser of 14,000 tons displacement and about 500 ft. in length, and, together with some destroyers, had been escorting a convoy of vessels proceeding eastward by the north side of Rathlin Island. About 9 a.m. on Oct. 2 she was torpedoed about five miles westward of Altacarry Head. The damage done by the torpedo was very considerable. The *Drake* took a list to starboard, the steam-steering gear was put out of action and the telephonic communication was broken, so that the vessel had to be steered by means of a hand wheel, which could be worked only with great slowness and with the help of twelve men, while the orders had to be transmitted through a number of other men stationed at intervals between the bridge and the hand wheel. It was contended

A for the *Drake* that she was "not under command" within the meaning of art. 4, and bound to hoist the black balls, and that it was, therefore, the duty of the *Mendip Range* to keep out of her way. After being torpedoed, Captain Radcliffe, who was in command of the *Drake*, determined to take her to Belfast, and she proceeded on her course for Belfast in a south-east direction from Altacarry Head. But on the report of the engineer commander that the vessel could not hold out so
B far as Belfast, Captain Radcliffe determined to take her round Rue Point into Church Bay. For some unexplained reason (possibly on account of the suspected presence of hostile submarines) the captain brought the vessel round to her new course, not by porting but by starboarding and coming round the greater part of a circle, an operation which is said to have taken forty minutes. When this turning was completed and the vessel was steadied on her new course she is stated to have
C been at a point three miles distant from Altacarry Head in a south-east direction. She proceeded for some time on her new course and afterwards ported for the purpose of rounding Rue Point and so getting into Church Bay. The *Mendip Range* and the *Drake* sighted one another at a distance of some three miles. The preliminary act, on behalf of the *Mendip Range*, stated the distance of the other vessel when first seen as about three miles and the bearing as about three points
D on the port bow, while the act on behalf of the *Drake* put the *Mendip Range* at about three or four miles distant and about six points on the starboard bow. These statements may be taken as approximately correct. The *Mendip Range* was making about ten knots, and the *Drake* about seven. The *Mendip Range* starboarded, intending to pass under the stern of the *Drake*, sounding two short blasts, but the *Drake* came round under the port helm with the result that the two vessels
E converged, the ram of the *Drake* striking the starboard side of the *Mendip Range*. The evidence for the *Mendip Range* was that the *Drake* suddenly ported, thereby bringing about the catastrophe. On behalf of the *Drake*, it was contended that there had been no such sudden porting, and it was asserted that the *Drake* had been for some considerable time under the port helm, and had been gradually coming round.

F It is admitted that the *Mendip Range* was not to blame for starboarding, as those on board of her might not have been able at the distance to see that the *Drake* was then coming round under the port helm. The question of the navigation of the *Drake* is, to my mind, a very difficult one. According to the oral evidence from the *Mendip Range*, which is strongly corroborated by the photographs taken at the time of the collision by the young man Potts on board the
G *Mendip Range*, the *Drake* came suddenly round under the port helm directly before the collision. ROCHE, J., found that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range*, by which I understand the learned judge to mean before the *Mendip Range* had come round under her starboard helm. He adds that he is satisfied that port helm action was taken, not for the *Mendip Range*, "but for the general purposes of the *Drake*
H in directing her course to the beach where she desired to anchor in shoal water." ROCHE, J., stated his conclusion as follows:

> "In these circumstances, I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass and would be able to pass clear of her on her port side and to the southward of her, and I do
I not find the course taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course."

Earlier in his judgment the learned judge described the situation thus:

> "Therefore it is obvious that a good deal, and, as I find, the greater part of the alteration of the *Drake* occurred at quite a late stage, as I am advised that it is a nautical probability, and I find, as a fact, that although the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered under starboard helm its effect was not such as to become apparent to

those on board the *Mendip Range*; that the *Mendip Range* thereupon starboarded, and the port helm of the *Drake* was adhered to, and that the one vessel so starboarding, and the other vessel so porting, the collision was brought about in the manner previously described."

The finding of ROCHE, J., acquitting the *Drake* of negligence was affirmed in the Court of Appeal. BANKES, L.J., after referring to the terms of the judgment given in the court below, says:

"I think the general conclusion which I draw from the learned judge's judgment is that he did intend to decide, and did decide, this very material question whether the *Drake* took port helm action after the *Mendip Range* had starboarded; he intended to decide that in favour of the *Drake*. It is suggested, no doubt, that the action of the *Drake* under her port helm was more marked; she turned more rapidly, or she moved more rapidly under her port helm at the last than she had done at an earlier stage, in the time during which she had been in sight of the *Mendip Range*, but I do not think that he intended to find, and personally I do not think he would have been justified in finding, that there was an alteration of helm in the sense that anyone in charge of the *Drake* gave any fresh helm orders. That is the conclusion at which I have arrived upon this evidence, and, in my opinion, the view taken by the learned judge, as I understand his view, as expressed by him, was right, and I think that the *Mendip Range* cannot be charged in this case with having in any way contributed to the accident, and I think those in charge of the *Drake* were not negligent and were not to blame. The case is one in so far as she is concerned of inevitable accident. I think the judgment of the learned judge below was right."

The judgment of SCRUTTON, L.J., is devoted chiefly to the examination of the question whether the *Drake* was justified in hoisting the "not under command" signal, and I think the only passage in his judgment which is relevant to the point which I am now considering is the following:

"The judge has found that the *Drake*, before the *Mendip Range* altered her course, and when the *Drake* hoisted her two black balls, had an order for port helm, an action not taken for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shallow water. That is to say, being injured, she was taking the course necessary to save herself from injury. That, in my view, was a perfectly proper course for the ship to take even though she had hoisted two black balls, to try and save herself, even though her means of saving herself were unreliable, and it was under those circumstances the exact course she should pursue when she tried to save herself in that way. Now, so far as one can see, the evidence amply justifies that finding of the judge. If one looks at the chart, and sees where the *Drake* was torpedoed and the course she was proposing to make round, out of the Altacarry Head and Rue Point, one looks at the course of the *Mendip Range* heading towards Fair Head and sees the place where the *Mendip Range* must have been when she saw the *Drake* clear of Rue Point about three miles off, it seems to me an irresistible conclusion that the *Drake* seen at this place and being known to be going to Church Bay, must have been then under port helm. It was the only thing she could be doing reasonably to carry out her very proper plan of getting into Church Bay to try and save herself. If so, it is not a case where the *Drake* has, after the *Mendip Range* has committed herself to a course of action, taken an unnecessary course which led to the collision. The *Drake* is carrying out the course necessary to save herself, and the *Mendip Range* has misunderstood it. I agree with the finding that under the peculiar circumstances the *Mendip Range* is not to blame, but I also agree with the judge's finding that the *Drake* was entitled to hoist the two black balls showing she was out of command and entitled to continue the course which she was on before the *Mendip Range*

A acted in the way she did, to save herself. She was unable, not through negligence, to avoid the collision, but because there was no step that she could have properly taken in the short time that elapsed between the two periods, each observing what the other was doing."

The third member of the Court of Appeal, EVE, J., said that he was not prepared to say that he would have come to the same conclusion as the trial judge, but B that, whatever his own leaning, the learned judge's decision was as likely to be right as a finding the other way.

It, therefore, appears that in deciding this part of the case the decision of ROCHE, J., and that of the Court of Appeal amount to concurrent findings upon a question of fact substantially on the same grounds. Our nautical assessors take strongly the view that the *Drake* was in no way to blame. This is, of course, a C most important factor in our consideration of a question of navigation. I should, however, add that I think that this opinion was to some extent influenced by the view of the assessors that the *Mendip Range* ought to have been found to blame for starboarding. The question whether the *Drake* was guilty of negligence leading to the collision is, to my mind, one of extreme difficulty. It does not, however, come before us as if we were a court of first instance. We have to deal with D the concurrent findings by ROCHE, J., and the Court of Appeal on a matter of fact. I do not think that the facts are clear enough to justify us in disregarding the advice of our nautical assessors and setting aside the concurrent judgments of two courts which had, each of them, the assistance of nautical assessors. In my opinion, therefore, the appeal against the acquittal of the *Drake* for negligence in navigation should fail.

E There remains for consideration the question whether the *Drake* was justified in hoisting the signal that she was "not under command." Regulation 4 of the regulations of 1910 [now 1948] is as follows:

> "(a) A vessel which from any accident is not under command . . . shall by day carry in a vertical line one over the other, not less than 6 ft. apart, where they can best be seen, two black balls or shapes, each 2 ft. in diameter. . . . F (d) The . . . shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way."

It was contended for the *Mendip Range* that the *Drake* was in fact under command and that the signal of the two shapes was therefore improper and misleading. G Article 4 requires that a vessel which from any accident is not under command shall exhibit the signal. The test is the condition of the vessel in point of fact. Is she or is she not under command? Two views have been taken of the construction of the article on this point. They are stated by LORD HERSCHELL in *The P. Caland* (1) as follows ([1893] A.C. at pp. 212–13):

> "In the Court of Appeal the Master of the Rolls expressed himself as follows:
>
> H 'Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part her not being under command so that she cannot keep out of the way—taking those two together, it seems to me that the real construction of the rules is that she must, through some accident, be in such a position that she is not under command in this sense, that she could not keep out of the way of another I vessel coming near her. But if she can be steered, and can be stopped, and can go ahead—which is necessary in order that she may be steered—then she is under command, and the apprehension of her being likely (however well founded) to be in a few moments out of command does not show that she is out of command at the moment spoken of.'
>
> And the other learned judges concurred in this view. I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that if an

occasion for doing so should arise she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and unusual delay. I am not satisfied that in either of these cases she might not be properly described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point, as it has no application to the present case, but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the court below."

It was not necessary for LORD HERSCHELL in that case to decide this question of construction, but he clearly indicated the inclination of his opinion. It is now necessary that we should decide the point, as on the construction depends the answer to the question whether the *Drake* was "not under command." I think that the view indicated by LORD HERSCHELL in the passage which I have quoted is correct. If a vessel is in such a condition owing to an accident that she can only get out of the way of another after great and unusual delay I think she must be considered as "not under command" for the purpose of art. 4. She is not able to behave as those on board other vessels meeting her would reasonably expect. Both courts below, with the assistance of their nautical assessors, arrived at the conclusion that the *Drake* was in such a condition. We have consulted our own nautical assessors on the point and they take the same view, and entertain no doubt whatever that this vessel was in such a state that the signal ought to have been hoisted. The construction of the rule is, of course, not for the assessors but for the House. But when that construction has been ascertained the question whether on the facts the disability which the accident entailed on the vessel was such as to put her out of command is one of fact; in most cases it is largely a matter of degree. In my opinion, the *Drake* was not under command within the meaning of art. 4 and the signal was properly hoisted.

It was also argued on behalf of the *Drake* that, whether she was in fact out of command or not, those in control of her in good faith and on reasonable grounds believed that she was, and that this justified the hoisting of the signal. Reference was made in support of this contention of the respondent to what was said by LORD BOWEN in *The Beryl* (2) ([1884] 9 P.D. at p. 144) in considering the effect of the old art. 18 (now art. 23) as to the duty, "if necessary," to stop and reverse. LORD BOWEN said it might be a matter for consideration whether "if necessary" meant if it is actually necessary or only if the captain should reasonably think the necessity had arisen, and in the subsequent case of *The Ceto* (3) (14 App. Cas. at pp. 693–4) LORD HERSCHELL said with reference to this article that he agreed

"that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge he possesses at the time."

The doctrine so laid down by LORD HERSCHELL appears to me not relevant to the construction of art. 4. It is quite reasonable to construe a direction to stop and reverse if necessary as having reference to the facts as apparent at the time, and it would be unreasonable to hold the captain in fault because it appears by the light of facts afterwards ascertained that another course would have been better. But such considerations are not applicable to an article which prescribes that if the vessel is not under command a certain signal shall be hoisted. The question is of the condition of the vessel in point of fact and if she is out of control the signal is to be hoisted. Those in control of the vessel are in the best position for knowing whether she is under command or not. If they come to a wrong conclusion on the question of fact the action taken thereon is not justified. That they acted bona fide and on reasonable grounds may affect the question of blame to be attributed to their action or inaction; it has no bearing on the question whether under art. 4 the proper course was taken. The question whether the signal should be made is one between the vessel and other vessels, and their rights

A inter se depend on the language of the article coupled with the facts as they exist. It is a question not whether there was negligence, but whether the signal was required by the article. In the present case, indeed, this point of the respondent's is not very intelligible. All the facts as to the condition of the *Drake* were perfectly well known to those on board of her. The real charge made against her by the *Mendip Range* was that she acted in hoisting the signal "not under command" on B the view of the meaning of the article taken by LORD HERSCHELL and not on the narrower view of its effect which had been adopted in *The Ceto* (3) by the Court of Appeal. If a rule has been misconstrued, it is immaterial to inquire whether there was good faith or reasonable ground for the misconstruction. In fact, the article was rightly construed by the captain of the *Drake*. In my opinion, this appeal should be dismissed with costs.

C

LORD ATKINSON.—During the course of the argument in this case, three questions have emerged for decision by your Lordships. First, whether the ship-of-war, the *Drake*, from the time she was torpedoed up to the time of her collision with the *Mendip Range*, was, by reason of an accident, out of control within the meaning of art. 4 of the Regulations for Preventing Collisions at Sea; secondly, D whether the respondent was guilty of negligence in hoisting on his ship the signals prescribed by that article as soon as he had sighted the *Mendip Range*; and thirdly, whether the respondent was guilty of negligence in rapidly turning his ship to starboard while the *Mendip Range* was acting under her starboard helm, so as to make it impossible for the *Mendip Range* to clear her. Each of these questions is a question of fact. It is, in my opinion, absolutely clear that there was abundant E evidence given before the learned judge, ROCHE, J., who tried the case, to justify his finding in favour of the respondent on each of the issues of fact thus raised. The second and third questions may readily, for all practical purposes, be condensed into one, namely, did the respondent on this occasion navigate and manage his ship, even if not under command, in such a faulty, unseamanlike, and improper manner as amounted under the then existing circumstances to the negligent F management and navigation of her. Counsel for the appellants urged in reply, if not before, that there were not concurrent findings in the courts below on each of these three questions of fact. It is not necessary that the decision of a judge on any question of fact should be couched in any particular form of words. It appears to me to be quite enough if he uses language which clearly conveys the meaning that he decides the question one way or the other; and, in my view, a judge G equally finds upon an issue of fact if he clearly expresses his concurrence with the decision of another judge who has decided that issue.

In his judgment ROCHE, J., says:

> "I am unable to find the person responsible for the navigation of the *Drake* guilty of negligence, because he has taken the view he did and has hoisted the two black balls. Therefore, I arrive at the negative conclusion that I am H unable to find, and do not find, the captain of the *Drake* or the navigating officer guilty of negligence for hoisting the 'not under command' signals. Had I found that she was wrongly exhibiting the non-command signals I should have found that it contributed [to the collision he evidently means]. Mr. Aspinall argues that it did not, but I should have so found because I think it was the cause of the other vessel starboarding."

I This last statement would appear to me to amount to a clear expression of opinion that the *Drake* was not under command. He then goes on to deal with what he calls the main charge against the *Drake*,

> "namely, that she failed to keep her course and speed, that is to say, that she improperly ported her helm and allowed her head to go off to starboard. . . . In these circumstances I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass, and would be

able to pass, clear of her on her port side and to the southward of her, and I so find the course taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course."

By the words, "general purposes of the *Drake*," the learned judge meant the purpose of the *Drake* to get into shoal water where she might anchor in safety. It is in my mind clear that, by these passages from the judgment which I have cited, the learned judge conveyed, and meant to convey, that he intended to decide, and did then decide, each of the three questions of fact I have mentioned in favour of the respondent. It is next contended that BANKES, L.J., did not express himself in such a way as to indicate that he concurred with ROCHE, J., in the decisions on each of those questions of fact. I think that that contention is as unsustainable as the other. He says it appeared to him that there was amply sufficient evidence to justify a finding that the vessel was not under control; that he himself should so find. He then asked of his assessors the question whether, having regard to the injuries to the *Drake*, did they consider the hoisting of the out of command signals was justified?, and, he says, they answered "Yes," and he entirely agreed with them, adding that it was unnecessary he should say anything more on the question raised by counsel for the appellants whether the vessel was or was not under control within the meaning of art. 4. He then adds:

"Counsel for the appellants seems to draw a distinction between the fact of whether she was not under command and whether those in charge of her were justified in considering that she was not under command, but, personally, I cannot see any real distinction. If this court, or any other court, were of opinion that the vessel was not in such a condition as to be properly described as not under command, they would not come to the conclusion that those on board were justified in considering that she was in that condition. The court comes to the conclusion as to whether the officers were justified upon the opinion that they themselves formed as to the actual condition of the vessel."

This passage makes it plain, I think, that the learned lord justice concurred with ROCHE, J.'s findings on the first and second questions of fact. He then proceeds to deal with the third question of fact, and after criticising ROCHE, J.'s words, says that he does not think that the learned judge intended to find that there was any alteration of the helm of the *Drake* in the sense that anyone in charge of the *Drake* gave port helm orders. Then he says that those in charge of the *Drake* were not negligent and were not to blame, that the case was one so far as the *Drake* was concerned of inevitable accident, and that he thought the judgment appealed from was right. It was not suggested even that SCRUTTON, L.J., did not come on these three questions to conclusions practically identical with those arrived at by ROCHE, J.

The case, therefore, is one in which there are concurrent findings on the three decisive questions of fact. The principle which should guide your Lordships in dealing with such a case is laid down by LORD HERSCHELL with his accustomed clearness and precision in *The P. Caland* (1) in these words ([1893] A.C. at p. 215):

"I quite agree with what has been said in previous cases as to the importance of not disturbing a finding of fact in which both the courts below have concurred. I think such a step ought only to be taken where it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the courts below. I can lay hold on nothing as turning the balance decisively one way or the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordship that it so unequivocally inclines in the opposite direction to that indicated in the judgment of the court below that this House would be justified in reversing the judgment appealed from."

LORD WATSON concurred. I think the passage applies strongly to the present case. Even if I felt, which I certainly do not, that if I had been in the place of ROCHE, J., or of that of the learned judges in the Court of Appeal I might have come to conclusions different from those at which they arrived, I should, on these three questions of fact, applying the principle so laid down by LORD HERSCHELL, have felt myself bound not to concur in reversing the judgment appealed from.

In *The Ceto* (3) LORD HERSCHELL lays down another principle which, in my opinion, is particularly applicable to the present case. He said:

> "I quite agree with the Master of the Rolls that rigorous accuracy is not to be expected in the evidence of seamen in cases of this description [collision cases]. It would be a mistake to tie them down to the letter of their evidence, to the exact number of points that are mentioned, either in relation to the bearing of other vessels or to the alteration of their courses. I think one must deal with the matter broadly."

If that principle be applicable even where duty requires that such matters as those mentioned should be accurately ascertained, how much more forcibly must it apply where accuracy in respect of them is comparatively immaterial. For instance, how can it possibly affect this case whether the *Drake* turned Altacarry Head at a distance from it of three miles or five miles, or whether, when she completed her large circle and steadied momentarily, she steered a course of S. or S.E. or S.S.E.? She was steered to turn Rue Point and seek for safety in shallow Church Bay, and care was taken by those in charge of her that, owing to her condition, she should not approach the shore of Rathlin Island too closely. The broad fact is that all her officers and others who were examined on her behalf swore that her helm was ordered to be put 20 degrees to port, and that she came slowly to starboard continuously. It is true that no person was examined to prove that this order was actually carried out, but these witnesses cannot be mistaken as to whether their ship was slowly turning to starboard as if on a port helm, all along from the time she had completed her large circle, steadied, and made for Church Bay up to the collision. That is an entirely different thing from fixing distances or bearings, or measuring time. If their evidence on this point be untrue, then they must be deliberately forswearing themselves. No judge who has considered this case has accepted this latter theory, and, speaking for myself, I do not accept it. Again, it was suggested that if the *Drake* was slowly coming to starboard during all the time deposed to, she must have gone aground on Rathlin Island or been much nearer to the coast of that island than the place of collision. The place of collision would appear to depend very much on the distance, eastward of this island, of the spot where the *Drake* finished her long circle. There was no object to be gained at the time by fixing the distance of that point from the shore with accuracy. Of course, once the *Mendip Range* was sighted the captain and crew of the *Drake* were bound to navigate their ship with such care, caution, and skill as was reasonable in the circumstances, despite terrors and apprehensions and anxieties which must have beset them in their perilous endeavour to reach a place of safety. The captain and crew of the *Drake* were, I have no doubt, like all their fellows in the Royal Navy, cool and courageous men, but they were, after all, human beings, and to most, if not all, human beings life is sweet, and it is, in my view, not only unjust to them but misleading to ignore the special circumstances in which they acted and treat them as having no perils to encounter, save those which attend in peaceful times ordinary navigation. Yet it appears to me that the argument for the appellants has proceeded very much upon these latter lines.

Counsel for the appellants insisted very strenuously that a ship, to come within art. 4, must, in fact, be out of command and not merely out of command according to the opinion and bona fide belief of her captain, even though in forming that opinion and belief he should have made all reasonable inquiry and examination to ascertain the true condition of his ship, and brought to bear upon the facts so ascertained all the skill and knowledge of a fully competent seaman, so that his

opinion and belief were in the result based upon reasonable grounds. It is obvious that the captain must act on the facts he has ascertained in the manner mentioned, and not on facts not known to him, and hoist the signals prescribed by art. 4. He cannot send for experts to examine his ship and advise him if his diagnosis of her condition is sound and right or erroneous. If the captain's diagnosis was right he would be held justified in putting up the authorised signals and treating his ship as not bound to keep out of the way of a crossing ship. If his diagnosis of his ship's condition at the time should possibly twelve months afterwards be in a judicial inquiry proved by the evidence of experts to have been erroneous, then his action, based on the assumption that it was not erroneous, would necessarily be held to be wrong and blameable notwithstanding that he acted on a belief and opinion carefully formed and based on reasonable grounds. For instance, in the present case one of the matters upon which he based his opinion of his ship's condition was that, as her bulkheads were leaking, they might under pressure give way, when his ship would sink or turn turtle, as she afterwards did. But according to the argument, if the *Drake* reached Belfast and, on being examined in dock by the dock's experts, they disagreed with the captain as to the dangerous and threatening condition of the bulkheads of his ship, he must be held in a court which tried the question and accepted the expert's advice, to have acted wrongly in hoisting the prescribed signals.

Again, I am not quite sure whether counsel contended that the captain's culpability must be judged by the facts as they appeared to him at the time he acted or by some new facts subsequently disclosed. Some light may be indirectly thrown upon this latter point if not upon the preceding one by the provisions of art. 23 of these same regulations, and the judgment of this House in *The Ceto* (3). This art. 23 provides that

> "Every steam vessel which is directed to keep out of the way of another vessel shall, on approaching that other, if necessary, slacken her speed, or stop, or reverse."

The regulation corresponds with the art. 18 of the regulation of 1884. A question was raised upon the construction of this latter article as to who was to be the judge of "the necessity of doing one or more of these things." In *The Beryl* (2) BOWEN, L.J., said (9 P.D. at p. 144):

> "It may, however, be a matter of construction whether 'if necessary' is to be construed as meaning 'if it is actually necessary,' or only if the captain should reasonably think that a necessity has arisen, but even if we were to take the latter as the construction most favourable to the master of the *Beryl*, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to puts him clearly in the wrong and obliges us to hold that the *Beryl* was also to blame for the collision."

FRY, L.J., says (ibid. at p. 145):

> "It has been argued that the necessity is to be estimated by the event and not by the judgment of a seaman acting reasonably under the circumstances. It is not necessary to decide this point, for from the latter point of view the answer of our assessors shows that the captain of the *Beryl* broke the rule."

In MARSDEN ON COLLISIONS AT SEA the decision of the House of Lords in *The Ceto* (3) is treated as having decided this question, and held that the rule was to be construed as bearing the latter of these two meanings. LORD HALSBURY, in that case, said (14 App. Cas. at p. 673):

> "The question, shortly stated, is whether two vessels approaching each other and knowing that they were approaching each other, in a dense fog through which it was impossible to see lights or signals or any part of the vessels by either of them were not both to blame for not stopping and reversing until they had ascertained more distinctly their respective courses. I quite agree that the solution of that question must not depend on the state of facts after-

wards ascertained unless there was enough to tell both parties at the time what the condition of facts was. . . . Each of them was aware or ought to have been aware, that this approach did involve risk of collision, and the question is whether the facts were such in the knowledge of each that as prudent and reasonable persons those responsible for the navigation of the ship should have stopped and reversed."

LORD WATSON said (ibid. at p. 685):

"Whether it was in a reasonable sense necessary for the master of the *Ceto* to stop and reverse her engines before the *Lebanon* hove in sight is a question not of law but of fact. His duty in that respect must depend not upon the result of the whole facts now disclosed in evidence, but upon his own observation of the *Lebanon* fog signals, and the indications of the position and course of the *Lebanon* relatively to his own vessel, which those observations ought to have conveyed to a prudent seaman of ordinary skill."

LORD HERSCHELL said (ibid. at p. 693):

"The sole question is whether the *Ceto* should be held to blame in respect of having disobeyed the requirements of art. 18. . . . This resolves itself into the further question whether under the circumstances, in a dense fog with the indications which the master of the *Ceto* had of the position of the other vessel he ought, by the exercise of reasonable care and prudence, to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence, with the knowledge which he possesses at the time."

In *The Beryl*, BRETT, M.R., said (9 P.D. at pp. 138, 139):

"But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known at the time. You cannot regulate the conduct of people by unknown circumstances. When you instruct people you instruct them as to what they ought to do under circumstances which are or ought to be before them."

This statement of the law was approved by LORD HERSCHELL in *The Theodore H. Rand* (4) (12 App. Cas. at p. 250).

Having regard to this decision, I confess I have difficulty in seeing on what principle, if the captain of a ship injured by accident comes, after due and reasonable examination and inquiry, to the conclusion that the facts then by him ascertained constitute reasonable grounds for the belief and opinion that his ship is not under command, he would not be held justified for having hoisted the appointed signals, at all events if the court before which the question comes for decision concurs with him in thinking that the facts at the time so discovered do afford reasonable grounds for the opinion he has formed. Even though facts should subsequently be discovered which would show that the supposed facts upon which he forms his opinion were erroneous, it may well be that the captain's protection is still wider than this and that in the circumstances mentioned he should be held justified in his action, although the court should hold that the facts known to him at the time he hoisted these signals did not in fact afford reasonable grounds for his act. It is not necessary to decide either of these questions in the present case, inasmuch as I not only think that the concurrent finding of the courts below on the three questions of fact I have already mentioned ought not to be disturbed, but in addition because I am of opinion that each and every one of these findings was right, I need hardly say that I thoroughly concur in the opinions expressed by LORD HERSCHELL and LORD WATSON in *The P. Caland* (1) as to the proper construction of art. 5 of the regulations. Too much reliance was, I think, placed by the appellants on the enlargements produced of two photographs taken by an apprentice on board the *Mendip Range*, named Potts, as proof of the charge made by the appellants that the *Drake* just before the collision rapidly turned to

starboard and made it impossible for the *Mendip Range* by porting to clear her. The sequence of the events stated by Captain Thacker was not accepted by any of the learned judges who dealt with the case. The suggestion that this turning movement was made deliberately by the *Drake* was rejected by all of them. Had it been made deliberately by order it would not only have been wrong and reckless, but, in my view, almost insane in character on the part of those in charge of the *Drake*; and if it took place without any change of helm it proves all the more conclusively that the *Drake* was not under command, else why would she answer her unaltered helm so irregularly. ROCHE, J., endeavoured to reconcile the evidence of the officers of the *Drake* with the statement made by the captain of the *Mendip Range* by suggesting that the porting of the *Drake* was not so effective in the early part of her progress as at the end of it, that most of the effect of the porting took place at the end, and that the effect of the porting at the earlier stage was not so marked as was or ought to have been apparent to those on board the *Mendip Range*. I cannot say that I regard this explanation as very satisfactory. I do not know if the learned lords justices did so.

The story of the apprentice was most extraordinary. If it be true, it is not to be wondered at that many ships were lost. The *Mendip Range* carried a gun, or guns, presumably to protect herself against hostile attack by submarines among other craft. Potts was one of the crew of one of the guns. John Gemmel was the foreman gunner. His business apparently was to watch for submarines, and presumably to help to fire on them if they appeared. In reply to a question he said he "was supposed to be looking after submarines." He assumed when he saw the *Drake* that she had been torpedoed. He said: "She was on the *Mendip*'s starboard bow and appeared to be turning, and then other members of the gun's crew cried out 'She is turning; there is going to be a collision,' and then the chief gunner made the remark, 'You will catch her on the turn,' but neither the demands of duty, nor the danger of being torpedoed and sunk by one of the submarines he was employed to shoot at, nor the danger of his ship being sunk in a collision, could chill his devotion to the photographic art. The only effect of these dangers upon him was to make him think it would be an interesting thing to take a snapshot of this torpedoed cruiser coming round. The *Drake*, he says, was about three miles away when he first saw her bearing about three points on the *Mendip*'s port bow, but was not under a port helm (in this he contradicts all the officers of the *Drake* with, at most, one exception). She was about 2,800 ft. away when the chief gunner shouted that the *Drake* was a mile away. But the most important point of all is that no evidence is given as to the time which elapsed between the taking of the photographs. The witness is asked: "How long an interval would be between the two photographs, do you think?" That question is never answered. But the witness is asked: "Is the churning up of the water in the second photograph due to the reversing of the engines?" He replies: "I do not know." Then he is asked: "It looks like it, does it not? You know more about the photographs than I do?" And he replies: "It is hard to say because it probably may have been made by the ship meeting up against the water as we were under a starboard helm." But the *Drake* herself was under a port helm. How the starboard helm of the *Mendip Range* would cause the churning shown at the stern of the *Drake* is a mystery to me. The *Drake*, the witness says, was about a quarter of a mile away when he took the first photograph. At the rate of seven knots, which is the speed of the *Drake*, as found by ROCHE, J., she would traverse one mile in 8 4/7 minutes and a quarter of a mile in 2 1/7 minutes. If the two ships were approaching each other end on, i.e., at seventeen knots, as the *Mendip Range*'s speed was ten knots they would traverse a mile in 3 9/17 minutes, a little more than 3½ minutes, and a quarter of a mile in 52½ seconds. Of course they were not approaching end on, but they were approaching to some extent sideways, and the inference I draw from these figures is that the second photograph was taken in the very jaws of the collision after the *Drake* and the *Mendip Range* had each reversed their engines and gone full speed astern and the relative positions of the

two ships had completely changed. Neither Gemmel nor any of the members of the crew who made the alleged remark to Potts were examined. Neither ROCHE, J., nor the lords justices in the Court of Appeal appear to have attached any importance to these photographs. I think they were right in taking that course. For these reasons I think the appeal fails and should be dismissed with costs.

LORD WRENBURY.—The construction of the rules relevant to this case is important for its decision, and I shall at the outset express my opinion upon it. Article 19 [r. 19 of regulations of 1948] provides that where steam vessels are crossing, so as to involve the risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. Article 21 provides that "Where by any of these rules one or two vessels is to keep out of the way the other shall keep her course and speed." These rules govern the movements of the keep-out-of-the-way (or giving-way) ship, and of the course and speed (or stand-on) ship. Article 4 provides for the case of a ship "which from any accident is not under command." She is to indicate her condition by certain signals, and (para (d)), other vessels are to accept them as signals showing them that she is "not under command and cannot therefore get out of the way." The whole effect of art. 4 is to relieve the ship not under command if she be the giving-way ship from the obligation of keeping out of the way. The rules say nothing as to any obligation then arising in the other ship to keep out of the way, but as a matter of seamanship if the one vessel is not able to get out of the way it is the duty of the other to do so. She is not, however, one which "by any of these rules is to keep out of the way" within art. 21. She owes a duty to keep out of the way of a ship which (being not under command) "cannot therefore get out of the way" within art. 4, but her duty in that respect arises not from anything in the rules, but from the duty of good seamanship and from the common law duty of not being negligent. Then what is the duty of the ship not under command? She (if she was the keep-out-of-the-way or giving-way ship) is relieved from the duty of keeping out of the way (art. 4). But there is nothing in the rules to provide that she is to keep her course and speed—or, in other words, to become the stand-on ship. In the nature of things it would be unreasonable that the rules should provide that she should keep her course and speed, when ex hypothesi she is not under command and may not be in a position so to do. So far as the rules are concerned her duty also is undefined. Her duty arises apart from the rules, and is a duty not to be negligent, to use good seamanship, to do nothing to foil the other vessel in doing the duty which she, as above stated, now owes to keep out of the way.

To apply these observations to the present case. The *Mendip Range*, when she saw the two black balls of the *Drake*, was bound to know that the *Drake* was relieved of the obligation to keep out of the way, and that she (the *Mendip Range*) had to accept the responsibility of becoming that which otherwise she was not, namely, the keep-out-of-the-way ship. The *Drake*, for her part, did not become a stand-on ship, but owed a duty which, so far as the rules are concerned, was not defined, but which was the duty of good seamanship and of not being negligent. She owed the duty not to do anything to obviate or annul or render dangerous the manœuvre, which the *Mendip Range* now owed the duty to make, to keep out of the way.

Importance was attached below to the question whether the *Drake* was really out of command—whether she acted rightly in hoisting the two black balls. It is a question which has no bearing in forming a judgment upon the manœuvres of the *Mendip Range*. By hoisting the signal the *Drake* had said that she was—and the *Mendip Range* was entitled and bound to assume that she was—not under command. As between the two ships the *Drake* must be taken to be that which she said she was. She was bound to play the part of the character which she had assumed. Her duty was not to foil the manœuvres of the *Mendip Range*.

It has been decided (and it is a cardinal fact in the case) that the *Mendip Range* was not to blame, the contention was technically open to the respondent, and he

has not waived it. I have to start, therefore, with the established fact that the *Mendip Range* was right in starboarding, was right in continuing to starboard, and was right in being where she was and as she was when the collision took place. The whole question, therefore, is whether the *Drake* was to blame for so acting as that she was at the moment of the collision found at the same place.

ROCHE, J., found that the *Drake* was not under effective port helm for anything like ten minutes before the collision. He does not, it is true, find affirmatively that she had during those ten minutes altered her helm, but he does find that "it was impossible that there could have been an effective porting for anything like the long period alleged." He finds that

> "at the time the vessels were at a distance of about a mile there had been no effective porting of the *Drake* from a course of south-west such as would be, was or ought to have been, apparent to those on board the *Mendip Range*."

Our assessors tell us that looking at photograph No. 1 and judging by the apparent size of the *Drake* she was about a mile away when that photograph was taken. Up to that time, therefore, according to the learned judge's finding, there had been no effective porting on the part of the *Drake*. Our assessors also tell us that looking at photograph No. 2 and having regard to the speed, the time that must have elapsed between the two photographs must have been about a minute and a half. In photograph No. 1 the funnels of the *Drake* are closed and from the *Mendip Range* they are seen in a continuous line showing their port sides. The motion of the *Mendip Range* would tend to keep the funnels closed and to cause them to tend to show their starboard sides. In other words the motion of the *Mendip Range* would tend to counteract the opening of the funnels showing their port sides. Notwithstanding this the *Drake* in (say) a minute and a half so altered her heading that the funnels were entirely open, showing their port sides. She had gone round to starboard through a right angle or a little more. This must have been a most effective port helm.

BANKES, L.J., does not find the same facts as ROCHE, J. He agrees with him that the action of the *Drake* under her port helm was not so appreciable as to throw any blame upon the master of the *Mendip Range* for not realising when he gave the order to starboard that he was starboarding to a vessel then already committed to a port helm. In other words he finds that the *Drake* was not in the earlier stage turning to starboard at anything like the rate at which she was turning in the last minute and a half. He also finds that there was no alteration in the helm of the *Drake* in the sense that anyone in charge of her gave any fresh helm orders. But he does not agree with the trial judge as to the *Drake* not being under effective port helm for ten minutes before the collision unless the word effective is to be understood as used for vindicating the *Mendip Range* rather than for indicating his view as to the action of the *Drake*. In my judgment, ROCHE, J., plainly meant, as indeed he said, that the *Drake* had been discontinuously acting under port helm and that her story of an effective porting for anything like the time alleged was impossible. BANKES, L.J., believed and ROCHE, J., did not believe the *Drake*'s story of a continuous circuit under a port helm to round Rue Point.

In this state of circumstances the question to be answered is whether the *Drake* so acted as to foil a proper manœuvre of the *Mendip Range*. It is a possible view of the matter that when a ship has declared herself to be not under command the other ship must be prepared for any extravagant and dangerous action on the part of the ship not under command for she ought to contemplate that possibly the disabled ship cannot control her movements, and from the necessity of the case may do anything extraordinary. If this were so it might result that the *Mendip Range* ought to have contemplated that the *Drake*, either because she could not control her helm or because she was in a sinking condition, might be compelled to hug the shore, and that she (the *Mendip Range*) must act accordingly. But this consideration is not open. It is a consideration which if well founded would go

A to show the *Mendip Range* to be to blame, and she has been held not to blame, and no one has contended the contrary before us. What then caused the collision? The answer must be that it was caused by the *Drake* porting to a ship which she knew was starboarding. That she knew it is not disputed. She did not, it is true, hear the sound signal given by the *Mendip Range*, but she saw the two whiffs of steam as the whistle was blown. Her helm was such as to cause her to go round
B through at least a right angle to starboard in the last minute and a half. Had her helm been even amidships when the first photograph was taken, there would have been no collision. The question whether the *Drake* was right in declaring herself not to be under command is, as I have said, immaterial in my opinion in judging the *Mendip Range*. It is not necessarily immaterial in judging the *Drake*. She knew in what respects and to what extent she was not under command. She knew
C that she had an effective helm, but that it took time to give orders to the helm. She knew that she had the power, and she was using the power to take a course which she thought expedient, namely, a course to starboard to run round Rue Point into Church Bay. But by her signal of "not under command" she had told the *Mendip Range* that she was not a vessel who could command herself. The rules do not leave wholly undefined the meaning of "not under command," for
D those words are followed by the words "and cannot therefore get out of the way." The fact was that the *Drake* could and did command her course. She unfortunately so commanded it as to produce a collision by porting and continuing to port to a vessel which she knew was starboarding. She was misleading the *Mendip Range* by telling her that she (the *Drake*) could not command her course, while all the time she was commanding it. The appellant's case may be briefly stated thus:
E "You (the *Drake*) told me you were not under command. But your case is that you were under command in the material particular, that you could and did command your helm and deliberately steered a starboard course to round the Rue Point and get into Church Bay. By so doing you foiled my manœuvre to pass under your stern and so caused the collision." I do not see the answer to this
F contention. I think the appeal should be allowed and the *Drake* held to blame.

LORD PHILLIMORE.—The first matter to be determined is whether or not H.M.S. *Drake* was right in hoisting the two black shapes as a signal that she was out of command and could not get out of the way. On this point I feel in some difficulty. The primary step to be taken to get out of the way is to use your helm to turn the course of your ship; and this ship could, slowly perhaps, but still
G effectively, use her helm, as is shown by the fact that between the time of sighting the *Mendip Range* and the collision, she turned eight points or a right angle. Having regard to this fact and what was said by LORD HERSCHELL with the approval of LORD WATSON in *The P. Caland* (1), if I were to act on my unguided judgment, I should say that this vessel was under command, but the great majority of nautical assessors who have advised the three tribunals is of an opposite opinion,
H and the judges in the courts below have concurred with them; and this being so, I hesitate to advise your Lordships to act upon my uncorroborated opinion. Before, however, I pass from this point, I have to say that, with all respect for those who maintain the contrary, I cannot accept the contention which makes the test of the right and duty to hoist the black shapes, not the very truth of the case,
I but the opinion which the officer in charge of the damaged ship may form. Here it is to be observed that the rule does not give a licence or permission of which the officer in charge may or may not avail himself, but imposes a duty. If the ship is by any accident out of command, the officer must hoist the black shapes, and must thereby signal to other vessels that he cannot keep out of their way. The language of the rule is express that the condition of hoisting the black shapes is the fact and not the opinion of the fact, and this is the way that this very point was dealt with by the noble Lords who gave their opinion in *The P. Caland* (1). The opinion of the experienced nautical man that his ship was out of command is

an element to be considered in arriving at the conclusion whether she was or was not, but has no further importance. A

With these preliminary observations I propose to accept for the purpose of my opinion, the position that the *Drake* was right in hoisting the two black shapes. Perhaps I do so the more easily because it appears to me comparatively immaterial whether she was right or wrong in so doing. If she was right in intimating that she was a vessel out of command, she had to behave as such. It has been said B that with regard to the rest of the case, it is wholly a question of fact, as to which there have been concurrent findings in the two courts below, and, therefore, one upon which your Lordships would be exceedingly slow to form a different opinion. To me it is not a question of fact, but one of law. For the purpose of deciding this case I am content to take as the only necessary materials (i) the agreed facts, (ii) the evidence of the captain of the *Drake*, qualified only by the conclusions to be C drawn from the photographs and the place of the collision, (iii) coupled with the findings of both courts below that the *Mendip Range* was not to blame, and (iv) the reasons for holding her not to blame.

The captain of the *Drake*, after describing how he had been torpedoed, and the injuries which he had received, and his original idea of going to Belfast, and his giving that up, says that he made a large sweep, nearly a circle under a starboard D helm, thus bringing him heading to the southward. When he had finished this sweep under a starboard helm, he does not specifically state where he was with regard to Rue Point, but he must have been to the eastward of Rathlin Island, in the sense that he was not as far south as Rue Point; and this is confirmed by the evidence from the *Martin*, who picked the *Drake* up just east of Rue Point and found that she was at that time already heading south, and by the captain's own E idea, though it is admittedly an incorrect one, of the place of the collision. He would, therefore, have to head for a time to the southward, till he got sufficiently south to clear the point and to be enabled to port to round it, and, accordingly, he says, as one would expect, that after starboarding he steadied as near as he could on a starboard course. He adds that when he first saw the *Mendip Range* F his heading was south or south by west true. If, therefore, at that moment he was under a port helm he can only just have begun to be under it, because he was at that moment approximately on the course on which he steadied. Parenthetically it may be observed that this heading which he gives for himself at that moment is the heading which the *Mendip Range* attributes to him when she first saw him, and that the distances and bearings as given by the two ships work out in substantial harmony. Being thus heading approximately south by west and having G only just begun, if at all, to swing under his port helm after he had steadied on a southerly course, he continues, generally speaking, under a port helm till the collision, and turns a right-angle. I have said "generally speaking," because Roche, J., thinks that it cannot have been a continuous port helm, but only such a port helm as would make that which the captain describes himself as wishing to make a wide sweep round Rue Point, so as to get into Church Bay, a manœuvre H which, at any rate with a sound ship, would not be accomplished by a continuous port helm, but would require a porting, an easing, a porting, an easing, and so forth action. On the other hand, the Court of Appeal has accepted his statement to the effect that there was one order to port 20 degrees, never varied or checked till just the moment before the collision, when the helm was put amidships. I am, though sceptical, even prepared to accept this statement, only it must be I coupled with the agreed facts, which are that in the quarter of an hour or twenty minutes which the captain says elapsed from first sighting the *Mendip Range* to the collision she had not turned more than a right-angle, and had not turned so short as to defeat her intention of rounding the Point, but came into collision almost due south of the Point, and at least half a mile, if not more, from it, and that, as the photographs show, the alteration at the last was rapid and considerable, leaving, therefore, comparatively little alteration to be made in the first stages. I may add that on the findings of both courts, and the statement by

A counsel for the respondent before your Lordships that he was not going to invite you to say that the *Mendip Range* was to blame, the porting during the earlier stages must have been so gradual and so slight as to be imperceptible. Otherwise, the *Mendip Range* would have been to blame, either for starboarding or for continuing to starboard. If it be the case, as suggested for the *Drake*, that the operation of passing the orders was slow, and the operation of complying with the order B and getting the wheel over was slow also, it may be thought that if the captain of the *Drake* had just given the order to port 20 degrees when he saw the *Mendip Range*, she would not have turned more than to the extent that she did, even under a continuous port helm, and, therefore, it might be possible to accept, as the Court of Appeal has done, the statement of the captain of the *Drake* with hardly any or with no qualification.

C One has to consider whether this continuous porting, developing as it did, was right. When the two vessels first sighted each other the *Drake* had not her black shapes up; and if she had any particular vessel in her mind for which she put them up it must have been the *Mendip Range*. If she had not put up the black shapes the officer in charge of the *Mendip Range* would have acted upon the rule with regard to crossing steamships, which imposed upon the *Drake* the duty of D getting out of the way, and he would have expected her to get out of the way by porting, his duty would have been to have kept on his course and he would have kept on it. There would have been no collision, and the porting of the helm of the *Drake* in order to reach Church Bay and the porting to avoid the *Mendip Range* would have coincided. As it was, however, the *Drake*, having put up the black shapes, the officer in charge of the *Mendip Range* thought, and has been held to E be justified in thinking, that it was his duty to get out of the way of the *Drake*, and thought also, and has been held to be justified in thinking, that with the directions of art. 22 [r. 22 of 1948 regulations] of the Regulations for Preventing Collisions at Sea before him his proper course was to get out of the way by avoiding crossing the head of the *Drake*, that is to say by south boarding. This manœuvre was defeated by the *Drake*, I will not say porting, but, I will say in her favour, F continuing under a port helm. This continuance, however, under a port helm was so gradual, in the view of the courts below, so imperceptible till the last, that there was no negligence on the *Mendip Range* in not observing it, and, therefore, the collision happened. If the *Drake* had not put up her black shapes and had continued under her port helm there would have been no collision. If, having put up her black shapes, she had relaxed her port helm and kept or even approximately G kept the heading at which she was on when these vessels first came in sight of each other there would have been no collision. It was the unfortunate coincidence of these two things that brought it about.

Both courts below have found the facts as I have described them, but have nevertheless held the *Drake* not in fault—ROCHE, J., on the ground, as I understand him, that the porting and continuing to port of the *Drake* was not a manœuvre H taken under the regulations to avoid the *Mendip Range*, but a course of navigation taken on her own account and irrespective of the *Mendip Range*, to reach her destination. But when the rules provide that a ship shall keep her course—I except cases where the vessels are travelling in a river or narrow channel with sinuous banks—they mean that she shall keep her compass heading till the danger has gone by. Otherwise the other ship could not know what manœuvre to take I to avoid her. The *Drake* was not carrying a huge board with a notice that she was going round Rue Point or signalling by flags that she was. Those on board the *Mendip Range* had no reason to think that she was. The master thought that she had been injured, but that she was making for Ballycastle Bay on the mainland, which would have meant the *Drake* keeping on to the southward and not porting. If a ship, however injured and in a haste to get to a place of safety, manœuvres in a manner that would not have been expected in the presence of another vessel, that will probably happen which did in this case. The Court of Appeal decided upon very sweeping grounds. BANKES, L.J., and SCRUTTON, L.J.,

appear to have held that a vessel out of command is under no duty except to notify that she is such; that, if she can manage it, she can port or starboard, go ahead or astern, as suits her convenience, and all other vessels must give her the widest berth. It is a preliminary comment upon this view that their Lordships should have been logical and held the *Mendip Range* to blame. But there is a more serious observation. It was observed by one of your Lordships that there is no article in the regulations directing the navigation by two ships approaching one another so as to involve risk of collision when one is out of command and is showing the proper signals. But as the phrase "out of command" is explained in the regulations as meaning out of command so that she cannot get out of the way, it is obvious that, if a risk of collision be imminent and a collision is to be avoided, the other vessel must get out of the way, and if her duty be not one specifically imposed by the regulations it certainly is to be inferred from them. If it is not specifically imposed, it may also be the case that art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed" does not also specifically apply, and, if it is not under the rules that the uninjured ship is to keep out of the way, there may be no article requiring the broken-down vessel to keep her course. But just as rules of good seamanship and the inference from the regulations require the other vessel to keep out of the way of the broken-down one, so they require the broken-down one not to defeat the action of the other ship; and the only way in which she can be certain of not defeating it is by keeping her course, meaning by that the direct line of her compass heading at the time when the vessels ought to begin to act for each other. I am not speaking of cases where a ship owing to her broken-down condition cannot keep her course and will yaw about. Such a ship is to be excused and any approaching vessel should give her a sufficiently wide berth to avoid any danger from a yaw. But if a ship, because she hoists the broken-down signals, is to be enabled voluntarily to alter her course as much as she likes even to the extent of a right angle, regardless of other ships which have to navigate for her, all that is to be said is that she becomes a chartered libertine. "Faenum habet in cornu. Longe fuge." She is a mad animal, from which all other ships must flee. In my view, the *Drake* should be held to blame and alone to blame for this collision.

A B C D E F

Solicitors: *Downing, Hancock, Middleton & Lewis*, for *Middleton & Co.*, Sunderland; *Treasury Solicitor.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

A

Re DENBIGH, COWAN & CO. AND R. ATCHERLEY & CO.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), February 28, 1921]
[Reported 90 L.J.K.B. 836; 125 L.T. 388]

B *Sale of Goods—Contract—C.i.f. contract—"Payment cash (before delivery, if required) against documents or delivery order"—Delivery order tendered, but no policy of insurance—Right of buyers to reject.*

By a contract, headed "c.i.f. contract," sellers sold to buyers tapioca to be shipped at Java for Liverpool "to be taken on c.i.f. terms. . . . Payment cash (before delivery, if required) against documents or delivery order." When the C tapioca arrived, the sellers tendered to the buyers a delivery order, but no insurance policy, and, as there was no policy, the buyers refused to take delivery. The sellers contended that, under the contract, they had the option of tendering either the documents or a delivery order.

Held: the contract must be construed as a c.i.f. contract under which the buyers were entitled to the delivery of all documents usual under a c.i.f. D contract, or to a delivery order in place of that one of the usual documents which dealt with the obtaining of possession; therefore, the buyers were entitled to refuse to take delivery without an insurance policy.

Notes. Considered: *Comptoir D'Achat et de Vente Du Boerenbond Belge S.A.* v. *Luis De Ridder, Limitada, The Julia*, [1947] 2 All E.R. 443. Referred to: *The Gabbiano*, [1940] P. 166; *Colin and Shields* v. *Weddel & Co.*, [1952] 2 All E.R. E 337.

As to c.i.f. contracts, see 29 Halsbury's Laws (2nd Edn.) 209 et seq.; and for cases see 39 Digest 575 et seq.

Cases referred to in argument:

E. Clemens Horst Co. v. *Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, F H.L.; 39 Digest 575, *1801.*

Landauer & Co. v. *Craven and Speeding Bros.*, [1912] 2 K.B. 94; 81 L.J.K.B. 650; 106 L.T. 298; 56 Sol. Jo. 274; 17 Com. Cas. 193; 39 Digest 577, *1811.*

C. Groom, Ltd. v. *Barber*, [1915] 1 K.B. 316; 84 L.J.K.B. 318; 112 L.T. 301; 31 T.L.R. 66; 59 Sol. Jo. 129; 12 Asp.M.L.C. 594; 20 Com. Cas. 71; 39 Digest 576, *1802.*

G *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co., Theodor Schneider & Co.* v. *Burgett and Newsam*, [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 13 Asp.M.L.C. 235; 21 Com. Cas. 174, C.A.; 39 Digest 578, *1813.*

Wilson, Holgate & Co., Ltd. v. *Belgian Grain and Produce Co., Ltd.*, [1920] H 2 K.B. 1; 89 L.J.K.B. 300; 122 L.T. 524; 35 T.L.R. 530; 14 Asp.M.L.C. 566; 25 Com. Cas. 1; 39 Digest 579, *1817.*

Appeal by the buyers from the judgment of Rowlatt, J., on a Case Stated by an arbitration appeal tribunal.

By two contracts, in the same form, the respondents sold to the appellants certain tapioca. The contracts were headed "C.i.f. Contract":

I "We have this day sold to you the following flake tapioca: 1. About fifty (50) tons to be shipped at Java for Liverpool via canal (or otherwise) during the months of April and/or May and/or June, 1920, by steamer of the Conference Line, if not shipped in Contract Line, buyers to have option to cancel, at fifty shillings (50s.) per cwt. 2. To be taken c.i.f. terms, net landing weights, war risk included. 3. Quality guaranteed usual 'Bendoredjo' sealed sample in our possession. 4. Should the goods or any portion thereof not arrive from loss of vessel either before or after declaration, which is to be made soon as received, or other unavoidable cause, this contract for such

portion to be void. . . . Each shipment to stand as a separate contract. 5. Payment cash (before delivery, if required) against documents or delivery order, less usual rebate, but not later than arrival of vessel or vessels. Customary allowances and conditions of sale of the Liverpool United General Produce Association Limited. Brokerage . . . per cent. to D.C. & Co."

On the arrival of the tapioca in Liverpool, the sellers tendered to the buyers a delivery order, but no policy of insurance, and in each case the buyers refused to take delivery of the goods without a policy of insurance, contending that the contracts were c.i.f. contracts and that they were, accordingly, entitled to a policy as well as the delivery order. The two cases differed only in this respect, that in the second contract the sellers had not taken out a policy of insurance in respect of the consignment, but had effected a floating policy and made a declaration as to the goods. The disputes were referred to arbitration, with the result that, in the first case, the arbitrators held that the buyers were justified in refusing to take delivery. On appeal to the committee of the Liverpool United General Produce Association, in accordance with a term in the contract, the committee reversed the decision of the arbitrators, and the award of the committee was upheld by ROWLATT, J., on a Case Stated by them for the opinion of the High Court. In the second case, the arbitrators at a later date followed the decision of the committee and their award was upheld by the committee, and on appeal on a Case Stated, by ROWLATT, J. The buyers appealed.

Neilson, K.C., and *R. E. Gething* for the buyers.
Stuart Bevan, K.C., and *Stewart-Brown* for the sellers.

BANKES, L.J.—We have to construe a contract contained in language which has given a great deal of trouble to commercial men who are thoroughly conversant with this particular trade. There was a difference of opinion between the arbitrators in the first instance, and the appeal tribunal came to a different conclusion from that arrived at by the majority of the arbitrators. We must try to construe this contract according to the ordinary rules of construction. Counsel for the sellers has given us an explanation of the business reasons why this particular kind of contract is used by commercial men in Liverpool. But the contract must be construed according to the language used and not according to the meaning intended to be given to it by the draftsman, unless his meaning is clearly expressed.

The contract is made on a form intended for c.i.f. contracts, because the document is so headed, and we, therefore, approach the contract on the assumption that the parties intended to make a c.i.f. contract. It is possible for the parties, of course, to make a contract which clearly is not a c.i.f. contract, although it may be written out on a c.i.f. form. It is possible also to insert terms in the contract which constitute a variation from an ordinary c.i.f. contract; and it is necessary to look at the whole of the document to see what the essentials of that contract are, bearing in mind the heading, which states that it is a c.i.f. contract. In my opinion, there is nothing in the language of this document to show that, in its essentials, it was not a c.i.f. contract. Then it is necessary to see to what extent there have been variations from the ordinary form of c.i.f. contract, with its ordinary and well-accepted results. There is no doubt that there are variations from what may be called the ordinary c.i.f. contract, and the important clause which has given rise to this difficulty is cl. 5 [HIS LORDSHIP read the clause, and continued:] Counsel for the buyers admits that the documents therein referred to are documents ordinarily required under a c.i.f. contract—the invoice, bill of lading and the policy of insurance—and that admission appears to me to make the contract in its essentials a c.i.f. contract. The clause does, however, undoubtedly give an alternative, because payment is to be made cash against documents or delivery order, and the first question to be decided is: Is the variation one as to terms of payment, that is, is it a variation affecting only the obligation of the buyer, or is it a variation of the terms of performance and so affecting the obligations both of the buyer and seller? To adopt the construction which would make this clause

apply only to the obligation of the buyer would produce this extremely unreasonable result, that the buyer might be called on to pay, although the seller had not performed his obligations under the contract, so that the purchase money might be recoverable. The clause must be read as a variation affecting the performance of the contract by the buyer and the seller. From that point of view how is it to be read? Counsel for the sellers says that the alternative is one giving the seller the option to decide into which of two quite different forms of contract the purchaser shall be considered to have entered. He contends that the sellers may either treat it as a c.i.f. contract, with the usual consequences, or as an arrival contract, in which case the only obligation on the sellers is to deliver, at any rate in the first instance, a delivery order. I cannot accept any construction which brings about such an entirely unreasonable result. If that was the intention of those who are responsible for this form of contract, they must, in my opinion, make their intention much clearer than it is made by language of this kind, and they cannot hold the purchaser to such an unreasonable bargain unless they express themselves clearly to that effect. I think the alternative in the clause is one giving the purchaser the option to substitute a delivery order for one of the documents which, under a c.i.f. contract, he is under an obligation to tender; and that the document for which the delivery order may be substituted is one of the usual documents under a c.i.f. contract which he has to tender and which would give the buyer the right to possession of the goods. I would, therefore, read the clause in this way: "Payment cash against delivery of all the usual documents under a c.i.f. contract or delivery order in lieu of one of those documents necessary for giving possession of the goods." I am, consequently, unable to take the same view of this case as the learned judge. No distinction can be drawn between the two cases, and the appeal must be allowed.

SCRUTTON, L.J.—This is a curious form of contract in the tapioca trade, as to the meaning of which I was very much puzzled until I had the advantage of listening to the very clear explanation of the business of it, as he understood it, from Mr. Brown, for which, personally, I am very much indebted. One has, in all these contracts, to construe the whole contract, and, when the contract is a form drawn up by one of the parties to it, in case of doubt one construes the document against the party who drew it up. Now this document, drawn up by the sellers, has at its head in large letters "C.i.f. Contract." I do not know that the party who drew it up can complain if it is interpreted as a c.i.f. contract, which he thought was the proper description to give it. Its first clause is the ordinary clause that is found in a c.i.f. contract: "Fifty (50) tons to be shipped at Java for Liverpool" at a price. Its second clause states expressly that the goods are to be taken c.i.f. terms. What is the effect so far? The price under a c.i.f. contract would ordinarily include the cost of the goods, the cost of the carriage from the named port to the named port on ordinary terms in the trade, and the cost of running the goods on that voyage against the risks usual in the trade, which in this case were modified by saying, "War risk included"—that is to say, the price was to include an insurance against war risks; and what would ordinarily follow in a c.i.f. contract would be that, assuming goods in accordance with the contract were shipped, the seller would comply with the contract by tendering to the buyer documents which would enable the buyer to get delivery of the goods on arrival at the port of discharge; or, if they did not arrive, or arrived damaged, to sue either the shipowner on the contract of carriage, or the underwriter on the policy of insurance. The clause which follows shows that, in one respect, this is not a complete c.i.f. contract, for ordinarily, if the goods are lost on the voyage, it is immaterial; so long as the seller tenders documents, the buyer may or may not have a remedy under the contract of carriage or policy of insurance; what he gets is documents entitling him either to the goods or compensation for their loss. This contract contains a provision that, if the goods are lost, the contract shall be void. It then goes on to cl. 5, which is in question in this case "Payment cash against documents

or delivery order." "Payment cash against documents" in a c.i.f. contract would be the ordinary condition where the seller presents the bill of lading, the policy or the invoice showing the amount of money he claims. The buyer pays the price provided in the contract for those documents, and he then either has a right to receive the goods under the documents or to claim for damage to them, if the contract justifies him, against either the shipowner or the underwriter. But this contract contains the words "against documents or delivery order," and, of course, a question arises as to what that means. Does that mean that there must be a delivery order and, if that is presented, there need not be a policy—that the necessity for the policy goes so far as total loss is concerned, because the contract provides in the case of total loss that the contract shall be void? But what about sea damage, damage to the goods which might ordinarily be recovered under a policy of insurance? Does the contract mean that, if the seller delivers documents, he must deliver a policy, yet, if he delivers a delivery order, he need not deliver anything which gives the buyer a claim against the underwriter for partial damage? Counsel for the sellers says that what this contract really means is that the seller has to have an option whether he shall deliver these goods on c.i.f. terms, in which case he must deliver a policy; or whether he shall deliver them on arrival terms, in which case he need only deliver a delivery order and leave any question of quality or damage to be sorted out in some claim against him and against nobody else. Counsel for the sellers tells us, and I have no doubt he is giving us the accurate business information on the subject, that that view arose from difficulties which had been encountered in Liverpool, first of all, when merchants sold portions of goods covered by one bill of lading and delivered the bill of lading, and, secondly, when they covered all the cargo under one policy of insurance and delivered parts of it which they had sold to individual buyers; and this is an attempt by the sellers to get out of those difficulties by getting payment on the delivery order, while at the same time, according to counsel, they endeavoured to get full advantage of the c.i.f. contract by putting "To be taken on c.i.f. terms," so as to put the landing charges on the buyer.

Which is the right meaning? In my view, when a seller draws up a document and describes it in large letters as a c.i.f. contract, and says at the beginning that it is to be taken on c.i.f. terms, if he wants to substitute something quite different he must say so in clear language. This seems to me to be by no means clear language, even after listening to the explanation, and it is intended here to treat this, if possible, so as to give effect to c.i.f. contracts and c.i.f. terms as substituting a delivery order which would entitle you to receive the goods for the bill of lading, and which would entitle you to receive the goods at the seller's option. That leaves an obligation to tender the policy as it was and ordinarily would be under a c.i.f. contract. That point, I think, in the view of the learned judge below, renders it unnecessary to say anything about the second point, as to which there may be difficulties as to the measure of damages. The first point is enough to require this court to allow the appeals in both cases. One is glad to know, if, again, counsel's information is accurate, that Liverpool people have taken the steps of altering the contracts one way or the other to make clear what they do mean, and, from that point of view, one hopes that this dispute will not arise again; and, if they read what counsel has said, they will not call the result a modified c.i.f. contract.

ATKIN, L.J.—I agree. It appears to me, reading this contract as a whole, that one puts less strain on the language by adopting the construction of the buyers in this case rather than that of the sellers. I cannot think that this contract is one which contains in it alternative views which will develop in accordance with the option which is exercised. By cl. 5 I think that, if the parties want to make the contract as a whole either a c.i.f. contract or a contract for goods to arrive, they will have to do so in plainer terms than by merely saying, if calling it a c.i.f. con-

tract, "Payment cash (before delivery, if required) against documents or delivery order."

For these reasons, and for the reasons given by my brothers, with which I entirely agree, I think the appeal should be allowed.

Appeal allowed.

Solicitors: *Vizard, Oldham, Crowder & Cash*, for *H. J. Sharman*, Liverpool; *Finch, Jennings & Tree*, for *Weightman, Pedder & Co.*, Liverpool.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

THE CAP PALOS

[COURT OF APPEAL (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), July 15, 1921]

[Reported [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 37 T.L.R. 921; 15 Asp.M.L.C. 403]

Shipping—Towage—Exception in towage contract—Exemption respecting "any loss that may arise to any vessel being towed"—Loss of tow during temporary cessation of towage—Tow left by tug in dangerous position—Driven on rocks to become constructive total loss—Liability of tug owner.

The defendant contracted to tow the plaintiffs' schooner C.P. on a round voyage. The contract was carried out, with interruptions, until, on Oct. 24, 1919, the C.P. was left at anchor in the R.H. bay by the tugs in a position of some danger. The C.P. tried to get out of the bay, but failed to do so, and, on Oct. 26, she was driven on the rocks and became a constructive total loss. The defendant had ordered another tug to go to her assistance, but had cancelled the order thinking, wrongly, that the Salvage Association had sent tugs. The contract contained an exception clause whereby the defendant, as tug owner, was relieved from liability for "any damage or loss that may arise to any vessel or craft being towed . . . through collision or otherwise, whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owner, or any of his servants or employees." The plaintiffs claimed for the loss of the C.P. by reason of breach of the contract by the defendant.

Held: the exception clause covered defaults during the actual performance of the contract, but, as the defendant had ceased, even though only temporarily, to attempt to carry out the contract and had left the performance of his duties to others, he was not protected from liability for the loss.

Notes. Considered: *The Refrigerant*, [1925] P. 130; *Danneberg* v. *White Sea Timber Trust*, [1935] All E.R.Rep. 328; *The Albion, France, Fenwick and Tyne Wear Co., Ltd.* v. *Swan, Hunter and Wigham Richardson, Ltd.*, [1953] 2 All E.R. 679. Referred to: *Neilson* v. *London and North Western Rail. Co.*, [1922] All E.R.Rep. 395; *Buerger* v. *Cunard Steamship Co.*, [1925] 2 K.B. 646; *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1930), 145 L.T. 51; *A./S. Rendal* v. *Arcos, Ltd.*, [1937] 3 All E.R. 577; *Bontex Knitting Works, Ltd.* v. *St. Johns Garage*, [1943] 2 All E.R. 690; *Sze Hai Tong Bank, Ltd.* v. *Rambler Cycle Co., Ltd.*, [1959] 3 All E.R. 182.

As to contracts of towage, see 30 HALSBURY'S LAWS (2nd Edn.) 653 et seq.; and for cases see 41 DIGEST 674 et seq.

Cases referred to:

(1) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, *163*.

(2) *James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Co., Ltd.*, [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 32 T.L.R. 712; 61 Sol. Jo. 9; 13 Asp.M.L.C. 504; 22 Com. Cas. 81, C.A.; 41 Digest 486, *3176*.

(3) *Davis* v. *Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, *3188*.

(4) *Mallett* v. *Great Eastern Rail Co.*, [1899] 1 Q.B. 309; 68 L.J.Q.B. 256; 80 L.T. 53; 47 W.R. 334; 15 T.L.R. 137, D.C.; 8 Digest (Repl.) 47, *283*.

(5) *Gibaud* v. *Great Eastern Rail. Co.*, [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 37 T.L.R. 422; 65 Sol. Jo. 454, C.A.; 8 Digest (Repl.) 141, *906*.

Also referred to in argument:

Jureidini v. *National British and Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest (Repl.) 444, *161*.

Braithwaite v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 21 T.L.R. 413; 10 Asp.M.L.C. 52; 10 Com. Cas. 189, C.A.; 12 Digest (Repl.) 491, *3695*.

Bradley v. *Newsom, Sons & Co.*, [1919] A.C. 16; 88 L.J.K.B. 35; 119 L.T. 239; 34 T.L.R. 613; 14 Asp.M.L.C. 340; 24 Com. Cas. 1, H.L.; 41 Digest 649, *4809*.

Appeal from an order of HILL, J., in an action for damages for breach of contract, by the plaintiffs, the owners of the five-masted motor-schooner, *Cap Palos*, against the defendant, George Alder, a tug owner.

The following facts are taken from the judgment of LORD STERNDALE, M.R.:— The contract was to tow the *Cap Palos* on a round voyage, of which the first stage was from Immingham to Hartlepool in ballast. No tug was named for the service, but it was admitted by the defendant that, under the contract, there was an obligation to provide sufficient tug power. The first tug provided was not of sufficient power, but the defendant provided a second, and the towage proceeded with interruptions until the tugs and tow found themselves in Robin Hood's Bay. The tugs lost their hawsers, which had parted, and left the tow in that bay. After vainly trying to get out of the bay, she anchored there on the night of Oct. 24, 1919. On Oct. 25, she again tried to get out of the bay, but failed; and on the 26th she was driven on to the rocks, and became a constructive total loss. It is for this loss that the plaintiffs make their claim on the defendant. The *Cap Palos* was fitted with an auxiliary motor, but it was out of gear, and she had to depend on her sails. It was not contemplated by either party that the motor should be used. The details of the towage up to the time of getting to Robin Hood's Bay are, in my opinion, not relevant to the question before us and are quite sufficiently dealt with by HILL, J. Owing partly to the defective power of the first tug, and partly to other causes, the towage took much longer, and there were many more interruptions than were expected or than there should have been; but the towage did go on, and, in my opinion, did go on under the contract. The only point made at the trial on this part of the case was that the tugs and tow got out of their course and into the bay, because the two tugs, attached as they were to the tow and to one another, were of insufficient power to avoid their being set out of their course towards the shore. HILL, J., was advised by the Elder Brethren that the tug power was sufficient if properly handled, and the same advice was given to us by our assessors. The learned judge came to the conclusion that they got into Robin Hood's Bay by bad navigation in not making allowance for a change of wind, not hauling out when a mist came on from a course which would take them very near

the bay, and by not using the lead; but he held that the defendant was protected from the consequences of this negligence of the tug masters by the exceptions in his contract. I agree with the learned judge on this part of the case. The question as to the rest of the case is quite different. I agree with HILL, J., that, if assistance had been sent to the *Cap Palos* at any time up to midday on Oct. 26, which was Sunday, she could have been saved from becoming, as she did, a total constructive loss, although she might have been damaged to a certain extent. It was the defendant's duty under his contract to send such assistance, and he did not send it; and the questions are whether, on the facts, he is excused from performing that duty, and, if not, whether he is protected by the exceptions. The reason why nothing was done on Friday, the 24th, is not quite clear; but I think the result is that the defendant attributes it to a combination of bad weather and unpreparedness of the tugs, which had arrived in Hartlepool without their hawsers, which, they said, they had lost in Robin Hood's Bay, and had not yet been supplied with new ones, which the defendant took steps to supply. According to the defendant, the tugs were ordered to go to the *Cap Palos* on the morning of Saturday, the 25th, and were fitted to do so; but the masters refused to go, because of the weather. I doubt whether the weather was bad enough to prevent their going, and also whether they ought to have left the *Cap Palos* in Robin Hood's Bay and gone to Hartlepool; but it is not necessary to decide either of those points, because, in my opinion, these omissions of duty, if they existed, were those of the masters of the tugs, against which the defendant is protected by the exceptions in his contract. Some explanation of the circumstances may be afforded by the fact that the master of one of the tugs, the *Symbol*, was not in the service of the defendant, but of a firm from whom the defendant had just bought her, and was only in command of her for the purpose of taking her round from Southampton and delivering her to the defendant. On her way round she was sent to perform this towage. As appears from the correspondence, the master seems to have been anxious to get back with his crew to Southampton, and very likely did not want to renew a towage on the east coast in weather that was not good, while the master of the other tug may have been influenced by his example. The question, however, is not very material, because the defendant is not excused from the performance of his duty, if he had means of performing it without using these tugs. It is clear that he had these means, for he had another tug, the *J. P. Rennoldson*, which he in fact ordered on Oct. 25 to go to the *Cap Palos*, after he had been to Robin Hood's Bay and heard of the refusal of the other tug masters. Unfortunately, he cancelled these orders later in the day, and from this the whole trouble has arisen, for there is no reason to think that the *J. P. Rennoldson* could not have reached the *Cap Palos* in time to be of use. The reason given for the cancellation of the orders to the *J. P. Rennoldson* is as follows: The defendant gave evidence that a Mr. Milburn, the brother of Lloyd's agent at Whitley, and then acting for him in his absence, showed the defendant a telegram to the effect that Grimsby underwriters were sending two powerful tugs, expected to arrive that night. Mr. Milburn denied having shown him any telegram of that kind. I think it is probable that the defendant did get some intimation of the kind, because the facts were that the captain of the *Cap Palos* had communicated with Lloyd's agent, whose son, acting for him, did communicate with the Salvage Association, who, of course, act for underwriters in these cases; that the Salvage Association at Grimsby did send a powerful tug; that the ship's agent at Grimsby so informed the ship's agent at Liverpool after the vessel had been driven ashore; and that Mr. Milburn, the acting Lloyd's agent, had a faint recollection that he had heard that tugs were coming from Grimsby. The *Cap Palos*, although not insured in England, was re-insured here, and the matter seems to have followed the ordinary course where the Salvage Association are concerned with a ship in distress. Unfortunately, the tug sent by them was obliged by weather to put into Bridlington Bay, and could not reach the *Cap Palos*. On getting this information as to the tug, the defendant assumed that he might safely leave the matter in the hands of the Salvage Association, so far as

getting the vessel into a place of safety was concerned, and cancelled the orders to the *J. P. Rennoldson*. The plaintiffs claimed that the loss of the *Cap Palos* was due to the insufficiency of power of the defendant's tugs, and to his failure to supply a tug of sufficient power to continue the performance of the contract. The defendant pleaded that the loss of the vessel was due to the negligence of those in charge of her in attempting to get under way and failing to wait until towage assistance arrived or the weather moderated. In the alternative, the defendant relied on the exceptions in the towage clause. HILL, J., held that the defendant was protected from liability by the exceptions clause in the contract of towage, and dismissed the action. The plaintiffs appealed.

Butler Aspinall, K.C., and *Balloch* for the plaintiffs.

MacKinnon, K.C., *D. Stephens*, K.C., and *Dumas* for the defendant.

Cur. adv. vult.

July 15. The following judgments were read:

LORD STERNDALE, M.R.—I agree with HILL, J., that it is not necessary to determine the question, hotly contested at the trial, whether this information (as to the sending of tugs by the Salvage Association) was given to the defendant by Lloyd's agent, because I also agree with him that, however the defendant got it, he was not thereby relieved from his obligation to send the *J. P. Rennoldson* or some other efficient tug to the help of the *Cap Palos*, and so continue to carry out his contract. It may be that, when the Salvage Association send a tug to tow a vessel out of danger, and the tug arrives, they do in practice take charge of the operations until the vessel is in a place of safety without the help or interference of anyone who has a towage contract with her owners, because their tugs are better fitted and equipped and their crews better skilled in such work. But that, if correct, does not discharge such a person from the obligations of his contract. The Salvage Association's tug may, as in this case, not arrive, or other things may happen which require him to discharge that obligation; and I agree with HILL, J., that, in cancelling the orders to the *J. P. Rennoldson* and leaving to the Salvage Association the towage of the *Cap Palos* from a place of danger to a place of safety, the defendant failed to fulfil the obligations of his contract, and was guilty of a breach of it.

Then there arises the question whether the learned judge was right in holding that the defendant was protected by the exceptions in the contract. The main argument against his decision before us was based on an attempt to show that the defendant, after the *Cap Palos* went ashore, wholly repudiated all obligations under the contract, and could not, therefore, avail himself of the exceptions. This is a question of fact, on which there should have been a finding by the learned judge. I am quite satisfied from the pleadings, the arguments of counsel as appearing in the judge's note, supplemented to a certain extent by shorthand notes and by the judgment, that this point was never raised at the trial. The evidence to which we were referred on the point confirms me in this opinion, for, considering the counsel and the judge, I do not believe it would have been left as it is without further investigation if the point had been before the court. It was admitted that the learned judge was not asked for a finding on the point. I doubt, therefore, very much if it was competent for the plaintiffs to raise the point in this court, but it is not necessary to decide this, because of the view that I take of the case on other points, and also because I think that no such repudiation is proved by the evidence. I think what is proved is that the defendant gave up any attempt to tow the vessel from danger to a place of safety, but that he never repudiated his contract to continue his towage after she was brought to a place of safety. There was evidence given by him that he ordered the two tugs originally engaged to go to Robin Hood's Bay in case they were wanted. If this were true, it is some evidence of an intention to go on with his contract; if it were not true, the judge should have been asked for a finding on the point. I do not think that the finding of the learned judge that the defendant gave up any attempt was intended by him to be a finding

of more than I have stated—that is, that he gave up any attempt to do what he thought the Salvage Association tug was going to do. No other question was present to the judge's mind, and I do not know how he would have found on any other point which might have been, but was not, brought to his attention.

It was argued that, on these facts, as I have stated them, the exception ceased to apply, because the contract was changed in character on the analogy of deviation, as in *Lilley* v. *Doubleday* (1). This may be so, and I say nothing to the contrary, but I prefer to base my judgment on another ground. The exception clause in the towage contract is as follows:

> "The steam tug owner is not responsible for the acts, neglect, or default of the masters, pilots, or crews of the steam tugs, or of consulting engineers, ships husbands, or other persons in his employment, or for any loss of life or injury to persons, or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or cargo on board of same, or any other ship or cargo, or any pier, wharf, or other property through collision or otherwise, whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owner, or any of his servants or employees, or by any defect or imperfection in the steam tugs or their machinery or the towing gear, or its attachments or appurtenances, or tug's hawsers or ropes if in use, or any of them, whether such defect or imperfection is in existence before or at the commencement of the towage, or arises during or after the performance thereof, or from the steam tug running short of coal, or from delay, stoppage, swiftness or slackness of speed, however occasioned or for what purpose soever taking place, or from any perils of the seas, rivers or navigation, or from strikes, lockouts, labour disturbances, disputes or anything done in contemplation or furtherance thereof, whether the steam tug owner be parties thereto or not, or for any of the consequences of the causes above excepted."

Really, the words held to protect the defendant are "damage . . . through collision or otherwise" to a vessel being towed, or having been towed, by reason of the default of the steam tug owner. These words, isolated from the context, are very wide, and may cover the case, but there are numerous cases which decide that a limitation may be put on such wide words, if the construction of the whole clause requires it. I think that is the case here. I do not think it is necessary to say that in no case can the words "default of the owner" refer to a breach of contract, but I think that the whole clause points to the exceptions being confined to a time when the tug owner is doing something, or omitting to do something, in the actual performance of the contract, and do not apply during a period where, as in this case, he has ceased, even for a time, to do anything at all, and has left the performance of his duties to someone else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to someone else for performance. I think, therefore, that the appeal should be allowed, and judgment entered for the plaintiffs, with costs here and below.

ATKIN, L.J.—This is an action for damages for breach of a contract of towage, whereby the plaintiffs' ship was lost. The learned judge has held the defendant excused by reason of the exceptions contained in the contract. It is not disputed that the defendant's ordinary conditions of towage were incorporated in the contract made between the parties, and the only question to be determined is whether, under the circumstances, they apply so as to protect the defendant. It is contended by the plaintiffs that they do not apply, because at the time of loss the defendant was not performing, and had temporarily, at any rate, abandoned performance of the particular contract to which the exceptions related. [His Lordship stated the facts, and continued:] The history of the towage in hours, as appears from the record, is: Four and a half hours' towage, thirty-seven no towage; one towage, three no towage; nine and a half towage, sixty-one no towage,

of which only six hours' towage was efficient—a remarkable divergence from a contract for about fifteen hours' continuous towage. This closely resemble's Alice's "jam every other day"—tug yesterday and tug tomorrow, but never tug today. The figures appear to me to indicate such delay as to make the purported performance something quite different from that contracted for, a form of deviation quite familiar in maritime adventures. But the consideration of the defendant's performance of this contract cannot end with a bare enumeration of hours of towage. Evidence was given of his actions during the period from 10.30 on the Thursday, when the towage ceased, and 3 p.m. on Sunday afternoon, when the schooner went aground. On the Saturday, the defendant himself visited Robin Hood's Bay, and apparently made arrangements that a fresh tug, the *J. P. Rennoldson*, then at Middlesbrough, should go to the rescue. But on receiving a message, not identified, that two powerful tugs were being sent to the scene on behalf of underwriters on Saturday evening, the defendant cancelled these arrangements, and, as found by the learned judge, gave up any attempt to help the schooner. Much argument was addressed to us to show that this finding was contrary to the evidence. In my opinion, although there was evidence each way, there was ample evidence to justify the judge, who saw the witnesses, in arriving at this finding. The judge has also found that, if the defendant had continued to attempt to carry out his contract with reasonable industry, the schooner could have been saved up to midday on Sunday.

The question that arises is whether, under the above circumstances, the defendant can rely on the exceptions. In my opinion, they have no application in the facts of this case. It is immaterial to discuss whether the true view is that the wide words of the exceptions, "default," "omission," and "breach of duty," properly construed, do not extend to cases where the contracting party ceases altogether to perform the contract, or that the exceptions, construed in their widest sense, do not apply where the contract is not being performed at all. The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance (Marine Insurance Act, 1906, s. 45 to s. 48); carriage by sea and river (*James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Co., Ltd.* (2), and *Davis* v. *Garrett* (3)); by land (*Mallett* v. *Great Eastern Rail. Co.* (4), and *Lilley* v. *Doubleday* (1); and contracts of bailment. "The principle is well known, and perhaps *Lilley* v. *Doubleday* (1) is the best illustration, that if one undertakes to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it" —per SCRUTTON, L.J., in *Gibaud* v. *Great Eastern Rail. Co.* (5) ([1921] 2 K.B. at p. 435). If the tugs, on the orders of the defendant, had cast off the tow in a storm on a lee shore for the purpose of engaging in a more profitable salvage operation, and the tow were in consequence damaged, could it be suggested that the intention of the contract was that the defendant should be protected? It is not, as was contended, a question of repudiation of contract which was to be accepted by the other party in order to give rise to a claim for breach. The tow might go to the bottom protesting to the last moment and claiming fulfilment of the contract, and yet the defendant would, in my judgment, in such a case fail to be protected by his exceptions. I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default, but he must use very clear words to express that purpose, which I do not find here.

For the above reasons, I come to the conclusion that the exceptions in this case afford no defence to the claim, and that effect must be given to the learned judge's findings of fact, and judgment be entered for the plaintiffs for damages to be assessed by the registrar and merchants.

YOUNGER, L.J.—I am entirely of the same opinion. One of the defendant's conditions of towage, to which reference has been made in the judgments just delivered, is as follows:

> "If a steam tug is engaged to tow a ship to any port or station, but through stress of weather or other unavoidable circumstances, she is separated from the ship, the steam tug owner shall be paid (pro rata) for the distance towed, unless otherwise mutually agreed."

This condition seems to supply some indication of the circumstances in which separation of the tug from the tow was, in the contemplation of this contract, regarded as permissible. The circumstances did not exist here. The tugs, the learned judge finds, negligently left the *Cap Palos* in Robin Hood's Bay on the morning of Oct. 24. That negligent act, however, was the act of the masters, and from that the conditions protect the defendant. But the constructive total loss of the vessel was not due to that negligent act. It was due to the neglect and default of the defendant himself, fully cognisant as he was of the facts, and of the situation of the *Cap Palos*, in not sending before noon on Oct. 26, a tug or tugs to assist her in the position of danger in which she had been left, and incidentally to proceed with the completion of the first part of his contract of towage, the prosecution of which he had for the time abandoned. I agree in the view that, from that personal neglect and default of his own, at such a time and in such circumstances, the conditions of towage afford no protection to the defendant, even if the explanation he offers of his failure to send the tug *J. P. Rennoldson* to the assistance of the tow can on the evidence be accepted, a subject on which I refrain from further observation. I think the appeal should be allowed.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Van Sandan & Co.*, for *Belk & Smith*, Middlesbrough.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

JAMES *v.* SMITH

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), June 7, 1921]

[Reported [1931] 2 K.B. 317, n.; 100 L.J.K.B. 585, n.; 145 L.T. 457, n.]

Estate Agent—Commission—Agreement to pay "£1,000 if the business is sold at" a certain figure—Introduction of purchaser who signed contract to purchase, but was unable to complete—Burden of proof.

In January, 1920, the defendant wrote to the plaintiff saying that she was prepared to sell the freehold of the C. hotel, together with the business, furniture and effects, for £31,000, and "to pay you a commission of £1,000 if the business is sold at this figure." The plaintiff introduced a purchaser who signed a contract to purchase the hotel, but was unable to complete the purchase. The plaintiff claimed commission.

Held: on the true construction of the letter the plaintiff became entitled to commission on the introduction of a purchaser able and willing to purchase; there being no evidence that the purchaser was able to purchase, the plaintiff had failed to discharge the onus of proof; and, therefore, his claim to commission failed.

Notes. Considered: *Martin* v. *Perry and Daw*, [1931] All E.R.Rep. 110. Applied: *Poole* v. *Clarke & Co.*, [1945] 2 All E.R. 445. Considered: *Dennis Reed*,

Ltd. v. *Nicholls*, [1948] 2 All E.R. 914. Referred to: *George Trollope & Sons* v. *Martyn Bros.* (1934), 140 L.T. 376; *Ronald Bampton & Partners* v. *Garner & Sons, Ltd.*, [1937] 3 All E.R. 438; *Dennis Reed, Ltd.* v. *Goody*, [1950] 1 All E.R. 919; *Boots* v. *Christopher & Co.*, [1951] 2 All E.R. 1045.

As to an agent's remuneration, see 2 HALSBURY'S LAWS (3rd Edn.) 196 et seq.; and for cases see 1 DIGEST 488 et seq.

Cases referred to:

(1) *Passingham* v. *King* (1898), 14 T.L.R. 392, C.A.; 1 Digest 512, *1767.*
(2) *Horford* v. *Wilson* (1807), 1 Taunt. 12; 127 E.R. 733; 1 Digest 512, *1770.*
(3) *Green* v. *Lucas* (1875), 33 L.T. 584; 40 J.P. 390, C.A.; 1 Digest 511, *1761.*
(4) *Chapman* v. *Winson* (1904), 91 L.T. 17; 53 W.R. 19; 20 T.L.R. 663, C.A.; 1 Digest 514, *1776.*
(5) *Lott* v. *Outhwaite* (1893), 10 T.L.R. 76, C.A.; 1 Digest 514, *1775.*

Appeal from SHEARMAN, J.

On Jan. 6, 1920, the defendant, on behalf of the vendors, wrote the following letter to the plaintiff:

> "Gentlemen. Re your representative's call. I am prepared to sell the freehold of the Central Hotel, together with the business, furniture and effects, for the sum of £31,000, and to pay you a commission of £1,000 if the business is sold at this figure."

The plaintiff introduced a purchaser who signed a contract with the vendors to purchase the hotel for the sum named. He was unable to complete the purchase. The plaintiff claimed commission, and SHEARMAN, J., gave him judgment.

The defendant appealed.

Charles, K.C., and *J. G. Trapnell* for the defendant.
Holman Gregory, K.C., and *Rayner Goddard* for the plaintiff.

BANKES, L.J.—The question in dispute between these parties is whether the plaintiff has earned his commission. The defendant was the largest shareholder in the Richardson Hotel Co., Ltd., which owned the Central Hotel, Bournemouth, and she was apparently authorized by the company to sell the property. The plaintiff got into communication with her, and, on Jan. 6, 1920, she gave him a letter, which is the commission note on which this action is founded. It was in the following terms:

> "Gentlemen. Re your representative's call. I am prepared to sell the freehold of the Central Hotel, together with the business, furniture and effects, for the sum of £31,000, and to pay you a commission of £1,000 if the business is sold at this figure."

It was signed by the defendant. It is quite plain that this document is incomplete and barely intelligible, but the court must put some construction on it. Assume that the question for decision is, what is meant by the words: "And to pay you a commission of £1,000 if the business is sold at this figure." As I understand the contention, the defendant puts her argument in this twofold way. She says those words either mean, if the sale is completed and the purchase money paid—that is what is meant by "sold"—or they mean, if the business is sold, meaning a contract of purchase is signed, but by a person able and willing to complete. On the other hand, I understand the contention for the plaintiff to be that "if the business is sold" means if a contract to purchase is, in fact, signed by someone introduced by him with whom the vendor is willing to make a contract, regardless whether the person introduced can or cannot complete the purchase. It is between those three suggestions that the court has to elect, and, in my opinion, the one I mentioned second is the true interpretation of this document, and I think the words mean, if a contract of purchase is signed, but by a person able and willing to complete. I arrive at that by this process of reasoning. It is necessary, as I have said, to imply consideration moving from the plaintiff into

A the agreement to make it a complete contract, and if that consideration were written out and added to the document it would be: "In consideration of your finding me a purchaser." What is the meaning to be attached to those words? They mean, and must mean, a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well; they do not mean and cannot mean a purchaser in the sense either of a man of straw or of a B man without means.

Assuming that to be the consideration moving from the plaintiff and written into the document, what is the position of a purchaser able to purchase having been introduced to the defendant, and she refusing to enter into a contract? Counsel for the plaintiff does not dispute that he would have been under an obligation to prove that the purchaser whom the defendant refused to accept was a person ready C and willing and able to complete the contract. If that is the meaning of the consideration, it appears to me that it must remain and be part of the contract, whether the defendant refused to accept the purchaser or whether she accepted him, if the purchaser signs the contract. There cannot be two different meanings to the contract depending on whether the defendant accepts the purchaser or whether she refuses to accept him. I understand junior counsel for the plaintiff D to say that, although that may be true and may be the meaning of the contract, yet when a purchaser is introduced and the defendant elects to enter into a contract with him, that, in some way and for some reason which I do not follow, absolves the plaintiff from any obligation on his part to fulfil the consideration which was part of the contract with the defendant. I understand that that was the view accepted by SHEARMAN, J. In the earlier part of his judgment he seems E to have taken the same view as I am taking, for he said it was obviously the intention of the parties that £31,000 should be fixed as the purchase price in order that the defendant should receive £30,000 and the plaintiff £1,000, which indicates that, in his view, the bargain was that the commission should be payable out of the purchase money. But then he went on to say that the plaintiff introduced a purchaser, and the defendant then had the chance of inquiring as to the pur- F chaser's solvency, and that, if she did not choose to avail herself of that chance, it was her fault, and it did not lie in her mouth to say any longer that the plaintiff only earned his commission in the event of his introducing a customer able and willing to complete. Junior counsel for the plaintiff relied on *Passingham* v. *King* (1) as supporting that contention, and he suggests that the Court of Appeal in that case held that the vendor was liable, because, from the moment the con- G tract was signed, he had taken the case out of the hands of the agents. A. L. SMITH, L.J., said (14 T.L.R. at p. 392):

> "In these circumstances, he was of opinion that the defendant had taken up the negotiations himself and taken them out of the hands of the plaintiff and had accepted Vine as the purchaser."

H One does not know whether the words were intended by the lord justice to refer to the negotiations between the vendor and the purchaser subsequent to the contract of sale, or whether he intended them to apply to the contract of sale as well, but he speaks of the defendant taking up the negotiations himself and taking them out of the hands of the plaintiff. In the present case, there was no taking the business out of the hands of the plaintiff; if he was absolved from the duty of finding I a purchaser able and willing to purchase it was merely because the defendant had signed the contract with the person introduced. There was no taking the business out of the plaintiff's hands in the sense in which A. L. SMITH, L.J., speaks of taking the business out of the hands of the agent in that case. I do not propose to go through the other cases that have been referred to; they really all depend on the particular facts of each. *Horford* v. *Wilson* (2), cited by junior counsel for the plaintiff, is very like the present case in its facts, but the language of the learned judges in that case does not seem applicable, for the reason that the point we are now considering was not taken before them. In *Green* v. *Lucas* (3) the view

taken by the Court of Appeal as to the obligation of an agent who is claiming commission—namely, that he must introduce a person ready and willing either to take or to buy, as the case may be—seems to me to be an authority for the view we are taking of this case. With regard to the other cases, they all seem to me to have turned upon the particular language of the contract. In some of them, as in *Chapman* v. *Winson* (4), or in *Lott* v. *Outhwaite* (5), there were words in the contracts which clearly indicated that the commission was only payable either out of the purchase money or on completion of the purchase.

For the reasons I have indicated, I do not agree with the view taken by SHEARMAN, J., because I think that the obligation of the plaintiff being to introduce a person who was able to purchase, he had no evidence that the particular purchaser whom he introduced was in that position, and, having failed to give that evidence, his action fails, and the appeal must be allowed.

SCRUTTON, L.J.—I agree. The question in this case is whether an agent is entitled to commission who has introduced a man who has signed an agreement to purchase, but who is apparently quite unable to complete that agreement because he has no funds. The first question in all these commission cases is a very obvious one, but one which is frequently overlooked: that is the question mentioned by LORD COLLINS, M.R., in *Chapman* v. *Winson* (4) (91 L.T. at p. 19):

> "The parties can agree upon any particular event upon which commission is to become payable, and the question in the present case is what is the event upon which the parties have agreed that commission shall be payable?"

It is quite open to the parties to use language that makes it clear that the commission is only payable on the money ultimately received or which might have been received but for the vendor's fault. It is quite possible for the parties to make it clear that the commission is to be payable as soon as a contract for purchase has been made, whatever happens to it and with whomsoever it is made. What the event is which entitles the agent to commission depends on the contract in the particular case. In the present case that contract is to be found in the letter of Jan. 6, 1920, a letter written by the defendant at the dictation of the plaintiff. It is as follows: [HIS LORDSHIP read it.] What does the agreement mean, and what is the event which will entitle the agent to his commission? In my view, it is at least this: If you introduce a person who will make an agreement of purchase with me and whom you have reasonable cause to believe is ready and willing to purchase, I will pay you £1,000. I say it is at least that, but I think it is more, for a reason that I will give later. The other view, from which, indeed, counsel for the plaintiff did not shrink, involves this, that, if I introduce a man of straw, saying nothing as to his capacity, although I know him to be a man of straw, who is willing to sign an agreement, I shall have earned myself £1,000 although I know that the man I have introduced is quite unable to fulfil his obligations. If that is the least obligation that can be put on the agent, the latter, at the trial, no doubt advised by his counsel, took the course of not going into the box himself to state what his knowledge of the purchaser was, and there was no evidence whatever of the ability of the purchaser to carry out any agreement of purchase at the time he made it. So far as there was evidence, it suggested that he had no ability to carry it out. He was said by his solicitors to be a person of no means; he is stated to live in a very small house, and it does not appear that he had any binding agreement with anybody to provide him with capital. On these facts, it appears to me that the agent has not proved the minimum of his obligation, and he therefore fails. But I think his obligation is larger than that, because it is agreed that, if he had introduced a purchaser, but the vendor had declined to sell to him, the agent, to earn his commission, would have to prove, not that he introduced the purchaser whom he had reason to believe was ready and willing to purchase, but that he had introduced a person who in fact was able and willing to purchase. I find it very difficult to believe that the measure of obligation is different in the

A case where the vendor does not sell to the purchaser introduced, from what it is in the case where he does sell to the purchaser introduced. If, of course, the minimum is ability and willingness, the agent also fails, in the language used by two such masters of the common law as BRAMWELL, B., and BLACKBURN, J., in *Green* v. *Lucas* (3). As I understand the argument for the plaintiff it was this: True it is, that, if you do not sell, my obligation was to show that I had introduced a man B able and willing to purchase, but I am entirely relieved of that obligation if you do enter into an agreement with the man I introduced, although he is, in fact, quite unable to purchase, and although you made no inquiry but relied on my position as an agent. It seems to me that, in a case like that, the more reputable an agent and the more likely the vendor is to rely on him, the more difficult will be the position of the vendor, and the more likely he is to make an agreement with a man C whom a respectable agent has introduced, the more difficulty the vendor will be in when the purchaser turns out to be a man with no means at all.

On that limited ground, I am unable to agree with the judgment of SHEARMAN, J. I quite see that, on other agreements, there might be questions of great difficulty. I see, for instance, that the point on which A. L. SMITH and VAUGHAN WILLIAMS, L.JJ., disagreed in *Passingham* v. *King* (1) is a question of very considerable D difficulty, which I am relieved not to have to decide in this case. I decide this case on the wording of this contract on the minimum obligation which appears to me to be put by the contract on this plaintiff, and on the fact that he gave no evidence to satisfy that minimum obligation.

ATKIN, L.J.—I agree. I think the letter of Jan. 6 was a commission note, E and was intended to record the terms of the employment of the plaintiff. The question arises on the construction of the words: "I am prepared . . . to pay you a commission of £1,000 if the business is sold at this figure." I think the agreement to pay the commission of £1,000 if the business was sold does relate to the figure of £31,000. That is not sufficient to enable me to get at the meaning of this contract, because, so far, it does not express what is to be done by the plain- F tiff, and that term has to be implied; and it seems to me that it is on the question of what terms are to be implied that the difficulty in this case really arises. There has to be an implication made as to the subject-matter of the contract from the relations of the parties and from the rest of the language which constitutes the contract between them. It appears to me it must mean this: "I agree to pay you a commission if the business is agreed to be sold by you or through your services," G and that involves the further question, what services? Now it appears to me that the true view in this case is: "If you introduce a purchaser ready and willing to purchase the property at this price." I think on the whole, the balance of authority binding on us is in favour of this view, and is the true result of *Green* v. *Lucas* (3), and I think it represents what would be the term necessarily inserted if the parties had turned their minds to expressing it in order to give validity to H the arrangement which they were entering into. In a contract of this kind, which is a contract of employment of an agent to procure a purchaser for the purchase of real estate, I do not think that the agent, in the absence of any express contract to the contrary, performs his obligation merely by introducing a person who is willing to enter into a contract to purchase the property. In my opinion, the purchaser must be willing and ready, that is to say, able, up to the I time he signs the contract. There are two reservations I want to make in respect of this matter, because this is a very important matter, and questions as to commission interest so many people, that they are generally reported more or less imperfectly somewhere or other. I say this because a great many of the reports of commission cases omit altogether the terms of the contract upon which the commission is claimed, which is not an immaterial circumstance. As a matter of fact, the result depends so often on the terms of the contract, and nothing but the terms of the contract, that it is very seldom that one case really is a guide in respect of future cases. I think that "ability" does not depend on whether the

purchaser has the money in hand at the time; to my mind, it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that, if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation. Again, to my mind, this question is independent of the question whether or not it is the duty of the agent to make inquiries whether the person he introduces is able to carry out his contract. There may be some cases in which it is the duty of the agent to make such inquiries, and one case was cited to us in which a judge of first instance held that such was the duty of an agent who was employed to find a tenant of a furnished house, and I do not wish to say that that is not his duty. On the other hand, I think it is quite plain that there are cases where the agent is not expected to make inquiries himself, and it is quite possible he may leave it to the vendor to make them; and, of course, there may be cases where this term does not arise, and so it is quite consistent with there being an implied term that the agent is under no obligation to make inquiries, the only result being, if he does not make inquiries and the person he introduces is not apparently able and willing to perform the contract, he does not then earn his commission. To my mind, the obligation, when it exists, is an absolute obligation; that is to say, it is performed by introducing a person who, in fact, is ready and willing, and the contract is not performed merely because the agent believes, on reasonable grounds, that he is ready and willing. Such a belief might have a very important bearing if one were really considering the question whether the agent had any duty to make inquiries. As I say, I think this case is independent of such a matter as that, and it must be distinguished from a case of employing a person to obtain commercial contracts in respect of the sale of goods, as, for instance, the case of an ordinary commercial traveller employed in obtaining orders. I am not saying that there cannot be implied terms in such cases, but nothing that has fallen from me must be taken as implying that I think such a condition would exist in the employment of such agents. In this particular case, I think that the true view is that the agent was employed on the terms to find a purchaser ready and willing to carry out a purchase at £31,000, and that readiness and willingness must exist at the time the contract was entered into. It appears to me quite plain, on the facts of this case, that this purchaser who was introduced was not able to carry out the transaction, because within a week before the arrival of the time for completion his solicitor wrote in terms to say that he was unable to carry out the transaction, and in view of that evidence, there being no countervailing evidence at all to indicate that the purchaser was able to carry out the transaction, it appears to me quite plain that the plaintiff fails in the onus that is cast on him, and I think, therefore, that he did not do enough to entitle him to recover his commission. I think, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Bentley & Jenkins*, for *Tattersall & Son*, Bournemouth; *Blundell, Baker & Co.*, for *J. M. B. Turner*, Bournemouth.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

A

WRIGHTSON *v.* McARTHUR AND HUTCHISONS (1919), LTD.

[KING'S BENCH DIVISION (Rowlatt, J.), March 10, 21, 1921]

[Reported [1921] 2 K.B. 807; 90 L.J.K.B. 842; 125 L.T. 383; 37 T.L.R. 575; 65 Sol. Jo. 553; [1921] B. & C.R. 136]

B

Company—Winding-up—Charge—Registration as bill of sale—Charge by company on goods stored in locked room on company's premises—Delivery to chargee of key of room—Right to enter building and remove goods—Possession of goods passing to chargee—Bills of Sale Act, 1878 (41 & 42 *Vict., c.* 31), *s.* 4—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93 (1) (*c*).

C

The defendant company were minded to give the plaintiff security on goods of their own against loss which the plaintiff might suffer owing to the non-performance by the defendant M. of a contract to purchase certain goods from the plaintiff. The goods the subject of the security were set aside in two rooms on the defendant company's premises and were kept separate from the other goods on the premises. The rooms were locked, the keys were handed to the plaintiff, and the terms of the transaction were recorded in two letters written by the defendant company to the plaintiff. The second letter was written after the keys were handed over to the plaintiff, and contained the words: "You can have the right to remove [the goods] as desired." The defendant company went into voluntary liquidation and the liquidator contended that the security was void as against him under the Companies (Consolidation) Act, 1908, s. 93 (1) (c), as being a charge created or evidenced by an instrument which required registration under the Bills of Sale Act, 1878, s. 4.

D

E

Held: possession of the goods passed to the plaintiff by the delivery to him of the keys coupled with the fact that an irrevocable licence to enter the defendant company's premises to use the keys was also conferred, and, therefore, the security did not require to be registered as a bill of sale, and was valid as against the liquidator.

F

Notes. The Companies (Consolidation) Act, 1908, s. 93, is replaced by s. 95 of the Companies Act, 1948 (infra).

Referred to: *Mercantile Bank of India, Ltd.* v. *Chartered Bank of India, Australia and China, and Strauss & Co., Ltd.*, [1937] 1 All E.R. 231; [1937] 4 All E.R. 561.

G

As to the scope of a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 258 et seq.; and for cases see 7 DIGEST 5 et seq. As to possession of goods, see 25 HALSBURY'S LAWS (2nd Edn.) 194 et seq.; and for cases see 25 DIGEST 4 et seq. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 558; and for the Companies Act, 1948, s. 95, see 3 HALSBURY'S STATUTES (2nd Edn.) 533.

H

Cases referred to:

(1) *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352; 61 L.J.Ch. 518; 66 L.T. 320; 40 W.R. 492; 36 Sol. Jo. 347; 7 Digest 19, *82*.

(2) *Re Townsend, Ex parte Parsons* (1886), 16 Q.B.D. 532; 55 L.J.Q.B. 137; 53 L.T. 897; 34 W.R. 329; 2 T.L.R. 253; 3 Morr. 36, C.A.; 7 Digest 21, *96*.

I

(3) *Re Hardwick, Ex parte Hubbard* (1886), 17 Q.B.D. 690; 55 L.J.Q.B. 490; 59 L.T. 172, n.; 35 W.R. 2; 2 T.L.R. 904; 3 Morr. 246, C.A.; 7 Digest 20, *90*.

(4) *Dublin City Distillery, Ltd.* v. *Doherty*, [1914] A.C. 823; 83 L.J.P.C. 265; 111 L.T. 115, H.L.; 7 Digest 20, *88 i*.

(5) *Hilton* v. *Tucker* (1888), 39 Ch.D. 669; 57 L.J.Ch. 973; 59 L.T. 172; 36 W.R. 762; 4 T.L.R. 618; 7 Digest 20, *93*.

(6) *Ward* v. *Turner* (1752), 1 Dick. 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest 552, *372*.

(7) *Re Mustapha, Mustapha* v. *Wedlake*, [1891] W.N. 201; 8 T.L.R. 160; 36 Sol. Jo. 125; 25 Digest 553, *377*. A

Action in the Commercial Court.

The facts are set out in the judgment of ROWLATT, J.

By s. 4 of the Bills of Sale Act, 1878:

"In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say) The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipts thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. . . ." B C D E

By s. 93 (1) (c) of the Companies (Consolidation) Act, 1908:

"Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being . . . (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured. . . ." F G

J. A. Hawke, K.C., and *Harold Morris, K.C.*, for the plaintiff.

Holman Gregory, K.C., and *E. F. Spence* for the defendant company. H

Cur. adv. vult.

Mar. 21. **ROWLATT, J.,** read the following judgment.—The facts of the case, which are not in dispute, can be stated for the present purpose extremely shortly. The defendant company were minded, for reasons and under circumstances which I need not go into, to give the plaintiff security on goods of their own against loss which he might suffer, owing to the non-performance by the defendant George Wigram McArthur of a contract to purchase certain mercurial goods from the plaintiff. In these circumstances, there was a series of interviews between the plaintiff and, in the first instance, the whole board of directors, and, later, representatives of the board who acted for the others, at which the necessary arrangements were made. What took place was faithfully recorded in writing in two letters of Aug. 25 and one of Aug. 30, 1920. The first of these documents, a letter by the managing director of the defendant company to the plaintiff, was handed I

to him in order that he might consult his bank on it. The next letter from the plaintiff to the defendant company on the same day records that he has done so, and that he is able to agree to the proposal. This proposal was that, in consideration of two months' further time, the defendant company would lay aside £5,000 worth of goods as security for the due performance of the contract, and in the second of the two letters above mentioned, in which the plaintiff accepts it, he suggests that a valuer should be agreed to approve the security, and that arrangements will have to be made to remove the goods to an approved warehouse. On Aug. 30, the plaintiff and his valuer went to the defendant company's offices, where they saw the stock sheets containing the goods, namely, a quantity of sylko, some buttons and thread intended to form the security. This having been approved, the plaintiff, his valuer and the managing director went into the basement and saw the sylko in a compartment there. The door of the compartment had no key and was apparently broken, but it was arranged that the doors should be repaired, a key provided, and that the goods should be locked up in the compartment and the key handed to the plaintiff's valuer on his behalf. This was duly done in the course of a day or two. The parties then went to some other premises of the defendant company, and in a room there saw the buttons and thread which had been mentioned in the stock sheets. The door of the room was locked and the key handed to the plaintiff or his valuer. There were no other goods locked up either with the sylko or with the buttons and thread. The parties had abandoned the idea of removing the goods to an approved warehouse and had substituted this plan of locking them up in separate compartments on the defendant company's premises. This was done in order to save trouble, in the event of the defendant company being able to redeem the goods in whole or in part. After this the parties returned to the offices, and then, namely, after this transaction, the letter of Aug. 30 was given by the managing director to the plaintiff. The terms of the letter treat the setting aside of the goods, etc., as things to be done in the future. In fact, they had already taken place. The last words of this letter are "You can have the right to remove same [i.e., goods] as desired." The defendant company, being in voluntary liquidation, and, by its liquidator, having refused to allow the plaintiff to have access to the goods, or to remove them, the plaintiff commenced this action (i) against the defendant McArthur for damages for breach of contract in not accepting the goods, and (ii) against the defendant company for a declaration that the goods were the property of the plaintiff, or alternatively in the possession of the plaintiff, and that he was entitled to remove them, or, in the further alternative, that the goods were held by the defendant company on behalf of the plaintiff as security for the performance of the contract above referred to. The defendant McArthur, having made default in pleading, it was ordered that damages should be assessed at the trial, and they were assessed at £8,330.

The defendant company was in liquidation, and the liquidator contended that the security was void as against him under s. 93 (1) (c) of the Companies (Consolidation) Act, 1908, as being a charge created or evidenced by an instrument which required registration as a bill of sale under s. 4 of the Bills of Sale Act, 1878. The contention of the defendant company is that each of the three letters, or, at any rate, that of Aug. 30, which is the operative one, are instruments which evidence a charge, and which would, if executed by an individual, require registration as a bill of sale, and, therefore, the charge is void against the liquidator under s. 93 of the Companies (Consolidation) Act, 1908.

It was contended by counsel for the plaintiff, if I understand him aright, that, as there was a verbal arrangement to the same effect as the written arrangement, then, if the written arrangement is void as a bill of sale, the verbal arrangement can be treated as taking its place, and that that is not within the statute. That, in my view, is wholly unmaintainable. The document supersedes the conversation. If authority is wanted, it may be found in *Morris* v. *Delobbel-Flipo* (1), per STIRLING, J., citing *Re Townsend, Ex parte Parsons* (2). This line of argument rests on a misapprehension of such passages in the authorities as that in *Re*

Hardwick, Ex parte Hubbard (3), where BOWEN, L.J., says (17 Q.B.D. at p. 698): A
"It may often happen that the transaction will stand by its own strength, even if the document is avoided." The lord justice was not speaking of identical arrangements, one verbal and one written. He was speaking of a document on the one hand, and, on the other, a transaction not resting merely on words spoken or written, but on acts like a pledge with possession given.

Counsel for the defendant company went to the other extreme. He contended B
that, whenever the terms of a pledge are committed to writing, though the pledge is completed with possession, the writing is a bill of sale and the pledge is bad. This seems to me to err as gravely as counsel for the plaintiff's contention, though in the opposite direction. The special property of a pledgee, as shown by BOWEN, L.J., in the judgment referred to, exists by virtue of the act of delivery, not by virtue of the document. The point is neatly illustrated by the observations of C
LORD PARKER in *Dublin City Distillery* v. *Doherty* (4) ([1914] A.C. at p. 855), where he lays it down that where no possession physically is given to complete a common law pledge, but a document is used to pass the possession and complete the pledge, such document is within the definition, unless, of course, it falls within the special exceptions named at the end of the section. It is often said generally that a pledge is not within the definition—indeed, counsel for the plaintiff said so D
frequently in the course of the argument—but, as LORD PARKER'S dictum shows, that general statement is not accurate. What is accurate is that, where the passing of property, special or general, is effected by actual delivery of possession (as truly enough it usually, but not invariably, is in cases of pledge), any accompanying document does not have the effect of any such instrument as is described by the section. For the above reasons, it seems to me that, if the delivery of the E
keys of the rooms in which the goods now in question were locked up is to be regarded as passing the possession, the security intended to be created is valid, and the question in the case is whether possession did pass.

But before I consider that, I must deal with another argument presented by counsel for the defendant company. He urged that this was not a transaction of pledge, as there was no sum certain presently payable to be secured by it, and F
there might never be any sum payable, and that the document was an agreement conferring a right in equity to a charge on personal chattels within the definition. As already indicated, I do not think that whether a case falls or does not fall within the statute depends on whether it can be said that there is not or is a pledge. There is no exception of pledges, eo nomine. What does escape the statute is a right conferred not by a document, but by delivery of possession. But G
counsel for the defendant company argued that here it was only a right in equity, because, assuming possession, the plaintiff had not either the general property or the special property of a pledgee for a liquidated debt. I can only say that I fail to understand why the right of the plaintiff, assuming that he is to be treated as in possession, to retain that possession by way of security is not to be treated as a common law right. The decision of STIRLING, J., in *Morris* v. *Delobbel-Flipo* (1), H
already referred to, is directly in point, and I can only imagine that the learned counsel must have been thinking of the limited forms of legal estates in real property.

The point to which this case is now reduced is whether the circumstances that the rooms, the keys of which were delivered, were within the defendant company's premises, prevents the delivery of the keys conferring possession of the contents I
of those rooms. If the keys delivered had been the outside key of the whole warehouse containing these goods, I should have felt no difficulty, nor should I, had the key been of an apartment or receptacle in the premises of a third party as was the case in *Hilton* v. *Tucker* (5). On the other hand, if, the rooms being in the defendant company's premises, the key had been given without the licence to go and remove the goods at any time, I should have thought it clear that possession of the goods did not pass. It would be merely a case of the goods remaining in the defendant company's possession with the security that they should not be

interfered with, but without any power of affirmative control at the free will of the plaintiff. It would be like the case of furniture left in a locked room in a house that is let furnished, where the lessor has no right to enter except on reasonable notice and at reasonable times. The actual question has to be considered in the light of the principle that delivery of a key has effect, not as symbolic delivery, but as giving the actual control. This was the view expressed by LORD HARDWICKE, L.C., in *Ward* v. *Turner* (6), where he says that the key is the means of coming at possession. The matter was fully discussed in the light of all the cases in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, p. 61 and following pages. In *Hilton* v. *Tucker* (5), already referred to, in a judgment delivered since the date of that work, KEKEWICH, J., observes (39 Ch.D. at p. 676) that the delivery of the key in order to make constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key. If I may criticise that statement, my criticism would only be as to the propriety of the use of the word "constructive" in the connection in question.

I think, therefore, there can be no doubt as to the true principle, and the difficulty is in its application. There are two cases in which delivery of the key of a box in a house has been held to confer possession of the contents. The first was *Ward* v. *Turner* (6), before LORD HARDWICKE, the other was *Re Mustapha, Mustapha* v. *Wedlake* (7), but in both those cases both parties were living in the house, and, therefore, the person receiving the delivery could not be expected to take away the box, but could hold possession of it in the house. It has never been held, so far as I know, that delivery of the key of a box which the deliverer retains in his own house, where the other party does not live, passes possession of the contents.

On the whole, however, I think that, in the case before me, the possession was transferred, having regard to the fact that a licence to come and make the necessary entry to use the keys was also conferred, a licence which it seems to me could not be revoked. The door into the building would be open in business hours, and the mere fact that the plaintiff might wrongfully be excluded from the whole building does not, I think, affect the matter. If the key had been given to him with the intention to pass to him the possession of the room itself on a demise of it, I cannot doubt that possession would pass. I see no difference when the key is given to pass possession not of the room, but of the chattels. The key guards both in the same way.

I have only to add that some argument was addressed to me on both sides as to the effect of what was done on the defendant company's ability to obtain credit on the strength of these goods. I do not think that is the test, though considerations of that kind no doubt largely inspired the Bill of Sale Acts. The question is whether one can find a transfer by a common law pledge which involves the question of a common law delivery of possession. For these reasons, I give judgment for the plaintiff for the declaration asked for in the second alternative, including power to remove, with costs.

Judgment for plaintiff.

Solicitors: *Devonshire, Monkland & Co.*; *Downer & Johnson.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

A

LEAVIS *v.* LEAVIS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), February 28, March 21, 1921]

[Reported [1921] P. 299; 90 L.J.P. 302; 125 L.T. 28; 37 T.L.R. 578; 65 Sol. Jo. 456] B

Divorce—Contempt of court—Failure to obey orders as to costs and alimony pendente lite—Further proceedings by party in contempt—Discretion of court to allow—Matters for consideration.

Failure to comply with orders of the Divorce Division for payment of costs and of alimony pendente lite is still a contempt of court, although, since the Debtors Act, 1869, the party in default can no longer be attached. C

Where a husband had failed to comply with such orders, **held,** that the court had a discretion whether or not to allow him to take a further step in the litigation; in exercising that discretion the court would take into consideration whether his failure to comply with the court's orders was due to his fault or misfortune. D

Notes. The rules governing matrimonial causes are now Matrimonial Causes Rules, 1957, S.I. 1957 No. 619 (10 HALSBURY'S STATUTORY INSTRUMENTS), r. 64 of which governs the enforcement of orders made by the Divorce Division.

Considered: *Gower* v. *Gower*, [1938] 2 All E.R. 283. Referred to: *Hadkinson* v. *Hadkinson*, [1952] 2 All E.R. 567; *Marczuk* v. *Marczuk*, [1956] 1 All E.R. 657; E *Farrant* v. *Farrant*, [1957] 1 All E.R. 204.

As to enforcement of orders of Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 471–474; and for cases see 27 DIGEST (Repl.) 673 et seq.

Cases referred to:

(1) *Ivimey* v. *Ivimey*, [1908] 2 K.B. 260; 77 L.J.K.B. 714; 99 L.T. 75; 52 Sol. Jo. 482, C.A.; 27 Digest (Repl.) 682, *6517*. F

(2) *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583, C.A.; 27 Digest (Repl.) 682, *6515*.

(3) *Cooper* v. *Cooper* (1864), 3 Sw. & Tr. 392; 33 L.J.P.M. & A. 71; 164 E.R. 1327; 27 Digest (Repl.) 538, *4852*.

Also referred to in argument: G

Bates v. *Bates* (1888), 14 P.D. 17; 58 L.J.P. 85; 60 L.T. 125; 37 W.R. 230; 5 T.L.R. 155, C.A.; 27 Digest (Repl.) 676, *6451*.

Undefended Petition by a wife for restitution of conjugal rights.

The petition was filed on Aug. 24, 1920, and the husband appeared, but filed no answer. An order for payment of taxed costs to setting down and security for the costs of trial was made on Oct. 22, and one for alimony pendente lite on Oct. 29. H On Dec. 7 the wife gave notice of motion for Dec. 13 to attach the husband for non-compliance with the direction as to security in the order of Oct. 22. On Dec. 10 the husband took out a summons under r. 176 of the Matrimonial Causes Rules (1865), to stay proceedings in the suit on the ground that he was willing to return to cohabitation. On Dec. 13 the motion for attachment was heard by SIR HENRY DUKE, P., who ordered a writ to issue at the expiration of fourteen days, I and under the pressure of this order security was furnished. Only one payment of alimony was made, and the wife's taxed costs remained unpaid. The summons to stay after several adjournments came on before the President on Jan. 31, 1921, and was then adjourned into court for argument, and with the approval of the President placed in HILL, J.'s list. Affidavits were filed on both sides on which there was a conflict of evidence as to the husband's means. He admitted an income of £58 a month, but said he had to pay £20 a month to a money-lender and that he had other financial embarrassments, which rendered it impossible for him

to comply with the court's orders. On Feb. 18 the adjourned summons to stay came on for argument before HILL, J.

T. Bucknill for the wife.
J. B. Melville for the husband.

Cur. adv. vult.

Mar. 21. **HILL, J.**, after stating the facts, said.—Counsel for the wife took the preliminary objection that the husband is in contempt, and that the court ought not to entertain his summons to stay the proceedings because he has not complied with certain orders which had already been made against him, which he had done nothing to comply with up to the date of his summons, and which substantially he has still not complied with. It is true that he cannot be attached for that non-compliance in consequence of the Debtors Act, 1869, s. 4, but before the passing of that Act he could have been attached: see *Ivimey* v. *Ivimey* (1). Notwithstanding that Act these orders remain orders that the court can enforce by such means as are provided by the rules. That is pointed out as to orders for costs in *Ivimey* v. *Ivimey* (1), and as to orders for alimony in *Bailey* v. *Bailey* (2), and under rll. 179 and 203 of the Matrimonial Causes Rules (1865) the wife is entitled to levy execution for arrears both of costs and alimony. Though the contempt constituted by disobedience to such orders cannot be punished by attachment, it is none the less a contempt, and one which, if not checked, might interfere with the due administration of justice, for which it is necessary that a wife's costs of matrimonial litigation should be provided, and that she should not be left destitute.

In my view, it is a matter for the discretion of the court upon all the circumstances of the case whether the summons of the husband should be heard, and it is material to the exercise of that discretion to consider whether his failure to comply with the court's orders is in fact due to his fault or to his misfortune. In this case I am unable to perceive any cause of the present position, but the fault of the husband. It may be true that he has debts, but his income is admittedly £58 per month, and the chief reason of any difficulty he may find in complying with the orders in question is, in my view, that he prefers to spend the greater part of his income on himself. Moreover, even if I allowed the merits of his application to be gone into, and were satisfied of the bona fides of his offer to return, I should, having regard to what was done in *Cooper* v. *Cooper* (3), only make an order on payment of the wife's costs and of arrears of alimony at least up to the date of the offer to return. Before, however, coming to any decision as to the bona fides of the husband's offer, it would be necessary, in view of the conflict of evidence on the affidavits, that I should allow an opportunity of cross-examination, and for the reasons I have indicated I do not think it necessary to do this, but that the summons should be dismissed with costs. Leave to appeal was granted.

Solicitors: *Lewis & Lewis*; *Bulcraig & Davis.*

[*Reported by* J. A. C. SKINNER, ESQ., *Barrister-at-Law.*]

C. (OTHERWISE H.) *v.* C.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Birkenhead, L.C., sitting as a judge of the Division), May 7, 11, 12, 13, 31, 1921]

[Reported [1921] P. 399; 90 L.J.P. 345; 125 L.T. 768; 37 T.L.R. 759]

Nullity—Incapacity of husband—Impotence quoad hanc—Ground for decree.

A finding that a respondent husband is impotent quoad hanc is sufficient to support a decree of nullity granted to the wife.

—N—R (falsely called M—E) v. *M—E* (1) (1853), 2 Rob. Ecc. 625, applied.

Nullity—Evidence—Conflicting evidence of parties—Medical evidence consistent with evidence of both parties—Right of court to act on petitioner's evidence.

There is no rule of law or practice in nullity cases that where the evidence of the parties is conflicting and the medical evidence is consistent with either story the court will not act upon the testimony of the petitioner if it is contradicted by the respondent, for the court is not relieved from the duty of weighing the evidence.

U. (falsely called J.) v. *J.* (2) (1867), L.R. 1 P. & D. 460, considered and explained.

Notes. Considered: *Harthan* v. *Harthan*, [1948] 2 All E.R. 639; *Hodgkins* v. *Hodgkins*, [1950] 1 All E.R. 619.

As to impotency quoad hanc as a ground for nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 230; and as to duty of court when the evidence of parties conflicts, see ibid. p. 375. For cases see 27 DIGEST (Repl.) 272 et seq., 279 et seq.

Cases referred to:

(1) *—N—R (falsely called M—E)* v. *M—E* (1853), 2 Rob. Eccl. 625; 163 E.R. 1435; sub nom. *A. (falsely called B)* v. *B*, 1 Ecc. & Ad. 12; sub nom. *Anon.*, 17 Jur. 628; 27 Digest (Repl.) 278, *2228*.

(2) *U. (falsely called J.)* v. *J.* (1867), L.R. 1 P. & D. 460; 37 L.J.P. & M. 7; 16 W.R. 518; 27 Digest (Repl.) 279, *2240*.

(3) *Countess of Essex's Case* (1613), 2 State Tr. 785; 1 Hargrave's State Tr. 307; 2 Dyer, 179a, n.; 73 E.R. 394; 27 Digest (Repl.) 274, *2198*.

(4) *Duchess of Kingston's Case* (1776), 1 Leach, 146; 1 East, P.C. 468; 20 State Tr. 355; 168 E.R. 175; 27 Digest (Repl.) 692, *6623*.

(5) *G.* v. *M.* (1885), 10 App. Cas. 171; 53 L.T. 398; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326, H.L.; 27 Digest (Repl.) 417, *3461*.

(6) *—D—E* v. *A—G (falsely calling herself D—E)* (1845), 1 Rob. Eccl. 279; 163 E.R. 1039; 27 Digest (Repl.) 273, *2187*.

(7) *L. (otherwise B.)* v. *B.*, [1895] P. 274; 64 L.J.P. 121; 11 R. 673; 27 Digest (Repl.) 418, *3475*.

Petition by a wife for a decree of nullity of marriage on the ground that her marriage had not been consummated owing to the husband's impotence. The husband, by his answer, denied this allegation, and pleaded that the marriage had been consummated.

The parties went through a ceremony of marriage on Aug. 2, 1911, and spent a night together at an hotel in London, and the rest of the honeymoon at Bath and Porlock. The wife's case was that the husband during this time made no attempt to consummate the marriage; his case was that he made advances, but that she was frightened and nervous, and that he, therefore, desisted. They then went to husband's home, where, according to him, the marriage was fully and normally consummated, and ordinary cohabitation and intercourse continued for more than two years. In 1914 a dispute arose. The parties sought the counsel of wife's mother, and for the first time a complaint of husband's impotence was made by

A the wife. It was denied by the husband. On the outbreak of the war he joined the army and was away from the wife on active service, save that she spent a little time with him at Marseilles in October, 1915, and, according to the husband, intercourse took place there. He rejoined her on leaving the army in January, 1919, but shortly after that she left him, and instituted these proceedings.

B *Sir John Simon, K.C.*, and *Noel Middleton* for the wife.
Sir Ellis Hume-Williams, K.C., and *Sir Harold Smith* for the husband.

Cur. adv. vult.

May 31. **LORD BIRKENHEAD, L.C.**, read the following judgment.—It is not usual in these proceedings to meet with contests of fact, but when such a contest C does arise the difficulty of arriving at a decision is extreme, for the chief actors are the only available witnesses on the most important issues. The wife must remove all reasonable doubt, for she has undertaken the burden of proof, and it is important in such a case that she should be compelled to discharge the burden, for the charge made, though physical and not moral, is nevertheless a grave and wounding imputation that the husband is lacking, at least quoad hanc, in the power of D reproducing his species, a power commonly and rightly considered to be the most characteristic quality of manhood. The allegation made in the present case is not that the husband completely lacks the capacity of reproduction. As in so many other cases, it is urged that he is incapable of consummating this particular marriage with this particular woman. In general, the vitality, the animal spirits, and the resources of youth will enable a man to support intercourse with any E woman of suitable years, if she be neither repulsive nor antipathetic. There are, nevertheless, instances where the absence of physical sympathy has in the first place delayed intercourse and has afterwards by an accretion of nervous apprehension rendered it impossible for a particular man and a particular woman to unite in the generative act. The relation, no doubt, in many cases and moods appeals only to the animal in man, and so long as the required standard of attractiveness, F be it high or be it low, is attained by the woman, the function of coition will be as readily performed as in the case of animals. It is well known, on the other hand, that there are persons more highly strung and nervous, with whom general physical adequacy may be congealed in a particular application by lack of harmony in temperament or emotion.

Doubts were formerly entertained whether an averment that a respondent is G impotent quoad hanc is valid to support a decree of nullity. Both before and after the Council of Trent, the doctrine of the church admitted, and, indeed, enjoined, nullity on such a ground. Thus Sanchez (Disputationes de Sancto Matrimonii Sacramento (1625) Book 7, at p. 335) states the law, as gathered from Thomas Aquinas and Albertus Magnus, in such a form as to admit of no other conclusion. From that passage I will only quote two sections:

H "Quid refert, sive a natura, sive ex accidenti [the 'accidens' here considered being the lack of inclination of a particular man to a particular woman] impotentia promanet, ad irritandum matrimonium? Si vere impotentia utraque sit, impediatque potestatem tradendi corporis ad copulam conjugalem: eo quod illud accidens reddat cam impossibilem."

I And again:

"Quacunque ex causa impedimentum perpetuæ impotentiæ consurgat, dissolvetur matrimonium, ea cognita, utpote quod irritum fuit."

"Perpetua," it is obvious from the context, is used to describe a condition in relation to a particular woman, subsisting "mediis adhibitis ac experientia triennali præmissa." Recent authority on the point is scanty. It was stated in the course of the argument in *—N—R (falsely called M—E)* v. *M—E* (1) (2 Rob. Eccl. at p. 630) that

"the only case in the books, and that was collusive, in which a sentence of nullity quoad hanc had been pronounced, is that of the *Countess of Essex* (3)." A

No doubt there were circumstances of grave suspicion in the *Countess of Essex's Case* (3), and doubts appear to have been entertained by the minority of the court as to the validity of a decree based upon the quoad hanc doctrine. But the true ground for questioning the propriety of the decision in that case rests rather upon B the nature of the evidence adduced to prove the virginity of the petitioner. The memorandum in which the then archbishop embodied his doubts is so confused that it is impossible to ascertain whether they related to the facts or the law. I assume it to be true that no case can be found in the books between 1613 and 1853. I have myself been unable to find any such case during that period, though in the *Duchess of Kingston's Case* (4) (20 State Tr. at p. 461) THURLOW, A.-G., C arguendo, referring to a case in which a man, whose marriage had been annulled, propter impotentiam, had married another woman, and had had children, and the last circumstance was said to have disproved the cause of the divorce, states boldly, and as if enunciating a platitude, that the circumstance did not prove the judgment false, for one may be "habilis quoad hanc."

It is not until the judgment of DR. LUSHINGTON in *—N—R (falsely called M—E)* D v. *M—E* (1) (2 Rob. Eccl. at p. 635) that we find any reasoned discussion of the matter. Here, however, we reach firm ground. The report of the inspectors in that case was that M. was impotent as regards the said N.; DR. LUSHINGTON faced the consequences of this limitation, but he says:

"Does the rule of law do more, or rather can it by possibility do more? The E rule of law and the report necessarily go on the same grounds and no other—the non-consummation after opportunity. Who by possibility can say that such a man is necessarily impotent as to all women? It may be so, or it may not. There can be no evidence to establish the affirmative, as the evidence of such cohabitation is necessarily impossible. The utmost that can be said is, that there might be something of a guess made, by reason of the one failure, F that the probability is that a man, impotent quoad hanc, would be impotent as to all; this, however, would be inference, not proof. Who can tell the physical cause of that one failure, when the man is apparently without defect?"

I believe that the doctrine thus stated is as sound in law as it is consonant with common sense. It was adopted and approved by LORD SELBORNE in *G.* v. *M.* (5) (10 App. Cas. at p. 196). The rarity of reported cases upon the subject is not to G be attributed to any doubt as to the law. Decrees of nullity must have been pronounced again and again upon evidence of opportunity accompanied by failure. Where, as often happens, the failure is not explained by any patent defect, it is neither necessary nor, indeed, possible to prove the universal negative.

The issue which I have to decide in this case is, therefore, has the wife, removing all reasonable doubt from my mind, satisfied me that the husband was incapable H of succeeding, and has not in fact succeeded in consummating this marriage upon her body? I must then ask myself in what does consummation consist? And here, again, I turn to the high authority of DR. LUSHINGTON (*—D—E* v. *A—G (falsely calling herself D—E)* (6) (1 Rob. Eccl. at p. 298)). He says:

"Sexual intercourse, in the proper meaning of the term is ordinary and com- I plete intercourse; it does not mean partial and imperfect intercourse. Yet I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. . . . If there be a reasonable probability that the lady can be made capable of vera coupla—of the natural sort of coitus, though without power of conception, I cannot pronounce this marriage void. If, on the other hand, she is not, and cannot be made, capable

of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void."

There has, in the present case, been sufficient cohabitation to enable the wife, if believed, to maintain a charge against the husband of impotence quoad hanc. To dispose at once of the question of delay, I record my opinion that, having regard to the intervention of the war, no inference of want of sincerity on the petitioner's part can be drawn from the fact that nearly ten years have elapsed since her marriage on Aug. 2, 1911, and seven years since the accusation of incapacity was first made and denied. Delay may prove want of sincerity, see *G.* v. *M.* (5), and the comments upon that decision in *L.* (*otherwise B.*) v. *B.* (7). It may also be used by a jury or judge sitting without a jury, as a touchstone for testing the truth of the witnesses. In neither respect can the delay that has occurred be so used in this case.

Here I refer to a case which was cited to me on behalf of the husband, *U.* (*falsely called J.*) v. *J.* (2). I have considered the judgment of the judge ordinary, but do not think it supports the proposition that, where the medical evidence is consistent with either story, the court will not act upon the testimony of the petitioner if it is contradicted by the respondent. It is obvious when that case is examined that the judge ordinary did not accept the petitioner's evidence, and that if he had accepted it, he would have granted relief. He said (L.R. 1 P. & D. at pp. 461, 462):

> "To pronounce a marriage invalid on the unsupported oath of the party, who seeks to be relieved from its obligations, is a serious matter . . . only to be done when the last trace of reasonable doubt as to the truth and bona fides of the case had been removed. If there be a direct conflict of testimony between the two parties, who alone know the truth, . . . the difficulties are much increased."

That is good law and good sense, but the fact that difficulties are increased does not make them insuperable, nor is the court relieved from the duty of weighing the evidence merely because the parties, who alone know the truth, tell different stories, one of which at least cannot be true. It is impossible to evade or minimise the difficulties of cases of this kind. The principal actors do not summon witnesses to their bed-chamber. Therefore where, as in the present instance, they tell stories, which are fundamentally inconsistent upon those matters as to which they, and they alone, can have actual knowledge, the court is driven to seek guidance from collateral matters, if there be any of adequate weight. In this particular case I do not feel myself able to accept unreservedly the whole story as told by the wife or the whole story as told by the husband. This circumstance has, of course, added to the difficulty. I have, however, plainly stated the impressions left upon my mind, and the reasons which have led me to accept or reject a particular statement, in order that, if the matter be further reviewed, those on whom such a duty is thrown, may be aware of the processes through which my mind has passed. Naturally I studied with particular care the demeanour and personality of both the principal witnesses. A graver view must not be taken of the contradictions than the facts require. In unusual cases there is no doubt room for honest difference of opinion between men and women as to the actuality of their intercourse; and allowance must be made for the operation upon such doubt of injured vanity and of a partisanship not always conscious. In my opinion, the medical evidence, consistent, as it is, with the wife's evidence and inconsistent with the husband's, does afford me the necessary guidance. . . . In these circumstances, after giving consideration to the details of the case, and allowing weight to the fact that I cannot accept the wife's recollection on all points as accurate, I have come to the conclusion that her story as to the material facts is the true one; that the marriage has never been consummated; and that over a period of years the husband has endeavoured without success to consummate it. It follows from these conclusions that he is, and always has been, incapable of consummating this particular

union with this particular woman. The matter ends here, inasmuch as no allegation of frigidity, or denied access, or of physical malformation is preferred against the wife. For these reasons I decree that the marriage shall be declared null. The petitioner must have the costs.

Solicitors: *Pickering & Co.*; *Lewis & Lewis.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

ELLIS *v.* DUBOWSKI AND ANOTHER

[King's Bench Division (A. T. Lawrence, C.J., Avory and Sankey, JJ.), July 11, 12, 1921]

[Reported [1921] 3 K.B. 621; 91 L.J.K.B. 89; 126 L.T. 91; 85 J.P. 230; 37 T.L.R. 910; 19 L.G.R. 641; 27 Cox, C.C. 107]

Cinematograph—Licence—Condition—Exhibition of film—Approval by unofficial body—No right of review reserved to licensing authority—Delegation of statutory duty—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2 (1).

The respondents, who were the occupiers of a cinematograph theatre, were granted a licence for the premises by the county council under the Cinematograph Act, 1909, one of the conditions of the licence, imposed under s. 2 (1) of the Act, being: "That no film be shown . . . which has not been certified for public exhibition by the British Board of Film Censors. If the licensing committee serve a notice on the licensee that they object to the exhibition of any film on any grounds aforesaid that film shall not be shown." The British Board of Film Censors was an unofficial body appointed to act as censors by firms letting out films on hire. It was not responsible to the county council and did not consult them and their decisions were not subject to consideration and revision by the county council. The respondents exhibited a film which had not been certified for public exhibition by the Board, but no notice of objection, as provided by the condition, had been served on them.

Held: (i) assuming the condition to be intra vires the county council, an offence would be committed if any film were shown in breach of its terms without, as a condition precedent, any notice having been served by the council of objection to the exhibition, but (ii) the condition was ultra vires the council since it put the final decision whether a film should be exhibited into the hands of a non-statutory, private body of persons who might act at the dictation of their own trade interests.

Notes. Distinguished: *Mills* v. *L.C.C.*, [1924] All E.R.Rep. 349. Referred to: *Harman* v. *Butt*, [1944] 1 All E.R. 558; *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.*, [1947] 2 All E.R. 680.

As to licensing of cinematograph theatres, see 32 Halsbury's Laws (2nd Edn.) 72–75; and for cases see 42 Digest 920–922. For the Cinematograph Act, 1909, see 25 Halsbury's Statutes (2nd Edn.) 39.

Cases referred to:

(1) *R.* v. *Burnley Justices, Ex parte Longmore* (1916), 85 L.J.K.B. 1565; 115 L.T. 525; 80 J.P. 382; 32 T.L.R. 695; 14 L.G.R. 960, D.C.; 42 Digest 921, *161.*

(2) *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614; sub nom. *Halifax Theatre de Luxe, Ltd.* v. *Gledhill*, 84 L.J.K.B. 649, D.C.; 42 Digest 920, *160.*

(3) *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, *164*.

Also referred to in argument:

Ex parte Stott, [1916] 1 K.B. 7; 85 L.J.K.B. 502; 114 L.T. 234; 80 J.P. 169; 32 T.L.R. 84; 80 Sol. Jo. 418, D.C.; 42 Digest 921, *167*.

Stott v. *Gamble*, [1916] 2 K.B. 504; 85 L.J.K.B. 1750; 115 L.T. 309; 80 J.P. 443; 32 T.L.R. 579; 14 L.G.R. 769; 42 Digest 921, *168*.

Ellis v. *North Metropolitan Theatres, Ltd.*, [1915] 2 K.B. 61; 84 L.J.K.B. 1077; 112 L.T. 1018; 79 J.P. 297; 31 T.L.R. 201; 13 L.G.R. 735, D.C.; 42 Digest 919, *148*.

Case Stated by justices for the division of Brentford in the county of Middlesex.

An information was preferred by the appellant, an inspector under the Middlesex County Council, against the respondents under s. 3 of the Cinematograph Act, 1909, for that the respondents, being the occupiers of the Gaiety Theatre, Richmond Road, Twickenham, did unlawfully allow the said premises to be used in contravention of the conditions upon and subject to which the licence relating to the premises was granted by the Middlesex County Council under the Act, it being alleged that, in breach of condition No. 2 of the licence, which provided that no film be shown which had not been certified for public exhibition by the British Board of Film Censors, the respondents did, on Nov. 23, 1920, show a film called "The Auction of Souls," which film had not been so certified.

The following facts were either proved before the justices or admitted by both parties. (a) The respondents were the occupiers and licence-holders of the said Gaiety Theatre. (b) Condition No. 2 upon and subject to which the licence relating to the said Gaiety Theatre had been granted to the respondents pursuant to the Cinematograph Act, 1909, was as follows:

> "That no film be shown which is likely to be injurious to morality or to encourage or incite to crime, or to lead to disorder, or to be in any way offensive in the circumstances to public feeling, or which contains any offensive representations of living persons, or which has not been certified for public exhibition by the British Board of Film Censors. If the licensing committee serve a notice on the licensee that they object to the exhibition of any film on any of the grounds aforesaid, that film shall not be shown."

(c) The film entitled "The Auction of Souls" was shown by the respondents at the said theatre on Nov. 23, 1920. (d) The said film had not been certified for public exhibition by the British Board of Film Censors. (e) No notice of objection to the film had been served on the respondents or any of them.

On the part of the respondents it was contended that the effect of condition No. 2 of the above-mentioned licence for cinematograph entertainments, issued by the county council of Middlesex to the respondents by virtue of the Cinematograph Act, 1909, was that in order to obtain a conviction for an infringement of the said condition, notice must be served on the licensees of objection by the licensing committee, setting out the grounds of objection. In this case the film had not been certified for public exhibition by the British Board of Film Censors. It was further contended, on the part of the respondents, that the county council had no power to delegate or transfer any of its powers, functions and discretion conferred on it by the Cinematograph Act, 1909, otherwise than in accordance with s. 5 of the said Act, and that condition No. 2 of the said licence upon and subject to which the licence relating to the said Gaiety Theatre was granted, in so far as it delegated or transferred such powers, functions and discretion to the British Board of Film Censors, was beyond the powers of the county council and unreasonable, or at any rate beyond such powers, if read in accordance with the contentions of the appellant. It was further submitted on the part of the respondents that by reason of the notice contained in the licence setting out the provisions of s. 3 of the said

Act, and in virtue of the provisions of such section, the terms and provisions of the said condition should be construed strictly. On the part of the appellant it was contended that condition No. 2 of the licence imposed two different kinds of restrictions. In the first place, it forbade the exhibition of any film which was in fact, e.g., injurious to morality, or, as in this case, which had not been certified for public exhibition by the British Board of Film Censors. In the second place, it enabled the licensing authority to give a notice that they objected to any particular film, provided that the authority specified one or other of the grounds contained in the conditions, and, if after such a notice the licensee had in fact shown a film to which such objection had been made, then an offence against the Act was committed. It was contended in this case that the former offence had been committed, and that the absence of any notice by the licensing authority afforded no answer and no defence to the proceedings. It was also contended by the appellant that the condition forbidding the showing of a film which had not been certified by the British Board of Film Censors was not a delegation of the powers of the licensing authority, but was merely a condition imposed by the licensing authority, and a reasonable and lawful one. The justices were of opinion that they had to read the whole clause as one and as disclosing one offence only, namely, the exhibition of a film to which objection had been taken by service of the notice referred to in the said condition, and that, inasmuch as no such notice had been given, no offence had been committed.

The questions of law upon which this case was stated for the opinion of the court were: (i) Whether the respondents, by showing a film which had not in fact been certified for public exhibition by the British Board of Film Censors, but as to which no notice of objection on the part of the licensing committee of the county council had been served upon the respondents, were guilty of allowing the licensed premises to be used in contravention of condition No. 2 of the licence. (ii) Whether condition No. 2 of the licence as read and contended for by the appellant was lawful and within the powers of the county council. The Cinematograph Act, 1909, provides:

> "Section 2 (1). A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine.
>
> Section 3. If the owner of a cinematograph or other apparatus uses the apparatus, or allows it to be used, or if the occupier of any premises allows those premises to be used, in contravention of the provisions of this Act or the regulations made thereunder or of the conditions or restrictions upon or subject to which any licence relating to the premises has been granted under this Act, he shall be liable, on summary conviction, to a fine. . . ."

Hills, K.C., and *F. J. Wrottesley* for the appellant.
H. M. Giveen and *H. C. Bickmore* for the respondents.

A. T. LAWRENCE, C.J.—In this case the justices refused to convict upon the ground that the condition in question was a single condition requiring a notice by the authority before any offence under the condition was committed. I do not think myself that that view of the condition is a correct one, but I think that the conclusion to which the justices came, namely, that they could not convict, can be supported upon the true construction of this condition upon another ground, namely, the ground which has been submitted to us by counsel for the respondents, that this requirement of a certificate by the British Board of Film Censors, before any film could be shown, is a bad condition and ultra vires the licensing committee of the county council to impose.

The condition sets up an authority, namely, this Board, and its ipse dixit is to control the exhibition of films. The committee, therefore, transferred to the Board

the authority that belonged to themselves and the justices alone, namely, the power of deciding what films shall or shall not be allowed to be exhibited. I do not think they have any power to do that. I think it is an unreasonable condition to impose. There are five previous branches of the condition all of which seem to me to be quite reasonable and proper, and then there follows this sixth branch "or which has not been certified for public exhibition by the British Board of Film Censors." That condition seems to me to be bad. The committee have no power to direct anybody to agree to so arbitrary a condition. I am quite prepared to assume that the Board has exercised their powers wisely and discreetly, but I do not think that the committee have the power to create any such non-statutory authority as an absolute and unappealable body. If the condition had been in some such form of words as my brother SANKEY suggested during the argument, which enabled the committee themselves to review the decision of the Board, I should have thought that it was reasonable and permissible. I do not think the arguments by counsel for the respondents on that point were convincing. I think it is highly convenient that no film should be exhibited which has not passed somebody, but that person must not be a dictator capable of finally deciding what the film is. It must be a matter of precaution only, and not of absolute prohibition. However, I think a condition which puts the matter in the hands of some third person or body of persons not constituted by statute, and having no constitutional authority, is ultra vires this committee. The committee can decide; they are the representative body and are responsible to their constituents. The justices in petty sessions are a constitutional body properly appointed, and they have by statute a recognition. In the same way there is an appeal from them to quarter sessions, but to say that there is to be an absolute body of persons set up without any possibility of questioning their judgment seems to be wrong; and, therefore, I think this condition is a bad condition, that the refusal to convict was right, and that this appeal must be dismissed.

AVORY, J.—I agree that the justices were wrong in dismissing this information on the ground that no notice had been given by the licensing committee under the latter part of condition No. 2, that they objected to the exhibition of this particular film. In my opinion, assuming condition No. 2 to be reasonable and intra vires, an offence would be committed if any film were shown which was injurious to morality or an encouragement to crime, or which had not been certified for public exhibition by the British Board of Film Censors without, as a condition precedent, any notice having been served by the licensing committee that they objected to the exhibition. But I also agree, with some doubt and considerable hesitation, that this condition that no film shall be shown which has not been certified for public exhibition by the British Board of Film Censors is so unreasonable as to be ultra vires the licensing authority. I come to that conclusion solely upon the ground that as this condition stands it is competent to this board of film censors to prohibit the exhibition of a film although it may not either be injurious to morality or encourage crime or lead to disorder or be in any way offensive to public feeling, &c., but that it confers upon them an absolute power to prohibit the exhibition of a film for reasons which may be purely private or interested from a trade point of view. I am not suggesting that they have hitherto exercised their functions from any such motives or instructions, nor am I suggesting that they are likely to do it in the future, but solely upon the fact that this confers upon them an absolute power of that description I think that this condition is ultra vires.

I wish to add that I entertain grave doubt whether this point can properly be taken on the statement of this Case, and whether the proper remedy in the circumstances, when such a condition is sought to be imposed, is not for the applicant to come to this court either for a prohibition or for a mandamus to prevent the imposition of a condition which is said to be unreasonable. It is quite true that the point is actually raised by the question of law No. 2 in this Case, but what I mean is that I doubt whether it can properly be raised or argued. In my view such

a point, if it be desired to raise it, should be raised in the way which I have indicated, either by mandamus or prohibition, as was done in *R.* v. *Burnley Justices* (1). It seems to me that where the applicant has accepted a licence with notice beforehand that it will only be granted to him on certain conditions, and where he accepts that licence with those conditions, it may be, I think, properly argued that he becomes liable to the penalty if he infringes any of these conditions, having regard to the fact that s. 3 of this Act provides that if the occupier of any premises allows these premises to be used in contravention of the conditions or restrictions upon or subject to which any licence has been granted, he shall be liable to a fine. In view of the cases which have been cited, and particularly in view of the judgment of LUSH, J., in *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2), I do not express any concluded opinion upon this point. All that I indicate is that, in my opinion, it is still worthy of argument on a future occasion when it is really taken and relied upon. In none of the cases hitherto has the point really been raised so as to be necessary for decision. I quite agree that it has been incidentally raised, but in no case has the judgment of the court really proceeded on that point. I agree that the appeal, for the reasons given, should be dismissed.

SANKEY, J.—I agree. Upon the first point I desire to adopt the judgment of the Lord Chief Justice, and I cannot usefully add anything to it.

With regard to the second point whether a Case Stated is a proper way of raising a point of this character—I think we are bound by previous decisions, and it is probably too late to say that the proper remedy is by mandamus. The point was absolutely taken in *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.* (3), by Mr. Danckwerts, and it appears at the end of the argument in the following terms:

> "The respondents, having taken the licence with this condition in it, are bound by it, and are liable for a breach of the condition."

That point was not found to be a good point by the court. Beyond that, in the case that my brother AVORY has referred to, it appears to me to have been directly decided. The words in *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill* (2) are as follows:

> "On behalf of the respondent it was not disputed by Mr. Montgomery that if the condition is ultra vires the appellants are entitled, although the licence was given, and accepted with that condition, to take advantage of the contention that it is ultra vires. The question, therefore, is whether the condition is one which it is within the power of the licensing authority to impose."

It appears to me that that is as near to a direct decision as it is possible to have, and I am not quite sure that it would be convenient to raise this question on mandamus. I can imagine many cases where an applicant wants a licence, and does not want to question the conditions, because they might never arise, and it might be putting him in the position of applying for a mandamus in the air. In the generality of cases it may be that the present method of procedure is more convenient. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. S. Freeland*; *Charles Everett.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

Re PRIOR. Ex parte PRIOR

[Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), June 3, 1921]

B [Reported [1921] 3 K.B. 333; 90 L.J.K.B. 1222; 125 L.T. 727; [1921] B. & C.R. 124]

Bankruptcy—Receiving order—Rescission—Charging order made by registrar on money in hands of official receiver—Jurisdiction—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 102—*Bankruptcy Rules* 1915, *r.* 6.

C A registrar in bankruptcy made an order that a debtor's interest in money in the hands of the official receiver should stand charged with the payment of a sum in favour of judgment creditor.

Held: the registrar had jurisdiction to make the order.

Notes. Considered: *Re Ward, Ex parte Hammond & Son* v. *Official Receiver*, [1942] 1 All E.R. 513.

D As to the rescission of a receiving order and its effect, see 2 Halsbury's Laws (3rd Edn.) 338–341; and for cases see 4 Digest (Repl.) 179 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488; 60 L.T. 5; 37 W.R. 47, C.A.; 21 Digest 653, *2314*.

E (2) *Watts* v. *Jefferyes* (1851), 3 Mac. & G. 372; 20 L.J.Ch. 659; 17 L.T.O.S. 281; 15 Jur. 783; 42 E.R. 305, L.C.; 21 Digest 655, *2343*.

Also referred to in argument:

Re Wemyss, Ex parte Wemyss (1884), 13 Q.B.D. 244; 53 L.J.Q.B. 496; 32 W.R. 1002; 1 Morr. 157, D.C.; 4 Digest (Repl.) 180, *1634*.

F *Flowers* v. *Lyme Regis Corpn.*, [1921] 1 K.B. 488; 90 L.J.K.B. 355; 124 L.T. 463; 37 T.L.R. 145; 65 Sol. Jo. 133; [1920] B. & C.R. 138, C.A.; 4 Digest (Repl.) 213, *1913*.

Re Greensill (1872), L.R. & C.P. 24; sub nom. *Hunter* v. *Greensill*, 42 L.J.C.P. 55; 27 L.T. 827; 37 J.P. 215; 21 W.R. 263; 4 Digest (Repl.) 541, *4722*.

Re Wood, Ex parte Fanshawe, [1897] 1 Q.B. 314; 66 L.J.Q.B. 69; 75 L.T. 387; 3 Mans. 299; 4 Digest (Repl.) 560, *4947*.

G *Re Deakin, Ex parte Daniell*, [1900] 2 K.B. 489; 69 L.J.Q.B. 725; 82 L.T. 776; 48 W.R. 678; 44 Sol. Jo. 553; 7 Mans. 302, C.A.; 4 Digest (Repl.) 560, *4948*.

Prout v. *Gregory* (1889), 24 Q.B.D. 281; 59 L.J.Q.B. 118; 61 L.T. 696; 38 W.R. 204; 7 Morr. 1, D.C.; 4 Digest (Repl.) 525, *4586*.

Re Cook, Ex parte Cripps, [1899] 1 Q.B. 863; 68 L.J.Q.B. 597; 80 L.T. 495; 47 W.R. 524; 43 Sol. Jo. 440; 6 Mans. 185, D.C.; 4 Digest (Repl.) 532, *4636*.

H **Appeal** from an order of the registrar in bankruptcy.

A receiving order was made against a debtor on Oct. 7, 1920. This order was rescinded by an order of the court, dated Feb. 3, 1921, to the effect that the official receiver should, after payment of the debts in full, pay the balance of the moneys in his hands to the debtor after making the necessary deductions. In June, 1920, the debtor commenced an action against his wife for a declaration as to certain I furniture. The action was dismissed with costs in December, 1920. The taxed costs of the debtor's wife amounted to £124 6s. 3d. The debtor's wife applied to the registrar in bankruptcy for an order to be made in respect of these costs, and the registrar in bankruptcy made a charging order to the effect that the debtor's interest in the balance of the funds in the hands of the official receiver should stand charged with the payment of the sum of £124 6s. 3d. in her favour. The debtor appealed on the ground that the registrar in bankruptcy had no jurisdiction to make the order.

By s. 102 of the Bankruptcy Act, 1914:

"(1) The registrars in bankruptcy of the High Court . . . shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the court. (2) Subject to general rules limiting the powers of this section, a registrar shall have power . . . (f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers."

By r. 6 of the Bankruptcy Rules, 1915 [see now Bankruptcy Rules, 1952, r. 8], it is provided that certain specified matters and applications (not including an application of the nature of the application in question) shall be heard in open court and that "any other matter or application may be heard and determined in chambers."

Tindale Davis for the debtor.

O'Hagan for the respondent was not called on to argue.

LORD STERNDALE, M.R.—This appeal raises a difficult question of a curious and possibly technical character, but without a shred of merit from beginning to end. The debtor has had a receiving order made against him. He has succeeded in getting that receiving order rescinded on payment of all the debts in full. He has, since that receiving order was rescinded, incurred a debt to his wife for £124 6s. 3d., and he incurred that debt in respect of the costs of an unsuccessful action which he chose to bring against his wife with reference to the title to some furniture. It was tried by ASTBURY, J., who gave judgment in favour of the wife for £124 6s. 3d. No attempt has been made to satisfy it. Therefore, it is the case of a man who has money to which he is entitled in the hands of the official receiver, has incurred a debt to his wife by unsuccessful proceedings taken against her, and refuses to do anything whatever to satisfy it. In those circumstances the wife applied for a charging order upon the money which is in the hands of the official receiver. It is not disputed that if the learned judge to whom bankruptcy matters are assigned, HORRIDGE, J., has made this order he would have had ample jurisdiction to make it, not as a judge to whom bankruptcy matters are assigned, but under his general powers of the King's Bench Division of the High Court of Justice; and it was not disputed, I do not know whether it is necessary to decide whether rightly or not, that that being so, a master of the King's Bench Division could have dealt with it. That depends on the rules applicable to the King's Bench Division dealing with what powers the judge or master may exercise. What is said is this. The learned judge would not have had power to make that charging order as a judge in bankruptcy. I respectfully object to that convenient expression "judge in bankruptcy" being used in this matter. There is no such thing as a judge in bankruptcy. There is no separate bankruptcy court. He is the judge of the King's Bench Division to whom for a time bankruptcy matters are assigned. It is said that sitting in the exercise of his bankruptcy jurisdiction he would not have had the right to make this order, and as he would not have had the right to make this order in the exercise of his bankruptcy jurisdiction, but only in the exercise of his jurisdiction as a judge of the King's Bench Division, the registrar in bankruptcy, who has only the powers in chambers of a judge exercising his bankruptcy jurisdiction, cannot make the order.

That a charging order can be made in circumstances of this kind seems to me not a matter of controversy in this court. It might, it seems to me, have been open to question whether "charging order" was the proper term to apply to the order which was made, but that seems to me to have been determined for us by *Brereton* v. *Edwards* (1). I say it might have been open for this reason. This order is not made under s. 14 of the Judgments Act, 1838, because that does not give any power to deal with cash or money, but it is made, not directly, but indirectly, by reason of the powers of s. 12 of that Act which gives the right to take in execution, among other things, moneys. It has been decided that where the money, instead of being in a place where the sheriff can get at it, is in the hands

of the Paymaster-General or of an officer of the court for the judgment debtor, then, in order to prevent the execution creditor being deprived of his right under s. 12, by reason of his not being able to levy on the moneys in the hands of an officer of the court, or a public officer like the Paymaster-General, an order would be made that the money shall be dealt with as if it had been seized and paid to the judgment creditor. That was decided by Lord Truro in *Watts* v. *Jefferyes* (2), where a sum of £500 had been ordered to be paid to the judgment debtor and the cheque had been actually drawn for the purpose of paying. I do not know whether it was called in terms a charging order or not, but an order was made that that cheque should be handed over to the judgment creditor in satisfaction of the debt. That being so, it is necessary to look at the position in which this money was. This money is in the hands of the official receiver under the terms of an order of Feb. 3, 1921, by which it was ordered "that the receiving order dated Oct. 7, 1920, be rescinded, and the same is hereby rescinded, and it is further ordered that the official receiver do pay the debts of the debtor on the footing of his said report to this honourable court, and that the balance of the moneys in his hands after deducting all fees, costs, charges, and expenses be paid to the debtor." So the order was just the same as the order in Chancery in *Watts* v. *Jefferyes* (2), namely, that the money be paid to the debtor, the only difference being here that the official receiver, before paying it over, would deduct his fees, costs, charges, and expenses.

Therefore, in substance there is no objection to this charging order. The only real objection, if I may call it a real one, is that the judge ought to have made the order and not the registrar—the purest possible technicality. Admitted that Horridge, J., to whom bankruptcy business is assigned, might have made the order without saying in what capacity he made it, it would have been perfectly good. But it is contended that the registrar cannot do it because if Horridge, J., said he was doing it in the exercise of his bankruptcy jurisdiction, he would have been wrong. In *Brereton* v. *Edwards* (1) it was put on the general jurisdiction as a judge of the High Court. To my mind there is no ground for saying here that Horridge, J., was not capable of doing it in the exercise of his bankruptcy jurisdiction. The money was in the hands of an officer of the court for the purpose of the bankruptcy jurisdiction which is entrusted to the judge, and that seems to me to put him in the same position as, we will say, an official of the Chancery Division would be, where undoubtedly the judge of the Chancery Division could have dealt with it. I assume the jurisdiction, wherever it arises, is in the judge, because it was not contested, and it seems to me that in those circumstances a judge who has the power and the will to assist the execution of the judgment creditor under s. 12 upon funds which are in the hands of an officer who is subject to him in his bankruptcy jurisdiction has a right to make an order in the exercise of his bankruptcy jurisdiction. As a matter of fact in other cases which have been referred to, where it was said that the judge could not do it except in the exercise of his bankruptcy jurisdiction the money was not in the hands of an official who was under him in the discharge of his bankruptcy jurisdiction, which seems to me to make a considerable amount of difference. If the judge, sitting in the exercise of his bankruptcy jurisdiction, could make this order I think there is no question that the registrar also could make it, and, as I think the judge could have done it in this particular case—I say nothing about the other cases where it was said he could not—but as he could in this particular case have made the order in the exercise of his bankruptcy jurisdiction, I think that the registrar has the same jurisdiction. Therefore, I think the appeal fails and should be dismissed with costs.

ATKIN, L.J.—I agree. This is an appeal from the order of the learned registrar in bankruptcy by which he ordered that the debtor's interest in the balance of the fund in the hands of the official receiver stand charged with payment of £124 6s. 3d. in favour of the wife of the debtor.

The first question which arises is whether there was jurisdiction to make that

order, for the judge by reason of his bankruptcy jurisdiction, or for the registrar. I think it is material to consider how those funds came into existence. It is quite plain that they came into existence by virtue of an order of the judge of the High Court, by reason of his bankruptcy jurisdiction, made on Feb. 3, 1921, by which, a receiving order, which had been made against the debtor, was rescinded, and directions were given to the official receiver as to what he was to do with the funds over which he had control, and had control merely by reason of the fact that a receiving order was originally made. The official receiver was directed, notwithstanding the rescission of the receiving order, to pay the creditors, who had proved, in full and to pay himself his costs and charges and to pay the balance to the debtor. It was, therefore, by reason of an order of the Bankruptcy Court that the official receiver had control of the fund. The judgment creditor happens to be the wife of the judgment debtor. What could she do to enforce her judgment? She could not issue a legal execution against this money, because, if she did, she would be interfering with the officer who was dealing with the money in pursuance of an order of the judge of the High Court, and it is plain that such an interference would not be permitted. Therefore, legal execution was impossible, and the only course she could take in order to satisfy her judgment out of money which was available to the judgment debtor and which he ought to pay to her was by some process of equitable execution. To whom ought she to go for that purpose? That there was jurisdiction to make such an order by way of equitable execution is undoubted. It has been exercised now to the knowledge of all of us for generations, and the express authority to which we have been referred in respect of it is *Brereton* v. *Edwards* (1), where the judge of the King's Bench Division sitting in chambers, FIELD, J., had made a charging order over a fund that was standing to the credit of the judgment debtor in a suit in the Chancery Division. The case went to the Court of Appeal and LORD ESHER held that FIELD, J., had power to make the order because of the Judicature Act. He says:

> "It seems to me, therefore, that FIELD, J., stood in the same position as if he had been a judge of the Chancery Division, and that he was entitled to make the charging order to assist the creditor in realising his judgment. Then arises the question, in what form ought FIELD, J., to have made the order? Was he bound to go through the ceremony of appointing a receiver, or was he entitled to make a charging order directly in favour of the creditor? Was he bound to make an order that the sheriff should apply to the Chancery Division? In my opinion, both these steps would have been a mere waste of time and money. I think the judge had jurisdiction to make the charging order at once. There need be no flinching from making a charging order in the Chancery Division with regard to any cash, when a creditor has obtained judgment for his debt, and the order is in the nature of an equitable execution in aid of the judgment."

LINDLEY, L.J., says the same thing:

> "The first question is, whether there is any mode of procedure by which a judgment creditor can obtain a charge upon cash standing to the credit of the judgment debtor in the Chancery Division."

He proceeds to say that he can. BOWEN, L.J., says:

> "I think the broad principle of law which we are now deciding is this—that any judge of the High Court has power, at the instance of a judgment creditor, to make an effectual order charging the judgment debt upon a sum of money standing to the credit of a judgment debtor in the name of the Paymaster-General in an action in the Chancery Division."

The result of that case is, in the first place, that the judgment creditor was entitled to relief by way of a charging order upon a fund such as this, and the only question that arises here is to whom ought the wife to make application. I think it appears in *Brereton* v. *Edwards* (1) that she could have made it to the

judge in chambers, but I think it also appears that it could be made, and, to my mind, it may be made with much more convenience and much more propriety to the judge exercising his jurisdiction in bankruptcy, because the reason for her not being able to get legal execution is that she would be interfering with an officer of the court, and this officer of the court is acting under the directions of the High Court exercising its jurisdiction in bankruptcy. It seems to me to be right and proper that, in the first instance, if one can, one should go to the judge in whose jurisdiction the officer is who has the funds in hand. Therefore, to my mind it is quite plain that the judge had power to make this order by reason of the jurisdiction given him by the Bankruptcy Act, because it was his officer who was holding this fund by reason of an order made by him in bankruptcy.

Then the only question is, it being clear that the judge exercising the jurisdiction in bankruptcy had himself power to make the order, could the order be made by the registrar? That is a technical question, and I think it is solved by a reference to one section of the Act and the rules. The power under s. 102 is subject to general rules; the registrar has power to make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers. We find r. 6 which provides that "the following matters and applications shall be heard and determined in open court." These are mentioned and do not include power to make a charging order, and then the rule adds: "Any other matter or application may be heard and determined in chambers." So the jurisdiction of the registrar seems to be quite neatly provided for by the rules; it is extremely convenient that the registrar should have that power, because the registrar is himself the person who makes the order rescinding the receiving order and gives the direction to the official receiver as to what he shall do with the fund. By analogy in the King's Bench Division the master in chambers has power to make this kind of charging order, and I can see no reason why the registrar should not have similar power. It appears to me that this order was perfectly properly made and that this appeal should be dismissed.

YOUNGER, L.J.—I agree. In my judgment, the order of the learned registrar, which is appealed from here, was in substance correct and is in form justified by a most salutary authority which is binding upon us. The fund here in question was in the hands of the official receiver under an order of the Court of Bankruptcy, directing it in a particular event to be paid to the debtor. In that condition, while the fund was in the hands of the official receiver as an officer of the court although it was in its nature capable of being reached by this judgment creditor of the debtor under and by virtue of s. 12 of the Judgments Act, 1838, it was not capable of being reached without the leave of the Bankruptcy Court in the hands of whose officer it was, without the person claiming or seeking to reach it thereby being in danger of committing a contempt. Accordingly, the natural and proper course to take in such a case would be that the execution creditor, although there had been no fi. fa. issued, as the person in whose favour the order had been made, should apply to the court in the hands of whose officer this fund was for an order that that officer should be directed, or at least at liberty, to pay to the judgment creditor out of that fund the sum which by the order was payable to her. That would be the normal and proper course to take in the case of a fund of this sort in the hands of an officer of the court, and it would be to the court in the hands of whose officer that fund was that the application would properly, and prior to the Judicature Act I think necessarily, have had to be made. In other words, in my judgment, apart from the form in which this order is made, the real justification for it is to be found in LORD TRURO'S decision in *Watts* v. *Jefferyes* (2), and I cannot do better by way of an accurate description of that decision than read LINDLEY, L.J.'s description of it in his judgment in *Brereton* v. *Edwards* (1).

> "LORD TRURO, L.C., acting not under [the Judgments Act, 1838] s. 12, but by analogy to it, held that the Court of Chancery ought not to prevent the sheriff from seizing under a fi. fa. a cheque which the accountant-general of

the court had drawn in favour of the judgment debtor, and which was then in the accountant-general's hands. That case goes a very long way, for it shows that, when there was property of a judgment debtor which could be seized under a fi. fa., that property could be reached by the judgment creditor, although it was in the custody of the Court of Chancery. After consulting our colleagues in the other Division of this court, we think that there is no reason in principle why cash standing to the credit of a judgment debtor in the Chancery Division should not be handed over to his judgment creditor, there being no authority or practice to the contrary."

So far it will be seen the lord justice is referring to an order made by the Court of Chancery in respect of a fund which was under the control of that court. The difficulty in *Brereton* v. *Edwards* (1), apart from the form of the order, was to find whether there was any jurisdiction in the King's Bench Division to make an order with regard to a fund that was at the moment under the control of a Chancery court, and it was held that the effect of the Judicature Act was to enable the judge of any Division to make that order with regard to a fund standing to the credit of another. But *Watts* v. *Jefferyes* (2) was in no way touched as to the court where the fund was, and under whose control it was, being the court to which in the first instance, and naturally, the application for leave to deal with it should be made. But *Brereton* v. *Edwards* (1) is useful for another purpose, and, to my mind, when so used becomes conclusive in this case, because, although there is no reference to a charging order being the proper form of procedure in a case where the sheriff seeks to levy under s. 12 of the Judgments Act, 1838, the reference to a charging order being confined to cases under sections of the Act other than those with which we have to deal, *Brereton* v. *Edwards* (1) laid it down, by what I venture most respectfully to describe as a most salutary decision, that it is in substance proper and right in the case of a fund situated as this is, and although s. 12 does not specially refer to a charging order and seems to imply that there shall have been previously a fi. fa. issued, that in substance it is proper and right that without the issuing of a fi. fa. one may get at the fund by virtue of a charging order attaching it. It seems to me clearly laid down by these two decisions that the Court in Bankruptcy, inasmuch as the fund is in the hands of one of its officers, is the court to which the application should be made for leave to get at a fund which would be available for the execution creditor if it were not in the hands of an officer of the court. And we find by virtue of *Brereton* v. *Edwards* (1) that, that application being naturally and properly made to the Court in Bankruptcy, the form of order which may conveniently be made is a charging order, although that is not the order expressly mentioned in s. 12 of the Judgments Act, 1838, under which the right to get to the fund has got to be found. Therefore, we have everything here as it seems to me, from that point of view quite clear. The order was made by the registrar as a judge of the Court of Bankruptcy. It was properly made by him as a judge of the Court of Bankruptcy; it is an order which, as made by a judge of the Court of Bankruptcy, may properly be made in chambers, and so, as soon as it is found to be an order of that court and properly made in chambers, there can be no doubt whatsoever that it is properly made by the registrar in chambers. Accordingly, I think this appeal ought to be dismissed.

Solicitors: *Woodthorpe, Browne & Co.*; *C. H. Heddon.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

DIAMOND ALKALI EXPORT CORPORATION *v.* BOURGEOIS

[King's Bench Division (McCardie, J.), June 22, July 1, 1921]

[Reported [1921] 3 K.B. 443; 91 L.J.K.B. 147; 126 L.T. 379; 15 Asp.M.L.C. 455; 26 Com. Cas. 310]

Sale of Goods—C.i.f. contract—Tender of documents—Bill of lading—Necessary contents—Insurance policy—Certificate referring to policy.
Shipping—Carriage by sea—Contract—Strike clause—Construction.

A contract provided for the sale of goods to be shipped in September–October, 1920, from American seaboard c.i.f. Gothenburg. Under the contract the sellers tendered, with the invoice for the goods, two documents purporting to be a bill of lading and a policy of insurance respectively. The material part of the bill of lading was as follows: "Received in apparent good order and condition from D.A.H. to be transported by the steamship *Anglia* now lying in the port of P. and bound for G. or failing shipment by said steamer in and upon a following steamer, 280 bags dense soda." The "policy" of insurance tendered was a certificate of insurance issued by an American insurance corporation, which, as declared by the certificate, after stating that the corporation had "insured under Policy No. 2319 for D.A.H. $5,790 on 280 bags 58 per cent. dense soda ash . . . valued at sum insured, shipped on board of the steamship *Anglia* and/or other steamer or steamers at and from P. to G.," and that "in case of loss such loss is payable to the order of the assured on surrender of this certificate," provided: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder . . . as fully as if the property was covered by a special policy direct to the holder of this certificate." By a condition of the contract the seller was "not liable for failures or delays in delivery due to strikes . . ."

Held: (i) the effect of the strike clause was to enable the sellers, if facts within the clause prevented shipment in September-October, to ship as soon as possible after the cause of delay had ceased to operate; (ii) the document put forward as a bill of lading was not a bill of lading within a c.i.f. contract since (a) it did not acknowledge the goods to be on board a specific ship, or, indeed, a shipment on board at all, (b) it left it uncertain whether the goods would be carried in the *Anglia* or some "following ship"—a loose and ambiguous phrase, and (c) there was no indication that the "following ship" would belong to or be under the control of the person who issued the bill of lading, but the document was a mere receipt for goods which at some future time were to be shipped by some uncertain vessel: *The Marlborough Hill* (1), [1921] 1 A.C. 444, criticised and distinguished; (iii) the certificate of insurance was not a good tender under a c.i.f. contract because it was not an actual policy in itself and did not contain all the terms of the insurance nor comply with the provisions of the Marine Insurance Act, 1906, as to assignment (see s. 50) and otherwise; and, therefore, the buyers were entitled to reject the documents.

Notes. Followed: *Scott* v. *Barclays Bank*, [1923] 2 K.B. 1. Distinguished: *Koskas* v. *Standard Marine Insurance Co.* (1927), 137 L.T. 165. Referred to: *J. Aron & Co.* v. *Comptoir Wegimont*, [1921] 3 K.B. 435; *Harper* v. *Mackechnie*, [1925] 2 K.B. 423.

As to c.i.f. contracts, see 29 Halsbury's Laws (2nd Edn.) 210 et seq.; and for cases see 39 Digest 530, 558, 575–581, 41 Digest 369 et seq.

Cases referred to:

(1) *The Marlborough Hill* v. *Cowan & Sons*, [1921] 1 A.C. 444; 90 L.J.P.C. 87; 124 L.T. 645; 37 T.L.R. 190; 15 Asp.M.L.C. 163; 26 Com. Cas. 121, P.C.; 41 Digest 369, *2156*.

(2) *Larsen* v. *Sylvester & Co.*, [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 24 T.L.R. 640; 11 Asp.M.L.C. 78; 13 Com. Cas. 328, H.L.; 41 Digest 306, *1682.*

(3) *Joseph Travers & Sons, Ltd.* v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, *278.*

(4) *Brown* v. *Turner, Brightman & Co.*, [1912] A.C. 12; 81 L.J.K.B. 387; 105 L.T. 562; 12 Asp.M.L.C. 79; 17 Com. Cas. 171, H.L.; 41 Digest 439, *2758.*

(5) *Brooke Tool Manufacturing Co., Ltd.* v. *Hydraulic Gears Co., Ltd.* (1919), 89 L.J.K.B. 263; 122 L.T. 126, D.C.; 12 Digest (Repl.) 465, *3472.*

(6) *J. Aron & Co.* v. *Comptoir Wegimont*, [1921] 3 K.B. 435; 90 L.J.K.B. 1233; 37 T.L.R. 879; 26 Com. Cas. 303; 39 Digest 426, *569.*

(7) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 39 Digest 560, *1677.*

(8) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 16 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens Horst Co.* v. *Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801.*

(9) *Landauer & Co.* v. *Craven and Speeding Bros.*, [1912] 2 K.B. 94; 81 L.J.K.B. 650; 106 L.T. 298; 56 Sol. Jo. 274; 17 Com. Cas. 193; 39 Digest 577, *1811.*

(10) *Johnson* v. *Taylor Bros. & Co., Ltd.*, [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; 36 T.L.R. 62; 64 Sol. Jo. 82; 25 Com. Cas. 69, H.L.; 39 Digest 660, *2515.*

(11) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp.M.L.C. 461, H.L.; 39 Digest 425, *564.*

(12) *Lickbarrow* v. *Mason* (1794), 5 Term Rep. 683; 39 Digest 614, *2115.*

(13) *Rowley* v. *Bigelow* (1832), 12 Pick. 307 (Mass.).

(14) *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578, D.C.; 30 Digest (Repl.) 224, *682.*

(15) *Hickox* v. *Adams* (1876), 34 L.T. 404; 3 Asp.M.L.C. 142, C.A.; 39 Digest 580, *1832.*

(16) *Burstall & Co.* v. *Grimswade & Sons* (1906), 11 Com. Cas. 280; 39 Digest 578, *1815.*

(17) *Manbre Saccharine Co.* v. *Corn Products Co.*, [1919] 1 K.B. 198; 120 L.T. 113; sub nom. *Manbre Saccharine Co.* v. *Corn Products Co.*, 88 L.J.K.B. 402; 35 T.L.R. 94; 24 Com. Cas. 89; 39 Digest 576, *1807.*

(18) *C. Groom, Ltd.* v. *Barber*, [1915] 1 K.B. 316; 84 L.J.K.B. 318; 112 L.T. 301; 31 T.L.R. 66; 59 Sol. Jo. 129; 12 Asp.M.L.C. 594; 20 Com. Cas. 71; 39 Digest 576, *1802.*

(19) *Wilson, Holgate & Co., Ltd.* v. *Belgian Grain and Produce Co., Ltd.*, [1920] 2 K.B. 1; 89 L.J.K.B. 300; 122 L.T. 524; 35 T.L.R. 530; 14 Asp.M.L.C. 566; 25 Com. Cas. 1; 39 Digest 579, *1817.*

Special Case stated by arbitrators for the opinion of the court.

Patrick Hastings, K.C., and *Lord Tiverton* for the sellers.
J. Compston, K.C., Simner and *Kenelm Preedy* for the buyers.

Cur. adv. vult.

July 1. **McCARDIE, J.,** read a judgment in which he stated the facts and continued: By a written contract of August, 1920, the Diamond Alkali Export Corporation of New York sold to H. Bourgeois of London fifty tons of soda ash. Shipment was to be September-October from American seaboard. Terms of payment were cash against documents under confirmed banker's credit at London. Price was c.i.f. Gothenburg. The contract contained this condition:

A "Sellers not liable for failures or delays in delivery due to strikes, lockouts, fire, accident, embargoes, stoppage of navigation, lack of transportation, war restrictions or seizures by any governmental agency or any contingencies whatever beyond sellers' control. In case any deliveries are delayed owing to any such contingency, the delayed shipments shall be made as soon as possible after such contingency has been removed or such shipments may be cancelled B at sellers' option. Date of bill of lading is to be considered date of shipment."

The buyers rejected the documents when tendered in London upon several grounds, namely (i) that the sellers had not shipped the goods until Nov. 8 and 9, 1920; (ii) that a proper bill of lading was not presented; (iii) that a proper policy of insurance was not presented. The sellers assert that their non-shipment of the goods in September-October, 1920, is met by the strike clause. They also assert C that the documents tendered to the buyers complied with the contract. It is admitted, and the award states, that the points are to be decided by English law. I shall not narrate the circumstances whereby (as is admitted) the goods were not shipped on board till Nov. 8 and 9, 1920. The facts found fall, I think, within the strike, &c., clause. The arbitrators state that the delay was at all times beyond the sellers' control. The strike clause is very broadly worded. It is not D confined to prevention. It refers to delay also. The words "or any contingencies whatever" seem to exclude the operation of the ejusdem generis rule: see, for example, *Larsen* v. *Sylvester & Co.* (2) and *Joseph Travers & Sons, Ltd.* v. *Cooper* (3).

That being so, the next question is whether the effect of the strike clause was merely to save the sellers from liability, or whether it operated also to debar the E buyers from insisting that the goods had not been shipped in the months specified in the contract. Upon the whole I think that the effect of the clause was to enable the sellers (if facts within the strike clause prevented shipment in September-October) to ship at a later date. I am not aware of any direct authority on the point. *Brown* v. *Turner, Brightman & Co.* (4) and the like decisions do not really touch the point. The decision in *Brooke Tool Manufacturing Co., Ltd.* v. F *Hydraulic Gears Co., Ltd.* (5) turned upon different considerations. The clause must be read in a fair business sense. It effects two things, I think. It, first, saves the sellers from liability for delay, etc., caused by circumstances within the clause; and, secondly, it enables the sellers, as a matter of right, to ship as soon as possible after the cause of delay has ceased to operate. It gives power to the sellers to cancel. It gives no like power to the buyer. In *J. Aron & Co.* v. G *Comptoir Wegimont* (6), I stated my views on the meaning and contractual effects of a condition for shipment at a specified time. I do not repeat them. Here an express clause of the bargain enables the sellers as a matter of right to ship at a later date than that expressed in the earlier part of the contract of sale. I, therefore, find in favour of the sellers on the first objection of the buyers.

It thus becomes my duty to consider the serious and powerfully argued conten- H tion of the buyers that the documents tendered did not conform to the contract. I will deal with those documents separately. I take first what I will call for convenience the bill of lading. That document was issued by the Swedish America Mexico Line, Ltd., of Gothenburg, Sweden. It is dated Nov. 8, 1920. It contains many clauses. The arguments before me turned on the earlier words of the bill of lading, and those only I set out. They are these:

I "Received in apparent good order and condition from D. A. Horan to be transported by the steamship *Anglia* now lying in the port of Philadelphia and bound for Gothenburg, Sweden, with liberty to call at any port or ports in or out of the customary route, or failing shipment by said steamer in and upon a following steamer, 280 bags dense soda."

Perhaps I should add that the first of the many clauses in the bill of lading is this:

"It is mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of

Congress of the United States approved on Feb. 13, 1893, and entitled 'an Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.' "

This Act of 1893 provides by s. 4

"That it shall be the duty of the owner or owners, master or masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading or shipping document, stating, amongst other things, the marks necessary for identification, number of packages or quantity, stating whether it be the carriers' or shippers' weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be primâ facie evidence of the receipt of the merchandise therein described."

I call attention to the words "bill of lading or shipping document." The Act recognises that there may be shipping documents fulfilling the requirements of the section and yet not bills of lading. The buyers strongly contend that the document here tendered was not a bill of lading at all, and that, in any event, it was not such a bill of lading as was required by the contract. They call attention to the fact that the document does not acknowledge the goods to have been actually placed on board. It merely says that the goods have been received "to be transported by the steamship *Anglia*." They further call attention to the words "or failing shipment by said steamer in and upon a following steamer." I need scarcely say that I appreciate the vital nature of the buyers' contention inasmuch as the form of document now before me is of frequent use at American ports. In order to test the matter it is necessary in the first place to consider the rights of a buyer under a c.i.f. contract. The strike clause here is a mere accident, and does not seem to affect the point at issue. For inasmuch as the duty of the vendors was to ship as soon as the contingency ceased to operate and inasmuch as they were able to ship on Nov. 8 and 9, 1920, it follows that the time of shipment under the contract was that date.

What, then, are a seller's duties and buyer's rights under a c.i.f. contract? They were stated by Lord Blackburn in *Ireland* v. *Livingston* (7) (L.R. 5 H.L. at p. 406) where he refers to a "bill of lading." So, too, in the well-known judgment of Hamilton, J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (8), where he says ([1911] 1 K.B. at p. 221):

"It follows that against tender of those documents, the bill of lading, invoice, and policy of insurance which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

So per Kennedy, L.J. (ibid. at p. 956):

"How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading accompanied, in case the goods have been lost in transit, by the policy of insurance. The bill of lading in law and fact represents the goods."

see also Scrutton, J., *in Landauer & Co.* v. *Craven and Speeding Bros.* (9) ([1912] 2 K.B. at p. 107). The latest statement is the opinion of Lord Birkenhead in *Johnson* v. *Taylor Bros. & Co., Ltd.* (10), where he says in speaking of the duties of a vendor under a c.i.f. contract ([1920] A.C. at p. 149):

"He is bound in the second place to tender to the purchaser within a reasonable time after shipment the shipping documents, for example, the bill of lading and a policy of insurance reasonably covering the value of the goods."

I should mention also the notes to Scrutton and Mackinnon on Charterparties and Bills of Lading (10th Edn.) art. 59.

If, then, a vendor under an ordinary c.i.f. contract is bound to tender a bill of

lading, the question next arising is: What is meant by a bill of lading within such a contract? The contract decides the right of the buyer. The question I feel is not as to the meaning of the phrase in a particular Act of Parliament or as to the possible meaning under other forms of contract. Nor is it material that a buyer objects to the document for ulterior motives: see, for example, Lord Cairns in *Bowes* v. *Shand* (11) (2 App. Cas. at p. 465) and per Lord Hatherley (ibid. at p. 476). A buyer, as those noble Lords pointed out, is entitled to insist on the letter of his rights. As Lord Hatherley said: "You must bring the buyer within the four corners of the contract." A buyer, moreover, may have obvious business reasons for so insisting as he may have to implement his own bargain with rigorous sub-vendees. I consider that the phrase "bill of lading," as used with respect to a c.i.f. contract, means a bill of lading in the sense established by a long line of legal decisions. Unless this meaning be given the matter is thrown into confusion. In art. 3 of Scrutton and Mackinnon on Charterparties and Bills of Lading (10th Edn.) is a definition which says,

> "A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship."

This statement suggests at once an obvious and serious distinction between a receipt for goods actually shipped on board a particular ship and a receipt for goods which are at some future time to be shipped on board either a particular ship or an unnamed ship to follow her. This business distinction and varying results of the two seem to me to be plain. The legal distinction seems to me to be equally plain. From the earliest times a bill of lading was a document which acknowledged actual shipment on board a particular ship. In Bennett's History of the Bill of Lading (Cambridge Press, 1914), at p. 8 is this passage:

> "Desjardins says that towards the close of the sixteenth century the use of the bill of lading was widespread. He quotes a definition from Le Guidon de la Mer, a document of that epoch, which defines the bill of lading as 'the acknowledgment which the master makes of the number and quality of the goods loaded on board' ": see Desjardin's Traité de Droit Commercial Maritime, tome 4, art. 904. Paris, 1885.

It is clear, I may add, that the bill of lading sprang from the ship's book of lading, which was a document of weight, showing the goods actually put on board.

The famous case of *Lickbarrow* v. *Mason* (12) decided that bills of lading were transferable by the custom of merchants. The finding of the jury as to the custom is set out as follows (5 Term Rep. at p. 685):

> "By the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods . . . The word 'negotiable' in that special verdict means no more than the word 'transferable' or 'assignable.' "

See Scrutton on Charterparties (10th Edn), art. 56 (note 1). I am not aware of any decision which has modified the finding of the jury in *Lickbarrow* v. *Mason* (12) as to the subject-matter to which alone the custom of transferability applied. Apparently that custom and that custom only was operative when the Bills of Lading Act, 1855, was passed. That Act expressly recites the custom found in *Lickbarrow* v. *Mason* (12), and then proceeds:

> "And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board."

It thus seems plain that the Act was referring to documents acknowledging an actual shipment on board a specified ship. I need not refer to ss. 1 and 2 of the Act, but s. 3 says:

"Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing the same. . . ." A

It seems clear that no assignee can invoke the benefits, for example, of s. 3 unless the document actually asserts that the goods have been shipped on board. The whole point of the section seems to go if the document does not contain such an assertion. I will refer to this Act later. In BLACKBURN ON SALE (3rd Edn.) p. 421, is this statement: B

"A bill of lading is a writing signed on behalf of the owner of the ship in which the goods are embarked acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading)." C

The common type of a bill of lading is given in CARVER ON CARRIAGE OF GOODS BY SEA (6th Edn.) s. 54. It is worthy of observation that in the American case of *Rowley* v. *Bigelow* (13), SHAW, C.J., said:

"The bill of lading acknowledges the goods to be on board and regularly the goods ought to be on board before the bill of lading is signed." D

See the note in PARSONS ON SHIPPING (Boston), vol. 1, p. 187, where the learned author somewhat pointedly says: "It is a fraud on the part of the master to sign the bills before the goods are on board." In BENJAMIN ON SALE (6th Edn.), p. 846, is this passage giving the result of the cases:

"When delivery is to be made by a bill of lading the rule is that the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading whereunder the buyer can obtain delivery duly indorsed, effectual to pass the property or the goods, made out in terms consistent with the contract of sale, and purporting to represent goods in accordance with the contract and which are in fact in accordance therewith." E

Apart from any authority to the contrary it seems to me that I must hold that the document here is not a bill of lading within the c.i.f. contract before me. It does not acknowledge the goods to be on board a specific ship, nor does it acknowledge a shipment on board at all. It leaves it uncertain whether the goods will come by the *Anglia* or some following ship. The word "following" is loose and ambiguous in itself. The document does not even say "immediately following," nor does it indicate that the "following ship" will belong to or be under the control of the person who issues the bill of lading. The document seems to me to be (in substance) a mere receipt for goods which at some future time and by some uncertain vessel are to be shipped. It is not even in the form of the New York Produce Exchange bill of lading set out in CARVER ON CARRIAGE OF GOODS BY SEA (6th Edn.) appendix A, p. 971. The buyer is left in doubt as to actual shipment and actual ship. F G H

The sellers, however, submit that I am bound by the opinion of the Privy Council in *The Marlborough Hill* v. *Cowan & Sons* (1). The buyers, on the other hand, contend that that opinion is erroneous and that I ought not to follow it. I need scarcely state the deep diffidence and embarrassment I feel in discussing that weighty opinion. As LORD PHILLIMORE himself, however, pointed out in *Dulieu* v. *White* (14) ([1901] 2 K.B. at p. 683), a Privy Council advice is not binding on the King's Bench Division even as to the res decisa. I wish to point out first that the actual decision in *The Marlborough Hill* (1) was merely that the bill of lading there in question (which closely resembles the one now before me) fell within s. 6 of the Admiralty Court Act, 1861. It may be that the phrase "bill of lading" in that section permits of a broad interpretation. I point out next that there is no express statement in *The Marlborough Hill* (1) that the document there in question actually fell within the Bills of Lading Act, 1855. In the third place, it seems to me to be clear that the Board did not consider the nature or effect of I

an ordinary c.i.f. contract, or the decisions thereon in relation to the question before them. *Bowes* v. *Shand* (11) was not even cited to the Board. Lord Phillimore, in reading the advice of the Privy Council, said ([1921] 1 A.C. at p. 451):

> "There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse, awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail."

With the deepest respect I venture to think that there is a great difference between the two, both from a legal and business point of view. Those differences seem to me clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion a mere receipt for goods at a dock warehouse for shipment might well be called a bill of lading. The Board says (ibid. at p. 452):

> "Then as regards the obligation to carry either by the named ship or by some other vessel, it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading, and if the contract begins when the goods are received on the wharf, substitution does not differ in principle from trans-shipment."

I do not pause to analyse these words. I only say that, in my own humble view, substitution and the right of trans-shipment are distinct things, and rest on different principles. The passage last cited can, I think, have no application at all to a c.i.f. contract which provides for a specific date of shipment. It will suffice if I say two things. First, that, in my view, the *Marlborough Hill Case* (1) does not apply to a c.i.f. contract such as that now before me. Secondly, the grounds for challenging the dicta of the Privy Council will be found in art. 22, and the notes and cases there cited, in Scrutton and Mackinnon on Charterparties (10th Edn.) as to what are called "through" bills of lading, in the lucid article in the Law Quarterly Review of October, 1889, vol. 5, p. 424, by Mr. Bateson, K.C., and of July, 1890, vol. 6, p. 289, by the late Mr. Carver, and in Carver on Carriage of Goods by Sea, notes to art. 107. I do not doubt that the document before me is a "shipping document" within the American Harter Act, 1893. I feel bound to hold, however, that it is not a bill of lading within the c.i.f. contract of sale made between the present parties.

I now consider the second document discussed before me. The buyers contend that the "certificate of insurance" tendered by the sellers was not a policy of insurance within the c.i.f. contract. It is headed "certificate of insurance." It is No. 767,922. It is issued by the Firemen's Fund Insurance Co. of San Francisco, a well-known office. The substantive words are these:

> "This is to certify that on the 8th of Nov., 1920, this company insured under Policy No. 2319 for D. A. Horan, $5,790 on 280 bags, 58 per cent. dense soda ash, N.Y. and L. test valued at sum insured, shipped on board of the steamship *Anglia* and/or other steamer or steamers, at and from Philadelphia to Gothenburg. And it is hereby understood and agreed that in case of loss such loss is payable to the order of the assured on surrender of this certificate. This certificate represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums. Not valid unless countersigned by D. A. Horan. (Signed) F. H. and C. Robson, Managers. (Countersigned) D. A. Horan. Notice: To conform with the revenue laws of Great Britain in order to collect a claim under this certificate it must be stamped within ten days after its receipt in the United Kingdom."

On the front of the certificate are certain conditions of which the first is this:

"This certificate is subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention, or the consequence of hostilities."

At the back of the certificate are other conditions which I need not detail.

Is this certificate a proper policy of insurance within the c.i.f. contract here made? I have read, I believe, all the cases on the rights and obligations of buyer and seller under c.i.f. contract from *Ireland* v. *Livingston* (7) and *Hickox* v. *Adams* (15), to *Johnson* v. *Taylor Bros. & Co., Ltd.* (10). Many decisions are cited in BENJAMIN ON SALE (6th Edn.), p. 850, and so on. In all the cases a "policy of insurance" is mentioned as an essential document. The law is settled and established. I may point out that in *Burstall & Co.* v. *Grimswade & Sons* (16) it was expressly provided by the contract that a certificate of insurance might be an alternative for an actual policy. I ventured in *Manbre Saccharine Co.* v. *Corn Products Co.* (17) to discuss the relevant authorities, including the lucid judgment of ATKIN, J., in *C. Groom, Ltd.* v. *Barber* (18), a judgment which I have again most carefully read. It seems plain that a mere written statement by the sellers that they hold the buyers covered by insurance in respect of a specified policy of insurance, is not a policy of insurance within a c.i.f. contract: see the *Manbre Case* (17). It seems plain also that a broker's cover note or an ordinary certificate of insurance are not adequate agreements within such a contract: see BAILHACHE, J., in *Wilson, Holgate & Co., Ltd.* v. *Belgian Grain and Produce Co., Ltd.* (19). Does the present document fulfil the sellers' contractual duty? In the *Wilson Holgate Case* (19) BAILHACHE, J., said ([1920] 2 K.B. at p. 7):

"It must be borne in mind that in dealing with certificates of insurance I am not referring to American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies."

It will be observed that BAILHACHE, J., used the word "accepted" and not the words "bound to accept." The sellers here rely on that passage and also on the notes to SCRUTTON AND MACKINNON ON CHARTERPARTIES (10th Edn.) p. 185, where it is said:

"A certificate of insurance issued by an insurance company under a floating policy upon which document the company can be sued would suffice in any case."

The buyer strongly challenges that view, and his counsel require me to express an independent opinion on the point.

I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished judges as SCRUTTON, L.J., and BAILHACHE, J. I feel bound to express my view, not upon a question of business convenience, but upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating policy issued by the insurance company to D. A. Horan. Now the certificate is not a policy. It does not purport to be a policy. This is conceded by counsel in his able argument for the sellers. It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does not show whether that policy was in a recognised or usual form or not. The certificate, therefore, does not contain all the terms of the insurance. Those terms have to be sought for in two documents—namely, the original policy and the certificate. But even if this document is not a policy yet the sellers say it is "equivalent to a policy." In connection with that phrase it is well to quote from another part of the judgment of BAILHACHE, J., in the *Wilson Holgate Case* (19). He says ([1920] 2 K.B. at p. 9):

"He, the buyer, cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a docu-

A ment of the very kind which he has agreed to take or at least one which does not differ from it in any material respect."

This leads me to ask whether the document before me differs in any material respect from a policy of insurance. The latter is a well-known document with clearly defined features. It comes within definite, established, and statutory legal rights. A certificate, however, is an ambiguous thing; it is unclassified and un-
B defined by law. It is not even mentioned in Arnould on Marine Insurance. No rules have been laid down upon it. Would the buyer sue upon the certificate, or upon the original policy plus the certificate? If he sued simply on the certificate, he could put in a part only of the contract, for the other terms of the contract, namely, the conditions of the actual policy, would be contained in a document not in his control, and to the possession of which he is not entitled. In the third
C place, I point out that before the buyer could sue at all, he would have to show that he was the assignee of the certificate: see Arnould, Marine Insurance (9th Edn.) ss. 175–177. In what way can he become the assignee? It is vital to remember the provisions of the Marine Insurance Act, 1906. The relevant statutory provision is s. 50 (3) which says: "A marine policy may be assigned by endorsement thereon or in any other customary manner." This subsection, how-
D ever, only applies so far as I can see, to that which is an actual marine policy. Section 90, the interpretation clause, says: "In this Act unless the context or subject-matter otherwise require," policy means "a marine policy." The Act contains no reference, express or implied, to a certificate of insurance. Section 22 says:

E "Subject to the provisions of any statute a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act."

If, as is admitted, this document be a certificate only, and not a policy, it therefore seems not even to be admissible in evidence before me. If the certificate does not fall within the Marine Insurance Act it appears to be only assignable by
F writing in accordance with the provisions of the Judicature Act, 1873, s. 25 (6). The certificate may have less legal effect than a slip, as to which see Arnould, Marine Insurance, para. 34, and s. 21 of the Marine Insurance Act, 1906. I mention these considerations briefly. Time does not permit to discuss them further or to develop their significance or to emphasise the points arising under ss. 91 to 95 of the Stamp Act, 1891. In my view, the Act of 1906 deals with marine policies only. It does
G not, I think, cover other documents, although they may be said to be the "business equivalent" of policies. I do not think that the Act of 1906 covers the document now before me. In my humble view, a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be an actual policy, and unless it falls within the provisions of the Marine Insurance Act, 1906, as to assignment and otherwise. I must, therefore, hold that the buyers were entitled
H to reject the documents upon the ground that no proper bill of lading and no proper policy of insurance were tendered by the sellers in conformity with the c.i.f. contract. I abstain from amplifying this judgment by the citation of other authority or the mention of further reasons in support of the conclusions I have deemed it my duty to state. It may well be that this decision is disturbing to business men. It is my duty, however, to state my view of the law without regard
I to mere questions of convenience. I desire to add four remarks: (i) that there is no finding or evidence before me of any course of dealing between the parties; (ii) that there is no finding or evidence before me of any custom or general usage which modifies the long and clearly established legal rights of a buyer under a c.i.f. contract. If any such custom or usage be asserted then the point can be dealt with in some future action in the Commercial Court. Whether such an assertion can be proved may well be a question of doubt in view of the matters appearing in the *Manbre Case* (17). See, too, the *Wilson Holgate Case* (19), where Bailhache, J., said:

"I am not satisfied that since *Ireland* v. *Livingstone* (7) was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it."

(iii) it may well be that legislation is needed to enlarge the operation of the Bills of Lading Act, 1855, and the Marine Insurance Act, 1906; (iv) that the difficulties indicated in this judgment can be easily, promptly, and effectively met by the insertion of appropriate clauses in c.i.f. contracts. For the reasons given I find in favour of the buyers with the results stated in the award. The sellers must pay the costs of the proceedings before me.

Solicitors: *Cosmo Cran & Co.*; *Myers, Swepstone, Stone, Barber & Ellis.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

OAKLEY *v.* MERTHYR TYDFIL CORPORATION

[King's Bench Division (Lord Trevethin, C.J., Sankey and Acton, JJ.). October 14, November 2, 1921]

[Reported [1922] 1 K.B. 409; 91 L.J.K.B. 345; 126 L.T. 320; 86 J.P. 1; 38 T.L.R. 60; 66 Sol. Jo. 218; 19 L.G.R. 767]

Street—Private street works—Expenses—Apportionment—Inclusion of premises not fronting street to be made up—Access to street through "passage"—"Passage"—Need to be "feeder" of street—Resolution authorising inclusion—Need to state that urban authority think inclusion "just"—Private Street Works Act, 1892 (55 & 56 *Vict.*, *c.* 57), *ss.* 6, 10.

An urban authority passed a resolution under s. 6 (1) of the Private Street Works Act, 1892, to make up a street which ran between two blocks of houses which fronted a road which they had taken over as a public highway. The appellant was the owner of the house at that end of one of the blocks which was farthest from the street to be made up. From the highway a lane passed along the side of the appellant's house and along the back of the terrace, thus crossing the street to be made up, and leading again into the highway at that end of the further block of houses which was farthest from the appellant's house. The lane, which was 10 ft. wide, had been constructed for the convenience of the tenants of the houses in the blocks; it had been open to the public since the houses were built, but had not been taken over by the authority. There was a back entrance from the appellant's house into the lane. The provisional apportionment prepared by the surveyor under s. 6 (2) of the Act included and was served on the owners of the houses in the blocks, including the appellant, and the authority, under s. 6 (3), passed a further resolution approving the apportionment. Neither resolution stated that the authority deemed it just to include such houses, although s. 10 of the Act provided: "They [the urban authority] may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works." Objection having been taken by the appellant,

Held: (i) while a "passage" within s. 10 need not be the only means of approaching the street to be made up, it must be something in the nature of a "feeder" of the street; the lane running along the two extreme sides and the back of the blocks of houses could not be said to be a "passage" through

which access to the appellant's house was obtained from the street between the blocks; and, therefore, the authority had no power to include the appellant's house in the apportionment: (ii) the resolution under s. 10 should have expressly stated that the authority thought it just to include the appellant's house, but it must be assumed that they had thought it just to do so, and the resolution was sufficient to conform with the Act.

Notes. Section 6 and s. 10 of the Act of 1892 have been replaced by s. 174 and s. 176 of the Highways Act, 1959.

Applied: *Hornchurch U.D.C.* v. *Webber*, [1938] 1 All E.R. 309.

As to private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 437–449; and for cases see 26 DIGEST (Repl.) 609 et seq. For the Highways Act, 1959, ss. 173 et seq., see 39 HALSBURY'S STATUTES (2nd Edn.) 597–612.

Cases referred to:

(1) *Newquay U.D.C.* v. *Rickeard*, [1911] 2 K.B. 846; 80 L.J.K.B. 1164; 105 L.T. 519; 75 J.P. 382; 9 L.G.R. 1042, D.C.; 26 Digest (Repl.) 612, *2656*.

(2) *Chatterton* v. *Glanford R.D.C.*, [1915] 3 K.B. 707; 84 L.J.K.B. 1865; 113 L.T. 746; 79 J.P. 441; 13 L.G.R. 1352; 26 Digest (Repl.) 612, *2660*.

(3) *R.* v. *Goole Local Board*, [1891] 2 Q.B. 212; 60 L.J.Q.B. 617; 64 L.T. 595; 55 J.P. 535; 39 W.R. 608, D.C.; 26 Digest (Repl.) 536, *2109*.

Case Stated by the stipendiary magistrate for the county borough of Merthyr Tydfil.

At a court of summary jurisdiction sitting at the Town Hall, Merthyr Tydfil, on Jan. 25, 1921, an application was made by the respondents to determine the matter of certain objections made by the appellant to a provisional apportionment of expenses made by the respondents under s. 10 of the Private Street Works Act, 1892, in respect of certain works proposed to be executed in a street called Cross Street, Awelfryn Terrace, Penydarren, which apportioned a portion of such expenses on the appellant.

The following facts were proved or admitted on the hearing: The respondents were an urban authority who had adopted the Private Street Works Act, 1892, and within whose district Cross Street was. Awelfryn Terrace consisted of two blocks, each of ten houses, numbered 1 to 10 and 11 to 20, and Cross Street lay between numbers 10 and 11. The said houses were built about the year 1898 and fronted upon Awelfryn Terrace, which was subsequently taken over by the urban authority as a public highway. There was a lane at the back of the premises passing from Awelfryn Terrace along the side of No. 1, Awelfryn Terrace, and then behind numbers 1 to 10 to Cross Street and behind numbers 11 to 20, returning at the side of No. 20 into Awelfryn Terrace. The lane was 10 ft. wide and was constructed for the convenience of the tenants of Awelfryn Terrace. It had not been ballasted, metalled, and rolled. There was a back entrance to No. 1, Awelfryn Terrace, and anybody taking coal, &c., to this back entrance would have to use the road to be repaired. The appellant was the owner of No. 1, Awelfryn Terrace. At a meeting held on Aug. 24, 1920, the respondents passed the following resolutions:

"Resolved that the street known as Cross Street which lies between the pine ends of numbers 10 and 11 Awelfryn Terrace, Penydarren, Merthyr Tydfil, be levelled, ballasted, metalled, gravelled and otherwise made good, and that the borough surveyor in accordance with the provisions of the Private Street Works Act, 1892, prepare as respects such street: (a) A specification of the work with plans and sections, (b) An estimate of the probable expenses of the works; (c) A provisional apportionment of the estimated expenses among the persons liable to be charged therewith under the Act. Resolved further that the council deem it just and accordingly do order that in settling the apportionment of the expenses among the several owners of the houses and lands fronting, adjoining or abutting on the above-mentioned street, regard should be had to the following considerations: (a) The amount and value of any work

already done by the owners or occupiers of such premises; (b) The greater or lesser degree of benefit to be derived by any premises from such works."

The respondents' surveyor prepared an estimate of the probable expenses of the works, and the provisional apportionment was served on the owners of the houses in Awelfryn Terrace, including the appellant, requiring each to contribute £2 1s. 6d. At a meeting held on Sept. 28, 1920, the respondents passed the following resolution:

"Resolved that this council hereby approve of the plans, specification, estimate and provisional apportionment prepared by their surveyor with reference to certain street works required to be executed at Cross Street between pine ends of numbers 10 and 11 Awelfryn Terrace, Penydarren, in pursuance of the resolution to execute such works passed by us on the 24th day of August, 1920."

On Sept. 29, 1920, a copy of the last resolution was duly published and copies thereof duly served upon the owners of the premises shown as liable to be charged in the provisional apportionment and among them was the appellant as the owner of No. 1, Awelfryn Terrace, access to which it was alleged by the respondents was obtained from the street through a "court passage or otherwise" within the meaning of s. 10 of the Act of 1892. On Oct. 12, 1920, the appellants served on the respondents a notice in the following terms:

"We have been instructed by Mrs. Jane Oakley, owner of No. 1 Awelfryn Terrace, Penydarren, to give you notice that she objects to the provisional apportionment served upon her in connection with the street works proposed to be executed in Cross Street between the pine ends of numbers 10 and 11 Awelfryn Terrace on the ground that the premises owned by her do not front, adjoin or abut on the street in respect of which the expenses are to be incurred. She further objects on the grounds given in paragraphs (c), (d) and (e) of s. 7 of the Private Street Works Act, 1892."

On receipt of the notice the respondents applied to the court to appoint a time for determining the matter of such objections and on Jan. 5, 1921, served notice on the appellant of the date of the hearing. It was admitted by the respondents that the primary reason for making up Cross Street was to give access to certain lands and premises which they had acquired with a view of laying out such land for building purposes. The total expense of making up the said street amounted to £78 and was equally apportioned between the respondents and the twenty premises forming Awelfryn Terrace. The appellant was the only objector and the amount apportioned to her was £2 1s. 6d. The lane had never been taken over by the respondents under the Private Street Works Act, 1892, or otherwise, but had been open for the use of the public since it was laid out and the houses were built. The magistrate came to the following conclusions: (a) That the resolutions of Aug. 24 and Sept. 28, 1920, were sufficient for the purposes of the Private Street Works Act, 1892; (b) that access was obtained to No. 1, Awelfryn Terrace from the street in which the works were to be executed, through a passage made for the purpose of giving such access thereto; (c) that No. 1, Awelfryn Terrace would be benefited by the proposed works. He made an order against the appellant for payment of £2 1s. 6d. and five guineas costs, and the appellant appealed.

By the Private Street Works Act, 1892:

"Section 6 (1): Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned

(subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street. (2) The surveyor shall prepare, as respects each street or part of a street—(a) a specification of the private street works referred to in the resolution, with plans and sections (if applicable); (b) an estimate of the probable expenses of the works; (c) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. Such specification, plans, sections, estimate, and provisional apportionment shall comprise the particulars prescribed in part 1 of the schedule to this Act, and shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit. (3) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in part 2 of the schedule to this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication. . . ."

"Section 10: In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say) (a) the greater or less degree of benefit to be derived by any premises from such works; (b) the amount and value of any work already done by the owners or occupiers of any such premises. They may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

du Parcq for the appellant.
Scholefield for the respondents.

Cur. adv. vult.

Nov. 2. **LORD TREVETHIN, C.J.,** read the following judgment of the court. In pursuance of resolutions passed on Aug. 24 and Sept. 28, 1920, and acting under the Private Street Works Act, 1892, the respondents decided to make up a street known as Cross Street within their borough, and approved of the specification, estimate, and provisional apportionment prepared by their surveyor with reference to the work to be executed. This Case is stated by the learned stipendiary of Merthyr Tydfil to obtain the decision of the court on two points: (i) Whether the premises of the appellant were liable to be included in the apportionment, as they have been by the respondents, under s. 10 of the above-mentioned Act, which provides, among other things, that the authority, if they think just, may include any premises access to which is obtained from the street through a passage, and which, in their opinion, will be benefited by the works, although not fronting, abutting on, or adjoining the street: (ii) whether the resolutions were in order and complied with the terms of the Act.

The facts are as follows. The appellant is the owner of No. 1, Awelfryn Terrace, which consists of two blocks, each of ten houses, numbers 1 to 10 and 11 to 20. Between No. 10 and No. 11 a street known as Cross Street lies. Awelfryn Terrace has been taken over by the authority as a public highway. There is a lane at the back of the premises, passing from Awelfryn Terrace along the side of No. 1, Awelfryn Terrace and then behind numbers 1 to 10 to the said Cross Street and

behind numbers 11 to 20, returning at the side of No. 20 into Awelfryn Terrace aforesaid. The lane is 10 feet wide, and was constructed for the convenience of the tenants of Awelfryn Terrace. It had not been ballasted, metalled, and rolled. There is a back entrance to No. 1, Awelfryn Terrace, from the lane. On Aug. 24, 1920, the respondents passed the following resolution:

"Resolved that the street known as Cross Street, which lies between the pine ends of Nos. 10 and 11, Awelfryn Terrace, Penydarren, Merthyr Tydfil, be levelled, ballasted, metalled, gravelled, and otherwise made good, and that the borough surveyor, in accordance with the provisions of the Private Street Works Act, 1892, prepare as respects such street: (a) a specification of the work, with plans and sections; (b) an estimate of the probable expenses of the works; (c) a provisional apportionment of the estimated expenses among the persons liable to be charged therewith under the Act. Resolved further, that the council deem it just, and accordingly do order, that, in settling the apportionment of the expenses among the several owners of the houses and lands fronting, adjoining, or abutting on the above-mentioned street, regard should be had to the following considerations: (a) the amount and value of any work already done by the owners or occupiers of such premises; (b) the greater or lesser degree of benefit to be derived by any premises from such works."

The respondents' surveyor prepared an estimate of the probable expense of the works, and the provisional apportionment was served on the owners of the houses in Awelfryn Terrace, including the appellant, requiring each to contribute £2 1s. 6d. On Sept. 28 the respondents passed the following resolution:

"Resolved that this council hereby approve of the plans, specification, estimate, and provisional apportionment prepared by their surveyor with reference to certain street works required to be executed at Cross Street, between pine ends of Nos. 10 and 11, Awelfryn Terrace, Penydarren, in pursuance of the resolution to execute such works passed by us on the 24th day of Aug., 1920."

This resolution was duly published, objection was taken thereto by the appellant, and the matter came before the learned stipendiary.

It was contended on behalf of the appellant (i) that the side and back lane in question was not, within the meaning of s. 10, a "passage" through which access to No. 1, Awelfryn Terrace was obtained from Cross Street. (ii) that the resolutions referred to were insufficient to enable a provisional apportionment to be made, because the first of them made no reference to the houses in Awelfryn Terrace, and did not show that the respondents had, in the words of s. 10, "thought just" to include such houses. The learned magistrate decided both contentions against the appellant.

As to (i), was this side and back lane, within the meaning of s. 10, a passage through which access to No. 1, Awelfryn Terrace was obtained from Cross Street? It might be suggested that this was a question of fact for the magistrate himself, but he has stated it, and it was argued as a point of law, a course which was apparently taken in the two cases which have been decided upon these words: *Newquay U.D.C.* v. *Rickeard* (1) and *Chatterton* v. *Glanford R.D.C.* (2). It was pointed out by the Lord Chief Justice in the *Newquay Case* (1) ([1911] 2 K.B. at p. 852) that in a provisional apportionment under s. 10 of the Act there may be included premises access to which is obtained through a private road made primarily for the purpose of giving access thereto, but not premises access to which is obtained through a road which is, or is intended for, a public street. Pickford, J., further lays down that some limitations must be placed upon the word "access" in the section, and he says (ibid. at p. 853):

"I agree that access from a street to premises by means of another public street is not access within the meaning of s. 10. If it were, there would be practically no end to the premises to which access may be obtained. By such means as that, access may be had from the Strand to the Chelsea Embank-

ment. The effect of the words must be restricted by excluding cases of that description."

It is true that by s. 5 of the Act of 1892 it is provided that the word "street" means, unless the context otherwise requires, a street as defined by the Public Health Act, 1875, and by s. 4 of that Act the word "street" does include "passage," whether a thoroughfare or not, and that it was held in *R.* v. *Goole Local Board* (3) that a not dissimilar lane to the present one was a passage, and so a street within the meaning of the section referred to; but we think that what we have to determine is the meaning of the words "access to which is obtained from the street through a passage" in s. 10 of the 1892 Act, and that the definition of "passage" in s. 4 of the 1875 Act is by no means conclusive. The word "passage," standing by itself, is one of very wide meaning. It is defined in MURRAY'S OXFORD DICTIONARY as that by which a person or thing passes or may pass, a way, a road, path, route, channel, an entrance or exit. As, however, has already been shown, the words "access to which is obtained from the street through a passage" cannot be construed in their widest and most literal meaning. It is not desirable, nor do we propose, to lay down any definition of the word. We are not prepared to hold, as suggested, that a passage, to be within the Act, must be the only means of approaching the street to be made up; but we are of opinion that it means something in the nature of a feeder of the street. There are in many towns (and examples can be seen within a short distance of these buildings), courts or alleys standing back from the street, access to which is reached through a passage, sometimes open, sometimes under houses fronting on the street, and, although we do not say that such a court and such a passage are alone within the meaning of the words in the section, we cannot hold that a back lane and a side lane such as those in this case, which were meant to be back lanes and side lanes for the houses fronting on Awelfryn Terrace, are passages by which access to Cross Street is obtained within the meaning of that section.

As to (ii), the adequacy of the resolution, it must be borne in mind that two resolutions are contemplated by the Act. There is the resolution under s. 6, which is the initiation of the proceedings. It will be observed that this first resolution is one which need not be published and which concerns the council itself. It may well be that at the time they pass such a resolution a council is not aware of any premises which are not fronting, abutting, or adjoining, but access to which is obtained from the street through a court, passage, or otherwise. The surveyor, however, when set in motion, has duties under s. 6 (2), and he may draw the attention of the council to such houses as above mentioned by including them in his specifications, estimate, and provisional apportionment. It then becomes the right of the council to pass a second resolution under s. 6 (3) approving the provisional apportionment which includes such houses, but this they can only do if they think it just to include such houses. This second resolution was passed in the present case, and from the fact that the council have included the houses in Awelfryn Terrace it must be assumed that they thought it just to do so. We think it would be more in conformity with the provisions of the Act that the resolution should state expressly that the council "think it just to include" such houses. For the purposes of persons objecting this is the really important resolution, because it has to be published so that objection may be made. We think that the inclusion of the houses in question in the second resolution was sufficient, and that each resolution complied with the terms of the Act and was valid. In the result, while upholding the learned magistrate on the second point, we are of opinion that he was wrong on the first one, and the appeal is accordingly allowed with costs.

Appeal allowed.

Solicitors: *Simons, Smyth & Daniel*, Merthyr Tydfil; *Sharpe, Pritchard & Co.*, for *T. A. Rees*, Merthyr Tydfil.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

REMMINGTON *v.* LARCHIN

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.) June 14, 1921]

[Reported [1921] 3 K.B. 404; 90 L.J.K.B. 1248; 125 L.T. 749; 85 J.P. 221; 37 T.L.R. 839; 65 Sol. Jo. 662; 19 L.G.R. 528]

B

Rent Restriction—Premium—Grant of tenancy—Recovery—Premium paid by third person to tenant agreeing to surrender tenancy and obtain grant of lease by landlord to third person—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *& 11 Geo. 5, c.* 17), *s.* 8 (1) (2).

By s. 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "A person shall not, as a condition of the grant, renewal, or continuance C of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after Mar. 25, 1920, the amount or value thereof shall be recoverable by the person by whom it was made or given. . . ." By sub-s. (2): "A person requiring any payment or the giving of any consideration in contravention of this section shall be liable on summary conviction D to a fine not exceeding £100. . . ."

The defendant was a tenant for a lease of three years from March, 1919, of a dwelling-house within the Act of 1920, and in 1920 he made an agreement with the plaintiff that upon payment by the plaintiff to him of £180 he would E surrender his tenancy and arrange with the landlord to grant the plaintiff a new tenancy for three years. The landlord was not aware that the plaintiff had agreed to pay the defendant a premium. The premium was paid, the plaintiff went into possession, and after the Act of 1920 came into force he sued the defendant to recover the premium.

Held: "person" in s. 8 (1) and (2) referred only to a landlord who was F granting a tenancy or the renewal or continuance of a tenancy and not to a person in the position of the defendant, and, therefore, the defendant had not committed an offence under s. 8 (2) and the plaintiff was not entitled to recover the £180 from him.

Notes. Section 8 (1) and (2) of the Act of 1920 has been replaced by s. 2 (1) and (6) of the Landlord and Tenant (Rent Control) Act, 1949. G

Considered: *Minns* v. *Moore*, [1949] 2 All E.R. 800; *Navarro* v. *Moregrand, Ltd.*, [1951] 2 T.L.R. 674; *White* v. *Elondene Estates, Ltd.*, [1959] 2 All E.R. 605.

As to prohibition of premiums, see 23 HALSBURY'S LAWS (3rd Edn.) 798–805; and for cases see 31 DIGEST (Repl.) 688–692. For Acts of 1920 and 1949, see 13 HALSBURY'S STATUTES (2nd Edn.) 981, 1094.

H

Cases referred to:

(1) *Tuck & Sons* v. *Priester* (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 36 W.R. 93; 3 T.L.R. 826, C.A.; 42 Digest 729, *1516*.

(2) *Mason, Herring and Brooks* v. *Harris*, [1921] 1 K.B. 653; 90 L.J.K.B. 993; 125 L.T. 180; 37 T.L.R. 334; 31 Digest (Repl.) 689, *7799*.

Appeal by the plaintiff from an order of the Divisional Court affirming the deci- I sion of the County Court judge of Wandsworth. The facts appear in the headnote and the judgments.

A. H. Woolf for the plaintiff.

C. Bray for the defendant.

BANKES, L.J.—The point here is whether upon the facts of this case the defendant, Mr. Larchin, is brought within the terms of s. 8 (1) of the Increase of Rent, &c. (Restrictions) Act, 1920. Mr. Baylis was the landlord of the premises

in question here, and he let them to Mr. Larchin for a term of three years. When one year of the term had expired Mr. Larchin was anxious to leave the premises and either he or Mrs. Larchin thought that there was an opportunity of getting rid of their fixtures and also of getting something in the nature of a premium. What exactly happened we do not know, but I will assume for the purpose of my judgment that it was Mrs. Larchin who negotiated the tenancy to the plaintiff. The position then was that the plaintiff had made it a condition of his paying £180 that, not only should the lady leave the premises and hand over the fixtures, but that the landlord should grant to him a fresh tenancy for three years. The question is whether or not that brings this case within the terms of the section.

It is said that s. 8 of this Act of 1920 differs materially from the corresponding section in the Act of 1915. No doubt it does, because it was the landlord only who was referred to in the corresponding section. But I do not myself find any assistance is to be derived from the difference in the language of the two sections. The Act of 1920 clearly included something which was excluded, by express language, from the Act of 1915—a sub-letting—and it may be that the consequential alterations which were needed in order to include a sub-letting, may have been the reason for the difference one finds in the language of the later section. I think one must apply oneself to the language of s. 8, as one finds it in the Act of 1920. The question is simply this. When the section speaks of a person who

> "shall not as a condition of the grant . . . of a tenancy . . . require the payment of any fine, premium, or other like sum,"

is it referring to a grant by that person or is it referring to a grant by somebody else? The language of the section does not supply any clear answer. I think it may be capable of more than one construction. But one is dealing with a penal section, and, therefore, must remember the general rule of construction—that if there are two possible meanings the court should adopt the more lenient one. One is also dealing with a group of sections which are governed or controlled, to the extent to which a court can regard a heading in a statute to a group of sections in interpreting them, by the heading: "Further restrictions and obligations on landlords and mortgagees." One must approach the language of the sections subject to those considerations.

I think that the more natural construction of this section is to read it as applying to a "grant, renewal, or continuance" by the person who requires the payment of the "fine, premium, or other like sum," and I think that construction is rendered the better one by the use of the words, "in addition to the rent," because it seems to me more appropriate to speak, in connection with a "payment in addition to the rent," of a person who is in a position to control the rent rather than a payment by a person who is a stranger altogether to the relationship between the parties under which a rent could possibly be created. I do not think the matter is plain, but, on the whole, I think that this appeal must be dismissed with costs.

SCRUTTON, L.J.—I think the construction of this section is a matter of considerable doubt. I am very much influenced in the conclusion at which I arrive by the well recognised rule of the courts in reference to construing penal sections. In *Tuck & Sons* v. *Priester* (1) LORD ESHER, in giving his judgment, said:

> "But then comes the question whether the plaintiffs are also entitled to recover penalties under s. 6. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

LINDLEY, L.J., said:

> "Having regard to the well settled rule that a court will not hold that a penalty has been incurred unless the language of the clause which is said to

impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words 'unlawfully made' are sufficiently ambiguous to enable the defendant to escape from the penalty which is imposed by s. 6. . . . Dealing with a penal clause, we ought to apply to it that strict or cautionary interpretation which the courts are in the habit of giving to such clauses."

I take the facts in this case to be that a tenant with a three years' agreement, desiring to go out of possession before his three years were up, took a payment from a third person for the surrender of his lease, some fixtures, and procuring from the landlord a grant of a tenancy to the third person. Does that transaction come within the language of s. 8? Section 8 is in a group of sections which have this heading: "Further restrictions and obligations on landlords and mortgagees." Section 8 (1) begins "A person." Why does it begin "A person" and not "A landlord"? But I am not sure that that criticism is not a little too hypercritical as applied to the Rent Restriction Act, which is not very well drafted. While the use of the word "person" rather favours the idea that more than the landlord was contemplated, it seems to me that the words "a condition of the grant, renewal, or continuance of a tenancy" point markedly to the condition being made by the person who grants, renews, or continues the tenancy, namely, the landlord. I think "the payment of a fine" and so on, "in addition to the rent" points the same way. I do not say for a moment that the section is clear; it appears to me to be reasonably capable of two meanings. But, on the whole, I think it is rather more capable of the meaning that it is only intended to apply to the landlord. The section being reasonably capable of two meanings, and, inasmuch as the contravention of it renders a man liable to summary conviction, I apply to it the rule in reference to the construction of penal statutes and select for it the least burdensome construction. The way in which MAXWELL ON INTERPRETATION OF STATUTES (6th Edn.) at p. 500 puts it is this:

". . . where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself."

I agree that this appeal should be dismissed.

ATKIN, L.J.—I have had great difficulty with regard to the construction of this section. If it stood quite by itself and apart from other legislation, I should be inclined to come to the conclusion that if a tenant had come to an agreement with his landlord for the landlord to grant to his nominee a new tenancy for a certain period and then found a person to act as his nominee to whom he could sell the right to possession and demanded of that person a sum of money, that sum of money would be demanded from the third person as a condition of the grant of the tenancy by the landlord. I think that would cover this case, and that is the conclusion I should have come to if I had had to construe these words alone. But the matter is not free from doubt. It is quite a possible view that this means that a person shall not as a condition of the grant, renewal or continuance by the landlord of the tenancy sublet to subtenants.

I think, in coming to a final conclusion, it is very relevant to bear in mind the language used in the preceding legislation. Section 1 (2) of the Increase of Rent Act, 1915, said:

"A person shall not in consideration of the grant, renewal, or continuance of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, or other like sum in addition to the rent."

Those are the words used in this other section—they are repeated in the Act of 1920 except so far as the difference between "condition" and "consideration" is concerned. But, apart from that, these words quite clearly refer to a grant by the landlord—because the section goes on to provide that that payment is to be

recovered by the tenant from the landlord to whom it is paid. Therefore, it is quite plain what was meant by the use of these words in this Act. They mean "a grant by the landlord," and, if one finds precisely the same words used in the Act of 1920 I think one is led to the conclusion—at any rate, one would presume—that this language was used in the same sense and with the same meaning as was given to it in the previous legislation which dealt with precisely the same subject-matter. As at present advised, it appears to me that the decision in *Mason, Herring and Brooks* v. *Harris* (2) that there is nothing to prevent a tenant from taking a premium for an assignment of the remainder of his term of tenancy is right. I do not see how an assignment of that kind could be brought within these words at all. If you allow that degree of mischief, as it is called, in the section, it is all the easier to find that the mischief may have been extended. I think the final consideration is that, after all, this section is a penal section. I think there is quite sufficient doubt about the matter to compel one to take the more lenient view. There are two possible constructions which can be put upon the section. In those circumstances I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Telfer Leviansky & Co.*; *Young, Son & Ward.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

METROPOLITAN RAILWAY CO. *v.* DELANEY

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Finlay, Viscount Cave, Lord Atkinson and Lord Sumner), March 18, 1921]

[Reported 90 L.J.K.B. 721; 125 L.T. 472; 37 T.L.R. 520; 65 Sol. Jo. 453]

Carriage of Passengers—Negligence—Train—Passenger injured while entering train—Sudden and unusually abrupt starting.

Where evidence is given in an action for negligence by a passenger against a railway company for personal injuries that a train started so suddenly that the passenger, while proceeding to his seat, without negligence and with reasonable dispatch on his part, was thrown from his balance so violently that in the effort to save himself he had to grasp at the only thing within reach, which caused him injury, there is evidence to go before the jury on which they can find in favour of the plaintiff.

Per LORD BIRKENHEAD, L.C. (LORD SUMNER disagreeing in view of the facts of the present case): I refuse to say that it is competent for the court, on evidence being produced that no attendant was either on the train or on the platform to assist passengers, to rule that there was not matter here also which was proper for the consideration and decision of a jury.

The respondent purchased a ticket at the Aldgate Station of the appellant railway company for King's Cross, and walked down the stairs to the platform where the train by which he intended to travel was standing. The doors of the carriages were open, and there was no guard or other official of the company on the platform, and no indication that the train was about to start immediately. He walked along the platform to the foremost carriage on the train and entered it by the rear door, had got into the vestibule immediately inside the carriage, and was turning towards a seat when, without any warning, the train started with unusual abruptness causing the respondent to lose his balance and to be thrown against the back of the carriage. He put out his

arm to save himself from falling, and the sliding door of the carriage, actuated by the sudden motion of the train, closed upon his right hand and crushed it. A

Held (VISCOUNT FINLAY dissenting): the jury were entitled to infer negligence and return a verdict for the plaintiff.

Notes. As to proof of negligence against a carrier of passengers, see 4 HALSBURY'S LAWS (3rd Edn.) 178–183; and for cases see 8 DIGEST (Repl.) 75 et seq. B

Appeal by the railway company from an order of the Court of Appeal.

The respondent, in an action tried before the Recorder of London and a jury, was awarded damages in respect of an injury to his hand while a passenger in a train belonging to the appellant company. A Divisional Court (BRAY and BAILHACHE, JJ.) were of opinion that there was no evidence to support the verdict of the jury and entered judgment for the company. The Court of Appeal (BANKES, C SCRUTTON and ATKIN, L.JJ.) reversed the decision of the Divisional Court, and restored the verdict and judgment of the Mayor's Court in favour of the respondent.

Barrington-Ward, K.C., and *du Parcq* for the appellants.
Horace J. Rowlands for the respondent.

LORD BIRKENHEAD, L.C.—The respondent is a workman who was accus- D tomed to travel to his work by an electric railway train which left Aldgate Station, London, at 6.30 a.m. On Feb. 28, 1919, shortly before the hour referred to he purchased a ticket at that station entitling him to travel to King's Cross. He then walked down the stairs to the platform where the train he intended to travel by was already standing. The doors of the carriages were open, and he has given evidence to the effect that there was no guard or other official of any kind in the E employment of the appellant company on the platform; that no one consequently was present to supervise the passenger traffic; and that no indication was forthcoming that the train was about to start immediately. He walked along the platform by the side of the train to the carriage he usually frequented—the foremost carriage in the train; he entered that carriage apparently by its rear door, had reached the vestibule immediately inside it, and was approaching the seating F accommodation when the train started suddenly, depriving him of his balance, and throwing him against the back of the carriage. He put out his arms in an attempt to save himself from falling, when the sliding door of the carriage, set in motion by the starting of the train, closed upon his right hand crushing and injuring it. The learned recorder, who tried the case at first instance, took the view that the facts above summarised supplied evidence of negligence which it was G proper to leave to the jury, and the jury found a verdict in favour of the respondent.

The issue is an extremely short one—whether or not the learned recorder had before him evidence of negligence on the part of the appellants which it was proper for him to leave to the jury. The principles upon which such matters are determined have so frequently been the subject of decision and exposition in this House, and are at the present day so familiar, that I do not think it necessary H either to repeat or enlarge upon them. It is, of course, for him who is complaining of the negligence of another to turn the scale where the balance is even, by that which he establishes. This is, indeed, the familiar condition of access to the jury, in such cases. It is important in this matter to observe the nature of the complaint made by the respondent in his particulars. It is as follows: "A train belonging to the defendants was standing in their Aldgate Station to pick up I passengers. The plaintiff entered the train, when it was set suddenly in motion and without warning thereby throwing the plaintiff off his balance, and causing the sliding door of the train to close and crush the first finger of the plaintiff's right hand." The complaint made is twofold: first, that the train was set suddenly in motion, and, secondly, that it was set in motion without warning. Was there then evidence of negligence under either or both of those heads proper to be left to a jury?

Some controversy has arisen in this case by the introduction of the term "jerk."

A The discussion appears to assume importance because of the admission made by counsel for the appellants that, if "a jerk" were proved, it would be impossible for him to resist the view which was taken by the Court of Appeal. I should myself have thought that the discussion was somewhat verbal. I know of no special sense in which the word "jerk" is used which would materially distinguish it from other words which might have been used, and perhaps actually were used B in this case. I should have supposed that if a vehicle hitherto motionless be in an instant projected with a degree of speed which within a few second approaches that of twenty miles an hour, the suddenness of that motion in contrast with its previous immobility might without any misuse of language be described as a jerk. And this view derives the strongest possible confirmation from the evidence which has been given by the respondent. The train, according to him, was so suddenly C set in motion that certain physical and apparently unavoidable consequences immediately happened. I take this short statement of those consequences from the notes of the learned recorder which state that the plaintiff said: "I was going to my seat when the train suddenly started. I lost my balance and put out my right hand to save myself from falling—the carriage door came back on the finger of my right hand." It appears from this evidence that he had only reached the D vestibule when he so completely lost his balance that he grasped at something to prevent himself falling upon the line; he would have found himself actually upon the line had not the door automatically closed. The question I have to ask myself here is not whether I, if I had been deciding this matter, should have reached the conclusion that the respondent had in fact proved negligence. It is whether, on evidence, that a train starts so suddenly that a man attempting to proceed to his E seat, without negligence and with reasonable dispatch on his part, is thrown from his balance with such violence that in the effort to save himself he has to grasp at the only thing within his reach, an automatic gate, I am to hold that there is no issue in respect of which the judge is entitled to assistance from the jury. I am quite unable to take that view, and I reject it. I do not say whether I should have agreed with the jury or not, but it was an issue proper to be left to them. F The case made by the respondent required an answer from the appellants, and the function of the jury was to reach a conclusion upon the whole matter.

Having once formed this view it is not necessary that I should discuss at any length the second matter of which complaint is made in the particulars of negligence, namely, that the train was set in motion without warning. But I desire to make an observation upon that point, although I am by no means sure that some G of your Lordships will in this respect go so far as I do. What are the facts? A train is set in motion without warning in circumstances in which it is contemplated that it shall immediately acquire a momentum of some twenty miles an hour with the consequence that such a momentum is fully reached before persons who are not loitering can possibly reach their seats. I refuse, speaking for myself, to say that it is competent for the court, on evidence being produced that no attendant H was either in the car or on the platform for the purpose of assisting passengers, to rule that there was not matter here also which was proper for the consideration and for the decision of a jury. I do not know whether after full inquiry it would be found negligent, or whether it would not, for a company which is contracting to carry passengers safely, and which accepts hire in consideration for that undertaking, to start a train in the circumstances of which evidence has been given I without giving any warning that the train is about to make a sudden and jerky start. But were I trying a case of this kind, if the evidence was given before me which was given in this case, I should conclude that this was a matter on which I was entitled to the assistance of the jury. I should hold in other words that, if the jury, after considering all the facts, including the answer of the railway company, reached the conclusion that a warning ought to have been and could have been given, and that the omission to give it amounted to negligence causing injury, their conclusion could not be set aside as unreasonable. Nor should I modify this view because it was proved that it would be very difficult for the

company to carry on their business under the obligations sought to be imposed upon them. If their present method be in fact negligent (as to which I express no opinion), they must correct their negligence by bringing their conduct into conformity with their contract. For these reasons I move that this appeal be dismissed.

VISCOUNT FINLAY.—I regret that I feel constrained to differ from the opinion which has just been expressed from the Woolsack. The question is whether there was any evidence to be left to the jury on which the jury could reasonably find that this accident was the result of negligence on the part of the defendant company. The facts are to a great extent undisputed. The plaintiff travelled habitually by this train at a very early hour in the morning. He knew the ways of the railway, and, when he arrived at the station and came down the stairs leading to the platform, he saw that the train was already in. It was at Aldgate Station, which was not a starting-point, but the train had come in from some other station, and the man knew, of course, that the train having come in would very shortly start. He walked on; he got into the carriage, and he was in the little platform inside, not where the seats are but close to where the seats are, where he was about to take his place. He had got in there, and he knew that the train must be about to start; it must be taken on the undisputed evidence that he knew that the train might start at any instant. That being so, the train did start; he lost his balance, he clutched at the door, and his hand was crushed in the way which has been described. The learned recorder left the case to the jury in an extremely fair and clear summing-up, to which I shall presently avert. When the case was taken on appeal to the Divisional Court, BRAY and BAILHACHE, JJ., were of opinion that there was no evidence to go to the jury, and entered judgment for the defendants. That was reversed in the Court of Appeal, SCRUTTON, L.J., concurring, but on a special ground, and referring to the fact that he differed from his colleagues on some of the grounds, at all events, on which they had put their finding.

The case is now presented to your Lordships in two ways. It is said, in the first place, that there was something unusual about the way in which the train started —that it started with a jerk, and, not merely with a jerk, but with an unusual jerk. Everyone who knows anything about electric railways is aware that when the train starts there must be something in the nature of a jerk; it does not matter how you describe it. The train starts and it gets very quickly up to a high velocity; but the question here is whether there was something unusual about the mode of starting—something that might be described as an unusual jerk out of the common course. SCRUTTON, L.J., rested his concurrence with his colleagues in reversing the decision of the Divisional Court entirely upon his opinion that there was evidence of this kind. I will read a very few sentences from his judgment:

> "If that was the ground upon which it was to be put, I should not have felt able to do as I am going to do, concur in the reversal of the judge below. I think, though it is not very satisfactory, that there was evidence on which the jury found that this train started suddenly 'out of the ordinary way, with more jerk than is usual'—that is the strictly accurate way of expressing what is meant by the charge that the train was started with a jerk; it was started 'out of the ordinary way, with more jerk than is usual.' I agree it is not a very satisfactory way in which the evidence was brought out, because it was got by one leading question by the judge and two leading questions by counsel for the plaintiff, the result of which was the plaintiff did say 'Yes' to a question saying: 'Did it start suddenly and did it start with a jerk?' It is not very satisfactory that you should get your evidence in that way, but there it is, and being there I think there was evidence on which a jury might find that this train started with an unusual jerk. If so, the verdict for the plaintiff must stand, but, as I say, I do not pretend that I am very satisfied with my conclusion, or at all clear that I am right."

A I think that when the evidence is examined it will be found that the plaintiff did not say "Yes" in answer to the question about the jerk, and I may say that I think it is very much indeed to the credit of the plaintiff and shows that he was a thoroughly truthful man that he always adhered to the question that he took up in the first instance and never in any way stated that there was anything unusual about the way in which the train was started. The real question was put very B fairly and very clearly by the recorder to the jury. He pointed out that

> "the trains would be impeded by the great number of passengers who travel by these trains if they had not these sliding doors, and it is simply because these doors do slide that these great numbers of people are enabled to get in and get out of these trains, provided that there are not so many people standing in the way of the door that it cannot be shut at all. In this case, happily, that C point does not arise, because this was very early in the morning, and there is no definite evidence here, except that this train was set suddenly in motion, and without warning. As I say, all trains must be set suddenly in motion, so that it is boiled down to this: Is there any duty imposed upon the railway company to give warning of their intention to start the train? It is said here by the plaintiff that they did not do that. There does not appear to be any D evidence that they gave any warning, or that there was anybody there who could give a warning."

That is what the recorder says the case boils down to. As for starting suddenly, of course all trains start suddenly, and particularly on all electric railways the train does start suddenly; it starts at once and gets into motion much quicker E than a train under the old system with the steam engines used to do. Counsel for the plaintiff asked whether it was not a possible reading of the particulars that the defendants set the train suddenly in motion in such a way as to throw the plaintiff off his balance, and caused the door to close and crush his finger? The recorder said: "The whole proceeding arose from suddenly starting the train in motion without warning and the other is the consequence of the alleged F nuisance." Counsel: "I merely put that as a possible reading of it."

There is the whole case, and I think that the recorder put the question to the jury fairly and properly, and it was rested on what seems to me the obvious meaning of the particulars and the obvious effect of the evidence. It was rested upon the absence of warning before the train started. I cannot see that there was any evidence of a duty to give warning. One must take into account what is G common knowledge with regard to the working of electric railways. The time spent at the station is much shorter under the system of electric railways than it used to be in the old days, and a warning here, for the reasons that have been indicated in the course of the discussion, would have been perfectly useless; it would have conveyed nothing to the plaintiff which he did not know. He came down the stairs, he saw the train waiting, he knew that it might start at any H instant, and he got into the carriage with that knowledge. In these circumstances I very much regret to be constrained to differ, but I think that the Divisional Court were right and judgment should be for the defendant company.

VISCOUNT CAVE.—I agree with the conclusion reached in this case by the noble and learned lord on the Woolsack. In my opinion, there was evidence upon which a reasonably-minded jury could, if they thought it right, find that the train I was started with unusual and undue celerity—that is to say, with a jerk, so as to throw the plaintiff off his balance and to cause the injury. In saying this I rely not only on the answers which were given by the plaintiff to questions which were of a leading nature, but on the evidence as a whole including the physical effect on the plaintiff of the starting of the train and the manner in which he endeavoured to save himself from falling. The facts were quite fairly put to the jury by the learned recorder. I do not say that I should have concurred in the verdict, but, the jury having found for the plaintiff, I do not think that their verdict can be disturbed.

LORD ATKINSON.—I concur with the observations that have been made by my noble and learned friend on the Woolsack. This man came down to the station and found the door of the carriage open, which was a direct invitation to him by the company to go on board, as he calls it himself. He went on board, and he was knocked over practically before he had time to reach from the platform to his seat. There is no allegation whatever that he unduly delayed, or that he himself was negligent in any way, and yet your Lordships are asked to conclude that, when they start the train in such a way and with such suddenness that they knock an ordinarily reasonable passenger over, there is nothing unusual in that occurrence or nothing to show that they started with undue quickness. To my mind, it is perfectly evident what this man meant by his particulars when he said: "The plaintiff entered the train when it was set suddenly in motion and without warning thereby throwing the plaintiff off his balance and causing the sliding door of the train to close . . ." The condition of the train was changed. It was at rest; he goes into it; it is set in motion so quickly and at such a rate that it causes him to lose his balance. My Lords, it appears to me that when the railway company allowed him to enter the train at the very moment before it started, it was their duty not to start it in the way they did start it, until they gave him a reasonable opportunity of reaching his seat. I agree with what has been said about the way the evidence was extracted from the plaintiff, but I think there was evidence on which a jury might reasonably come to the conclusion to which they have come in favour of the plaintiff. I do not say that if I myself was trying it in the position of a jury I would necessarily have come to the same conclusion, but I say there was evidence to go before the jury on which they might reasonably find as they have found.

LORD SUMNER.—Your Lordships have been informed, and I think it is the case, that this is the first time on which a case turning upon the management of electric trains in the metropolitan area has come before your Lordships' House, and, in view of that fact and of the considerable difference of judicial opinion that has occurred in this case, I will ask leave to do what I should not otherwise have done and give my reasons for concurring in the motion which is about to be moved from the Woolsack.

It is on the sole ground that I think there was evidence on which the jury could find that the electric engine set the train in motion improperly that I think this appeal fails. There was evidence I think, clearly to go to the jury that that was the case, and at this stage I think it is immaterial whether the expression "was set suddenly in motion and without warning" did or did not clearly make that case. I make no observations upon the fact that unfortunately a leading question was asked. I put far too many myself in my time. I do not think the appellants themselves can say that the answer was clearly in their favour, and, if the answer was susceptible of two meanings, it was for the jury to say what the plaintiff actually meant by his answer. But, putting that aside, I think the whole circumstances, uncontradicted and deposed to by the plaintiff alone who knew them, are more consistent with the train having got into motion with an improper degree of violence—what is called a jerk—than with the contrary view. The plaintiff had jumped into the vestibule—he says so. He was making his way to take a seat. He was, therefore, moving towards, if he had not actually passed into, the aperture in the forward bulkhead of the vestibule to lead to the seats. That was his position when the train started. At that time the door was wide open—that is to say, it was forward of the doorway which faced the platform. When his finger was trapped the door closed. The door closed through the momentum of the moving train, and there was time for it to pass from the forward edge to the after edge of the doorway against which his finger was trapped. There was also time for him to pass from the position in which he was when the train started, namely, making his way towards the aperture in the forward bulkhead, to a position in which his right hand, thrown out to catch hold of something, was trapped against

A the after edge of the doorway, and, therefore, close to the after bulkhead of the vestibule, I think such a distance in space and such an interval of time between these two positions of the door and the plaintiff are more consistent with quite a considerable disturbance of the plaintiff and loss of his balance such as would alone result from an excessive amount of violence in the starting, than from such a loss of balance as may happen to anyone however carefully the train started.

B For the rest of the case I only desire to say this. It is quite clear to my mind that the plaintiff already had the benefit of all the knowledge that any warning of any kind could have given him. He knew the train was about to start; he knew that he had, before it started, to get from the stairs, where he was when he saw the train at the platform, to the door into which he jumped, and I cannot see that any whistle, any counsel, or advice, or any interposition of any official, could have C told him anything more than he knew already. If the train had started without what is called a jerk, he was perfectly well able to look after himself. I do not, therefore, think there is in fact evidence here upon which it becomes necessary to express an opinion adverse either to the rolling stock or the system upon which that train was being worked that morning, apart from the starting of the engine in the way in which it was started, and I should certainly be very slow, in a case D where the evidence shows that nothing was done that was not in the ordinary course well known to the plaintiff, without much more argument than we have heard and much more evidence than there is, to say anything whatever to indicate that the management of the line by the railway company's servants was defective in except this one particular. BANKES, L.J., expressed the opinion that the particulars stated that the plaintiff was complaining of a combination of circum- E stances which resulted in an injury to him, and that, in his opinion, it was the duty of the defendants to avoid that state of things of which he complained, and to say in what way they would avoid it. I do not think that that is a way of stating the liability of the defendants in which I could at all concur. On the contrary, if I understand aright the passage in the judgment of BRAY, J., I should agree with that. He says:

F

> "I think when a man is completely in the carriage, and he knows that the train is going to start in a very short time, there is no obligation on the part of the railway company to protect him against the sudden starting of the train."

If BRAY, J., means by that, as I think he does, to protect him against the train G starting without further warning, but without any undue violence or jerk, I agree with him. Of course, if there is a jerk, the person who is inside the train is just as much entitled to complain of it as a person outside the train, if it causes him injury. On these grounds I concur in the motion about to be proposed from the Woolsack.

Solicitors: *J. Buchanan Pritchard*; *H. S. Wright & Webb.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND *v.* LINDSELL AND ANOTHER

[KING'S BENCH DIVISION (Lord Coleridge, J.), October 7, 13, 1921]

[Reported [1922] 1 K.B. 21; 91 L.J.K.B. 196; 126 L.T. 319; 66 Sol. Jo. (W.R.) 11; [1921] B. & C.R. 209]

Bill of Sale—Assignment of chattel "or proceeds when sold"—Indivisibility of assignment of chattel and assignment of proceeds—Bills of Sale Act, 1878 (41 & 42 *Vict.*, *c.* 31), *s.* 4.

W., the owner of a motor car, sent the car to the defendant L. for repair, instructing him to sell it when the repair was finished. W.'s account at the plaintiff bank being overdrawn, the bank agreed to allow him a further overdraft provided he would authorise L. to hold the car or its proceeds to the bank's order. W. wrote to L. instructing him to hold the car to the order of the bank "or the proceeds when sold," and sent a copy of the letter to the bank. The letter was not registered as a bill of sale, and was not in the statutory form. The car was subsequently sold and the bank claimed the proceeds.

Held: while, in general, where there was no assignment of a chattel, but only the assignment of the proceeds of a chattel when sold, the assignment was not a bill of sale, in the present case the proceeds of sale were only assigned with and as representing the car; the letter of assignment could not be treated as divided into two parts in respect of the car and of the proceeds; but it was a bill of sale which, as it did not follow the prescribed form and had not been registered under the Bills of Sale Act, 1878, was void.

Notes. Referred to: *Re North Wales Produce and Supply Society, Ltd.*, [1922] 2 Ch. 340.

As to the subject-matter of bills of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 274 et seq.; and for cases see 7 DIGEST 31 et seq. For the Bills of Sale Act, 1878, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 558.

Cases referred to:

(1) *London and Yorkshire Bank, Ltd.* v. *White* (1895), 11 T.L.R. 570; 39 Sol. Jo. 708; 7 Digest 21, *98*.

(2) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, *230*.

Also referred to in argument:

Burn v. *Carvalho* (1839), 4 My. & Cr. 690; 9 L.J.Ch. 65; 3 Jur. 1141; 41 E.R. 265, L.C.; 8 Digest (Repl.) 575, *242*.

Re Burdett, Ex parte Byrne (1888), 20 Q.B.D. 310; 57 L.J.Q.B. 263; 58 L.T. 708; 36 W.R. 345; 4 T.L.R. 260; 5 Morr. 32, C.A.; 7 Digest 56, *301*.

Action tried before LORD COLERIDGE, J., without a jury.

The defendant Lindsell was a repairer of motor cars carrying on business at Tunbridge Wells. Early in 1919, the defendant Welding sent the chassis of a "Sava" motor car to Lindsell's works for repairs and to have a body fitted, and instructed Lindsell to offer the car for sale when finished. Welding had an account at the Tunbridge Wells branch of the plaintiffs' bank which, in August, 1919, was overdrawn to the extent of £317, but the bank agreed to allow him a further overdraft of £25 on condition that he authorised the defendant Lindsell to hold the car or the cash if the car were sold to the order of the bank. On Aug. 11 Welding sent to Lindsell the following letter:

"This is to authorise you to hold the Sava car at present in your hands to the order of the National Provincial and Union Bank of England, Ltd., Tunbridge Wells, or the proceeds when sold after deducting your account."

On the same day he sent a copy of the letter to the plaintiffs. The letter was not registered as a bill of sale. The car was ultimately sold for £515, Lindsell deducted £280 in respect of his charges, and then, as Welding falsely represented that the plaintiffs were willing to accept a payment of £135 out of the proceeds, sent that sum to the plaintiffs and paid over the balance of £100 to Welding. This action was brought for a declaration that the plaintiffs were equitable assignees of the proceeds of the sale of the car, after deducting Lindsell's charges, and claiming that they were entitled to recover from Lindsell the £100 which he had paid to Welding. On behalf of the defendant Lindsell, it was contended that the letter of Aug. 11 was a bill of sale of the car and was void under the Bills of Sale Acts, not having been registered and not being in the statutory form. The plaintiffs contended that, even if the letter was a bill of sale, so long as the car was unsold, it ceased to come within the Bills of Sale Acts on the sale of the car, and that the good part of the security could be severed from the bad part.

Rayner Goddard and *F. J. Tucker* for the plaintiffs.
Neilson, K.C., and *Arnold Jolly* for the defendant Lindsell.
The defendant Welding did not appear and was not represented.

LORD COLERIDGE, J., stated the facts and continued: The question that has arisen in this case is whether the plaintiffs are prevented from succeeding in this action on the ground that the document is within the purview of the Bills of Sale Act, 1878. If it is, then, inasmuch as it does not follow the statutory form and is not registered, the plaintiffs cannot recover; if it is not within the Acts, they can recover. The first thing that is clear is this, that the plaintiffs cannot recover in this action without producing the document. There is no oral contract available in law whereby the property passed to them apart from the document. Titles acquired by oral contracts which are complete in themselves are not affected by the Bills of Sale Acts. Again, where there is no assignment of a chattel, but only an assignment of the proceeds of a chattel when sold, such assignment is not affected by the Acts. That is the principle laid down in *London and Yorkshire Bank, Ltd.* v. *White* (1). The plaintiffs depend for their title on the document which must, therefore, be scrutinised. It clearly gives the immediate right to seize as security for a debt. The motor car was in law in the possession of the defendant Welding for he had only deposited it temporarily in the defendant Lindsell's garage for the purpose of repairs. The defendant Lindsell had a lien on the car for his charges for repairs, but had no right to sell the car. There was no right of sale in the defendant Welding without the consent of the plaintiffs. It is clear, and, indeed, it was admitted, that, if the car had not been sold, the plaintiffs could not have seized it under the document of Aug. 11, as it would undoubtedly have been a bill of sale and void. It is said, however, that the only claim here is not for the motor car but for the proceeds of the sale, and that, where there is no assignment of a chattel, but only an assignment of the proceeds of sale, the Act does not apply, and that was the view taken in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2). But here there is an assignment of a chattel as security for a debt or of the proceeds when sold, and, in my opinion, the document cannot be split into two parts discarding one part, merely because the chattel had ceased to form part of the security at the time when the plaintiffs put forward their claim. The proceeds of sale were only assigned with and as representing the chattel, and the legal incidents attaching to the assignment of the proceeds of the sale must be held to arise out of, and to be inseparable from, those governing the assignment of the chattel. It is, in fact, an assignment of the chattel converted into cash, and this clause is precisely one at which the Act is aimed, for the defendant Welding could have obtained credit from ignorant people on his supposed ownership of the motor car when, in fact, it had been assigned to the plaintiffs. In these circumstances, I must hold that the document in question is a bill of sale, and, as it has not been drawn up in accordance with

the form prescribed by the Act, and has not been registered, the title of the plaintiffs fails, and there must be judgment for the defendants with costs. A

Judgment for defendants.

Solicitors: *Cox & Co.*, for *Snell & Co.*, Tunbridge Wells; *Champness & Co.*, for *Sir Robert Gower*, Tunbridge Wells.

[*Reported by* Fitzroy Cowper, Esq., *Barrister-at-Law.*] B

C

Re HUGHES. HUGHES *v.* FOOTNER

[Chancery Division (Sargant, J.), March 10, 1921]

[Reported [1921] 2 Ch. 208; 91 L.J.Ch. 10; 127 L.T. 117]

Power of Appointment—Power given to third person to appoint among class—Power to settle shares. D

By his will the testator appointed a sole executor and trustee to whom he gave the whole of his estate upon trust for all his (the testator's) children and their issue "in such shares and in such manner" as the testator should by codicil direct or appoint, or, failing any such appointment, then in "such shares" as the executor should in his discretion think fit and proper. The E testator died without having made any codicil and left surviving him children, grandchildren and a great-grandchild.

Held: the gift was a valid disposition of the testator's estate among all his children and their issue living at his death subject to the power of selection given to the executor; that power enabled the executor to determine not only the amounts of the shares among the members of the class, but also the F nature of the interests to be taken in those amounts so that he could settle any share.

Notes. Considered: *Re Combe, Combe* v. *Combe*, [1925] All E.R.Rep. 159. Referred to: *Re Perowne, Perowne* v. *Moss*, [1951] 2 All E.R. 201.

As to powers in the nature of trusts, see 30 Halsbury's Laws (3rd Edn.) 210; and for cases see 37 Digest 523 et seq. G

Cases referred to:

(1) *Houston* v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 34 T.L.R. 219, H.L.; 8 Digest (Repl.) 396, *889*.

(2) *Brown* v. *Higgs* (1799), 4 Ves. 708; 31 E.R. 366; reheard (1800), 5 Ves. 495; affirmed (1801), 8 Ves. 561, L.C.; (1813), 18 Ves. 192, H.L.; 37 Digest H 526, *1168*.

(3) *Phipson* v. *Turner* (1838), 9 Sim. 227; 2 Jur. 414; 59 E.R. 345; 37 Digest 488, *833*.

(4) *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640; 28 E.R. 408; 37 Digest 407, *177*.

(5) *Alloway* v. *Alloway* (1843), 4 Dr. & War. 380; 2 Con. & Law. 517; 37 Digest I 486, *816 i.*

(6) *Wilson* v. *Wilson* (1855), 21 Beav. 25; 25 L.T.O.S. 211; 52 E.R. 767; 37 Digest 489, *840*.

Also referred to in argument:

Re Eddowes (1861), 1 Drew. & Sm. 395; 5 L.T. 389; 7 Jur.N.S. 354; 62 E.R. 430; 37 Digest 527, *1179*.

Re Weekes' Settlement, [1897] 1 Ch. 289; 66 L.J.Ch. 179; 76 L.T. 112; 45 W.R. 265; 41 Sol. Jo. 225; 37 Digest 524, *1146*.

Bernard v. *Minshull* (1859), John. 276; 28 L.J.Ch. 649; 5 Jur.N.S. 931; 70 E.R. 427; 37 Digest 437, *418*.
Re White's Trusts (1860), John. 656; 70 E.R. 582; 37 Digest 529, *1201*.
Cole v. *Wade* (1807), 16 Ves. 27; 33 E.R. 894; on appeal sub nom. *Walter* v. *Maunde* (1815), 19 Ves. 424, L.C.; 37 Digest 523, *1135*.
Re Douglas, *Obert* v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 399, *906*.
Longmore v. *Broom* (1802), 7 Ves. 124; 32 E.R. 51; 37 Digest 530, *1216*.
Re Master's Settlement, *Master* v. *Master*, [1911] 1 Ch. 321; 80 L.J.Ch. 190; 103 L.T. 899; 55 Sol. Jo. 170; 37 Digest 476, *749*.

Adjourned Summons to determine (i) whether the will operated as a valid disposition of the testator's estate among all the children of the testator and their issue (a) living at his death or (b) living at his death or born in the lifetime of the executor, in such shares as he should appoint, or whether the residuary estate was undisposed of; (ii) whether, if the will operated as a valid disposition, the residuary estate would be divisible, in default of appointing the executor, equally among (a) all the testator's children and their issue living at the testator's death; or (b) among the said children and their issue, including therein any issue born after the testator's death but in the executor's lifetime, and among what persons and in what shares the same would be divisible; (iii) whether, if the executor had a power to appoint amongst the children and their issue, he could appoint in such manner as he thought fit amongst the said class, or whether he could only direct the shares in which the estate was to be divided among the same class, and whether the power could be exercised from time to time; and (iv) whether, if the executor had power to appoint, the increase of the residue accrued prior to the appointment was divisible equally among (a) the children and issue of the testator living at his death, or (b) living at his death or born in the executor's lifetime, or among what persons and in what shares the same is divisible? The facts were as follows: On Feb. 23, 1919, the testator, Frederick Hughes, made a will, of which the following are the material facts:

> "In the first place, I revoke all previous wills heretofore made by me. Secondly, I appoint my cousin Henry Hughes, of . . ., solicitor, to be the sole executor and trustee of this my will. Thirdly, I give to the said Henry Hughes all my estate, both real and personal, and of whatsoever nature or kind the same may be, to hold the same unto the said Henry Hughes and for trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or failing any such direction or appointment by me, then in such shares as my cousin, the said Henry Hughes, shall, in his discretion, think fit and proper."

The testator died on April 1, 1919, without having executed any codicil, leaving children, grandchildren, and great-grandchildren in considerable numbers, all of whom were represented before the court.

Farwell for the plaintiff.
Preston, *K.C.*, and *Attwater* for the heir-at-law.
Jenkins, *K.C.*, and *P. F. S. Stokes* for a daughter of the testator.
Ward Coleridge, *K.C.*, and *Swords* for a son of the testator.
Rolt, *K.C.*, and *H. A. Rose* for the grandchildren and the only great-grandchild of the testator.
Galbraith, *K.C.*, and *Sheldon* for another daughter of the testator.
Roby, *K.C.*, and *W. J. Whittaker* for two other daughters of the testator.
Alexander Grant, *K.C.*, and *Mossop* for a grandchild.

SARGANT, J., stated the facts and continued: The first question to be decided is whether the disposition by the will is so vague that it must be held to fail, and, if it does not fail for that reason, what is the class among the members of which the testator's cousin, Henry Hughes, is given a power of selection. The general law

on the subject is well settled, and is that the power of testamentary disposition is essentially a personal one and cannot be exercised by the will merely purporting to delegate to another the distribution of the testator's estate, and the ascertainment of the objects of his bounty. But there are some real or apparent exceptions to or qualifications of this general rule. One is that of the creation of a general power which the donee may exercise for his own benefit, for such a power is equivalent to property. Another is that of the creation of a power of distribution among charities. A third is that of the creation of a power of selection amongst individuals or a class of individuals who are pointed out as the beneficiaries: see *Houston* v. *Burns* (1). Does the present will come within this third head of exception or qualification? In my opinion it does. The general principles applicable to this third head are to be found in the judgment of LORD ELDON, L.C., in *Brown* v. *Higgs* (2). There the testator devised real estate to his nephew, John Brown, upon certain trusts, and directed him to employ the ultimate surplus of the rents

> "to such children of my nephew, Samuel Brown, as my said nephew, John Brown, shall think most deserving and that will make the best use of it, or to the children of my nephew, William Augustus Brown, if any such there are or shall be."

The trustee, John Brown, died in the lifetime of the testator, and it was held that the gift ensued for the benefit of all the children of Samuel Brown and William Augustus Brown living at the death of the testator. The most material passages in the judgment are as follows (8 Ves. at p. 570):

> "It is perfectly clear, that, where there is a mere power of disposing, and that power is not executed, the court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, the court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the court a power, which the party, to whom it is given, is entrusted and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place."

And again (ibid. at p. 574):

> "The principle is . . . that if the power is a power which it is the duty of the party to execute, made his will by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to exercise it."

With regard to powers of this description the rule to be drawn from *Brown* v. *Higgs* (2) and other similar cases is stated, and in my judgment concisely and accurately stated, in FARWELL ON POWERS (3rd Edn.) p. 528, in the following language:

> "If there is a power to appoint among certain objects, but no gift to those objects, equally, and no gift over in default of appointment, the court implies a trust for or a gift to those objects if the power be not exercised."

The general nature of the power here seems to be indistinguishable from that in *Brown* v. *Higgs* (2), but the actual gift here is somewhat different from the gift there. That gift was for such of the class as the donee of the power might select, while here the gift is in its terms for the whole class, with a super-added power merely to ascertain shares. The difference in language may not now effect the

actual extent of the power, when regard is had to the legislation on the subject of exclusive and non-exclusive powers, but it may nevertheless have a considerable effect on the construction of the document. So far, however, as this is concerned, the difference tends in favour of an implied gift to the members of the class equally, since it obviously diminishes the extent of the implication necessary for the purpose. In my opinion, the present case, while falling generally within the principle of *Brown* v. *Higgs* (2), and the rule already quoted from FARWELL ON POWERS (3rd Edn.), at p. 528, falls also within the rule stated on p. 534 of the same work, namely,

> "If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment."

It was argued that the class to take was undefined in this sense, that, as the power of selection extended to issue, and might have been exercised at any time after the testator's death, the classes did not correspond—that is to say, there were two different classes, the class among which the selection might be made being larger than the class to take in default of selection. But the effect of adding a power of selection among a class already defined is to limit that power of selection within the ambit of that class—namely, the class of children and issue determined at the testator's death. And, by virtue of that power, to select among the defined class, there is an implied gift to all the members of the class in the event of the power not being exercised. Accordingly, I hold that the will is a valid disposition of the testator's residuary estate among all his children, and their issue existing at his death in such shares as Henry Hughes shall appoint, and further, that until appointment the income belongs to the members of the class equally.

The third question then came on for argument.

Roby, *K.C.*, and *W. J. Whittaker* for two daughters of the testator.

Rolt, *K.C.*, and *H. A. Rose*; *Jenkins*, *K.C.*, and *P. F. S. Stokes*; and *Alexander Grant*, *K.C.*, and *Mossop*, all for the grandchildren.

Galbraith, *K.C.*, and *Sheldon* for a daughter of the testator.

SARGANT, J.—The next question is whether Henry Hughes has power only to appoint aliquot shares of the capital or whether the power extends so far as to enable him to settle a share—in other words, to put it in an illustrative manner, whether the distribution must be made horizontally only or may also be made vertically. Counsel for two daughters of the testator, indeed, suggested that there was no power to appoint exclusively. But the statute (11 Geo. 4 & 1 Will. 4, c. 46) [repealed] provided that no appointment should be impeached on the ground of being illusory, and since, in consequence of the statute (37 & 38 Vict., c. 37) [repealed] the difference between exclusive and non-exclusive powers has ceased to exist.

The more serious objection is whether, upon the construction of the will, Henry Hughes is authorised to settle a share. When I first considered the will I was inclined to think that the difference between the language used as to an appointment by the testator, and that used as to an appointment by Henry Hughes pointed to this, that Henry Hughes was intended to have a less extensive power than the power which the testator intended to reserve to himself, the latter being "in such shares and in such manner," whereas the power given to Henry Hughes was "in such shares" as he should think proper. And I confess that I did not at first realise how far the authorities had gone in the direction of authorising a diversion vertically. It is very material, in construing this will, to consider the state of the family at the date of the will. There were then living six children, twelve grandchildren, and a great-grandchild of the testator, and he clearly contemplated that he himself should have power to appoint among them by way of settling a share. He then seems to have realised the possibility of his not making any appointment

by codicil, and he proceeded to provide against a contingency by saying that in this case his estate should go "in such shares as my cousin, Henry Hughes, shall in his discretion think fit." I think he intended that his cousin should have power to benefit anyone of the three generations, and that he did not intend by the language he used to draw a distinction between the two powers. In an informal instrument of this kind he may easily have dropped out the words "in such manner," in describing the power he was giving to his cousin, for the sake of brevity and to avoid repetition; and not by way of contrast.

Having regard, then, to the state of the family, I do not consider the fuller words used in describing the first power of appointment as affording a sufficient reason for restricting the power given to Henry Hughes. It is important to have regard to long-established rules, especially where a word or phrase may have been accepted as having a wide meaning. As regards the general view of the Profession, I have been referred to DAVIDSON'S PRECEDENTS AND FORMS IN CONVEYANCING (3rd Edn.) vol. 3, part 1, p. 155, where the learned author says:

> "It has, however, long been settled that (at all events as to personal estate) a power to appoint to children in any proportion enables the donee to appoint for such estates and with such cross-limitations as he thinks fit."

And *Phipson* v. *Turner* (3), *Alexander* v. *Alexander* (4), and *Alloway* v. *Alloway* (5) are cited as authorities. All these three cases and *Wilson* v. *Wilson* (6) have been cited before me, and I think they justify me in giving a wide meaning to the word "shares," so as to enable Henry Hughes to appoint a share by way of settlement, or to appoint a partial interest. Henry Hughes has, in my judgment, power to determine not only the amounts of the shares, but also the nature of the interests to be taken in those amounts. The appointments may be made from time to time, but they must be confined to the objects of the power, namely, the children and their issue living at the testator's death.

Solicitors: *Robinson & Bradley; H. M. Gowing*, for *Harold Mayhew*, Birmingham; *Bell, Brodrick & Gray*, for *Woodhouse, Chambers & Co.*, Hull; *W. H. Martin & Co.*, for *J. A. Weston*, Kidderminster.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

McLUSKEY AND OTHERS *v.* COLE AND OTHERS

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.Jj.), October 18, 19, 20, 1921]

[Reported [1922] 1 Ch. 7; 91 L.J.Ch. 242; 126 L.T. 269]

B *Trade Union—Membership—Competence of one trade union to be member of another—Contract—Enforcement—Agreement between one trade union and another—Payment of contributions by one union and enjoyment of privileges and benefits under rules of other union—Trade Union Act*, 1871 (34 & 35 *Vict.*, *c.* 31), *s.* 4 (4).

C It is competent for one trade union to be a member of another trade union, e.g., a federation of trade unions which is itself a trade union.

An agreement whereby a trade union undertakes to pay contributions to another trade union of which the first trade union is a member and to comply with the rules of that other trade union and that other trade union agrees that the first trade union shall have the privileges and enjoy the benefits of its membership so long as it complies with the rules of the other trade union is D an "agreement made between one trade union and another" within s. 4 (4) of the Trade Union Act, 1871, and so the court cannot entertain any proceeding with the object of directly enforcing it or recovering damages for its breach.

Notes. It would seem from the decision of the House of Lords in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*, [1922] All E E.R.Rep. 53, that the views regarding "direct enforcement" expressed in the judgments in the present case cannot be accepted as good law: see also *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256.

As to "direct enforcement" and membership of a trade union, see 32 Halsbury's Laws (2nd Edn.) 481, 489; and for cases see 43 Digest 96, 98.

Appeal from an order of Peterson, J., by the plaintiffs, Peter McLuskey, secre- F tary of the Glasgow and District Glass Bottle Makers' Trade Protection Society, and other officials and trustees of the society, suing on behalf of themselves and all other members of the society. The defendants were George Cole (the president), John Thompson (the secretary), and the trustees and all other members of the National Federation of Glass Bottle Workers. Both the society and the federation were unregistered trade unions.

G *Montgomery*, *K.C.*, and *Slesser* for the plaintiffs.

Manning, *K.C.*, and *Clement Edwards* for the defendants.

LORD STERNDALE, M.R.—In para. 1 of the statement of claim it is alleged that the plaintiff society was at all material times affiliated to and formed a part of the defendant federation, and that the society had from time to time paid H subscriptions to the federation in respect of the affiliation and was entitled to various benefits and rights arising out of the affiliation, that the national conference of the federation had asked the different districts whether they were in favour of forming a national joint conciliation committee with a view to certain things, that the plaintiff society duly considered that matter and decided not to agree to the proposition of the federation—not to dissent from it, but to take no I vote upon it, and remain absolutely neutral. Upon that the federation called upon the Glasgow district to record their vote, and the Glasgow district carried a resolution "that the Glasgow district do not take any vote on the question." Thereupon the federation passed a resolution

> "that this conference, after carefully considering the position of the Glasgow district, is agreed that by openly and defiantly refusing to carry out the national conference resolutions the Glasgow district automatically forfeits its membership of the national federation according to r. 7, cl. 2, of the constitution."

It is then alleged that the federation had no power under that rule so to expel the plaintiff society or cause them to forfeit their membership, and the prayer of the claim is that that resolution shall be declared void, ultra vires, and not binding upon the plaintiff society, and that the plaintiff society are, and have been at all times since the resolution, a constituent part of the defendant society. The plaintiff society also claimed an injunction restraining the federation from acting upon the resolution. That seems to me to be perfectly clearly an action by the plaintiff society claiming that the federation cannot exclude the plaintiff society from what is variously called "membership," "right of affiliation," or "constituting a constituent part of the federation." It is a claim by the plaintiff trade union that the plaintiff trade union shall be retained as a member or an affiliated body or constituent part of the national federation, and it is not a claim by any individual members of the plaintiff society that they, the individual members, may be declared to be members of the national federation. I think there is no question about that upon the statement of claim. If there be any doubt it would be removed by the opening of the learned counsel before PETERSON, J., who began his argument in this way: "Both the plaintiffs and the defendants are trade unions"—not individual members of trade unions—"and they are both trade unions unregistered, and, consequently, the action is brought by various persons in a representative action, which is defended similarly in a representative action." The case proceeded on that basis from start to finish before PETERSON, J. Before us it has been argued in face of difficulties that arise if the plaintiffs are to be taken as the plaintiff society, that this is not an action by them as a trade union at all. It is an action, it is said, by the individual members of the plaintiff society to restrain the national federation from excluding them, the individual members, from the rights to which they as individual members of the defendant federation are entitled. That is a point which is a late thought so far as this court is concerned. It appeared for the first time in the address of the learned junior counsel for the plaintiffs. It looks very like an after-thought; at any rate, it never was raised before PETERSON, J. Whether it can be raised now, or whether, if it can be raised, there is anything whatever to support it, I shall deal with in a moment; but for the present I shall deal with the matter on the basis on which it was launched and on which it proceeded before PETERSON, J.—namely, a claim by the plaintiff society against the defendant federation as a federation. On that PETERSON, J., without giving any decision and I rather think without giving any opinion, upon the merits of the case, decided that it is an action which the court cannot deal with because it is excluded by s. 4 of the Trade Union Act, 1871, from the consideration of the court. I will deal with that point.

In the first place, in order to ascertain whether it is excluded from the jurisdiction of the court it is necessary to see whether the defendant federation is an illegal federation in the sense that it is in restraint of trade. PETERSON, J., has held that it was. I agree with him, and I agree with him for the reasons that he has given. I think it was a trade union the rules of which, and at any rate one of the objects of which, was in restraint of trade. It is necessary now to turn to the Trade Union Act, 1871. Section 4 provides that:

> "Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: (2) Any agreement for the payment by any person of any subscription or penalty to a trade union: (3) Any agreement for the application of the funds of a trade union,—(a) To provide benefits to members; or (b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions

of such trade union; or (c) To discharge any fine imposed upon any person by sentence of a court of justice; or (4) Any agreement made between one trade union and another; or (5) Any bond to secure the performance of any of the above-mentioned agreements."

The question here is whether this is an action brought directly to enforce an agreement which comes within s. 4 (4): "Any agreement made between one trade union and another." That it is brought directly to enforce an agreement of some sort is quite clear. I cannot myself see a much more direct way of enforcing an agreement than by an injunction to prevent a person from breaking it. Was this an agreement between one trade union and another, if there was any agreement at all? It is admitted by the learned counsel for the plaintiffs that if this be an action by the plaintiff society as a society (and that is the basis on which I am dealing with it at the moment) the claim must arise out of contract by the plaintiff society with the defendant society. That, to my mind, if it exists, must be an agreement between one trade union and another within meaning of this section. The agreement, if it exists, is an agreement that the plaintiff society should be a member of the defendant federation upon the terms of the rules.

Some doubt has been expressed—I express no opinion upon it—whether it is possible for one trade union to be a member of another trade union. But the Trade Union Act, 1913, shows that the law does contemplate that one trade union might be a member of another [see, e.g., s. 3 (5)]. In that event, sub-ss. (1), (2), and (3) of s. 4 of the Trade Union Act, 1871, might, in respect of the subject-matter to which they relate, deal with members of a trade union who are also trade unions themselves, and might prevent the court in the circumstances dealt with in those three subsections from in any way securing to trade unions who are also members of trade unions the rights which they would acquire as such members. I will assume that the word "member" in sub-ss. (1), (2), and (3)—though I by no means decide that it does—will include a member of a trade union which is itself a trade union. But I can see no argument derived from that which obliges me to say that an agreement of membership between one trade union and another is not within sub-s. (4). The words are as wide as ever they can be: "Any agreement." I am not going to discuss whether it is possible to put any limitation, or, if so, what limitation, upon the words "any agreement." That may arise for discussion hereafter and I reserve any opinion until it does arise. But I am clearly of opinion that the limitation which the plaintiffs seek to read into it, namely, "any agreement made between one trade union and another except an agreement of membership of the one trade union in another" cannot be read into it. I can see no ground for that at all and, therefore, this agreement, if it did exist, was, in my opinion, within sub-s. (4) of s. 4.

I have had considerable difficulty in seeing exactly how, when, and where the agreement was made. What took place was this. There had been two federations before this federation was formed. The plaintiffs belonged to one federation, and a number of other districts belonged to another. The two federations were not working together so well as many people thought they ought to do, therefore, the defendant federation came into existence in 1918 to include all the districts that had been in both of the other federations, in the hope that all would work together harmoniously. The agreement to form this federation into which all the districts would come was an agreement between the districts inter se and not an agreement with the defendant federation, which was not at that time in existence. But when the federation did come into existence, and when the districts became members of the federation, continued from year to year to pay their contributions and to fulfil their liabilities as members of the federation it may be that there then arose an implied contract by the plaintiffs and the other constituent members of the federation to do their duty under the rules, and, on the other side, an agreement by the federation to retain them and allow them to remain and have their privileges and benefits as members so long as they observed the rules. I think

that that is the agreement which PETERSON, J., has found, and I do not differ from him. But that clearly, in my opinion, as I have already said, is an agreement which comes within s. 4 (4) as an agreement between one trade union and another. If the plaintiffs' case rested upon that, and it seems to me that is the only agreement upon which it can rest, the court cannot consider the action because it is an agreement between one trade union and another. If such an agreement cannot be inferred from the facts, from what took place after the defendant federation came into existence, there is no contract at all. No right exists which does not arise out of contract, and, therefore, it seems to me that the plaintiffs are in a complete dilemma. Either they have a contract with the defendants by which the defendants are bound to retain them as members of the federation, in which case it comes within sub-s. (4); or they have no contract, in which case they have no right whatever in the action. Therefore, on the basis on which PETERSON, J., decided the case, he was, in my opinion, quite right.

But at a very late hour of the argument for the plaintiffs it was attempted to set up another argument which was not before PETERSON, J., and I propose to deal with it. It is this. The action is not an action by the plaintiff society as a society at all. The plaintiff society is merely a name for the individual members of the Glasgow District Society, those individual members are the plaintiffs in this case, and they are the people who have to show a contract of membership of the national federation and when they show that, they do not show an agreement between one trade union and another, but an agreement between certain individuals who are described under the collective names of "the plaintiff society," and "the defendant federation." In my opinion, the plaintiffs ought not to be allowed to raise that question here at all. I think that this court should be quite firm in saying we will not have raised in this court a contention which not only was not raised before the judge in the court of first instance, but which, if it had been raised, would have given rise to issues of fact, which were not presented to him, would have necessitated an amendment of the pleadings, and would have required evidence that was not given before him. If it rested with me, I should be content to say that the plaintiffs cannot raise that point here, because it would have required investigation of issues of fact, and the adducing of evidence which was not before the learned judge in the court below. But I do not propose to dispose of the appeal upon that ground because I think that there is absolutely nothing in the point even if the plaintiffs were allowed to raise it. It seems to me that all the rules to which we have been referred, and which have been discussed at considerable length point to this, that the intention of the parties was that the federation should be a federation in which the districts and not the individual members of the districts, should be members. I think that the whole tenor of the rules points to what I have just said. I do not propose to go through them in detail, but in my opinion, that is the effect of the rules, and that the districts should remain still members of their district societies and not members of the federation at all. The very rule which the defendants are here charged with violating, or, at any rate, which it is said does not justify their acts, seems to me to point almost conclusively to that:

> "That any district acting contrary to the standing orders by refusing to act in accordance with the decisions agreed to by the conference or districts, such district shall forfeit their membership."

That seems to me to be the obvious meaning of the rules. There is, in my opinion, nothing whatever in these rules to show that it was ever contemplated by anybody that the individual members of the district should be members of the national federation. It would require evidence from which a contract might be inferred between the individual members of the plaintiff society and the national federation. No such evidence was given. That point was never thought of, and, if it had been thought of, I think it could not possibly have succeeded. And

looking at the construction of the rules, I think that such a contention is entirely contrary to them. This appeal should be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. This action was brought for the purpose of obtaining a declaration that a certain resolution passed by the defendant federation was ultra vires and illegal and an injunction to restrain them from acting upon it. PETERSON, J., having decided that the objects of the federation were illegal because they were in restraint of trade, has come to the conclusion that the object of the action was directly to enforce an agreement by one trade union with another trade union, and, therefore, was one which the Trade Union Act, 1871, did not enable the court to entertain. On that ground he has dismissed the action. It is important for this purpose to see how the plaintiffs' claim was framed, and how the action was presented to PETERSON, J. The statement of claim describes the plaintiffs as "the secretary, president, vice-president, treasurer, and trustees" (having given their names in each case) "on behalf of themselves and all other members of the Glasgow and District Glass Bottle Makers' Trade Protection Society, hereinafter called 'the plaintiff society,' " as plaintiffs. It describes the defendants (giving their names again as before) as "the president, secretary, and trustees on behalf of themselves and all other members of the National Federation of Glass Bottle Workers, hereinafter called 'the defendant society,' as defendants." It then alleges that the plaintiff society (repeating its name) is an unregistered trade union. It alleges that the national federation, the defendant society, is a federation of trade unions of the glass bottle workers to which the plaintiff society was at all material times affiliated and of which the plaintiff society is a part. It then alleges that the plaintiff society has paid subscriptions and so forth to the defendant society, and is entitled to various benefits and rights arising out of such affiliation. It then states the facts culminating in a resolution arrived at by the federation to the effect that owing to the circumstances specified therein the plaintiff society forfeits its membership in the federation according to r. 7, cl. 2, of the constitution. Then the plaintiffs allege that the defendant society had not power under its rules to cause them to forfeit their membership. They ask for the declaration to which I have already referred, namely, that the resolution was ultra vires, and not binding upon the plaintiff society, and they are, and have been at all times, since the resolution, a constituent part of the federation, and then an injunction restraining the defendants from acting upon their resolution.

Can there be any possible question that that action, so launched, is founded on an alleged agreement between the plaintiff society alleged to be a trade union and the defendant federation likewise alleged to be a trade union? I quite agree that the plaintiff society does not in so many words say that the federation is a trade union. But there is no question about the fact, and it was so opened by the junior counsel before PETERSON, J. It seems to me quite plain that this action is founded on an alleged agreement between one trade union and another trade union. If that is so it is necessary to look at the Trade Union Act, 1871, because it is in consequence of that Act that PETERSON, J., has come to the conclusion that the action cannot be maintained. That Act provides by s. 3 that:

> "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

If it had stood there the impediment which had previously existed against the enforcing of agreements by or with a trade union—namely, the illegality for the purposes of the union—would have been removed, and there would have been no objection to the enforcing of any such agreement. But s. 4 limits that which would have been a more extensive effect of s. 3 and it provides that:

> "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing, or recovering damages for the breach of, any of the following agreements . . ."

Included in those is "(4) any agreement made between one trade union and another." PETERSON, J., held in the first place that the objects of the defendant federation are illegal as being in restraint of trade, and it is, therefore, one of those societies with regard to whose agreements s. 3 of the Act was necessary in order that they might be enforced by legal proceedings. But any agreement with such a body cannot be enforced if it comes within the description of any of the contracts mentioned in s. 4. As I have already said, as the action was originally launched it is quite clear that the contract alleged was one between one trade union and another trade union falling within s. 4 (4), and, that being so, it seems to me that PETERSON, J., had no option but to come to the conclusion he did that the action could not be entertained and must be dismissed.

But it was suggested in this court that an agreement under which one trade union could be a member of another trade union was a legal impossibility—that there could not be such an agreement. I think there are two quite conclusive answers to that contention. The first is that the Act of 1871 recognises the possibility of one trade union making an agreement with another trade union, and does not exclude from that recognition any particular agreements, and it seems to me that we must come to the conclusion on this point that there is nothing impossible in law in an agreement between one trade union and another under which the one shall be a member of the other. But if anything were required to remove any doubt on that subject, I think it would be the Trade Union Act, 1913, which clearly recognises that one trade union may be a combination of a number of other trade unions. Therefore, on the action as it was presented to PETERSON, J., the decision of PETERSON, J., in my opinion, was clearly right.

It was, however, attempted at a late stage to place the action upon a different footing altogether, and to say that this was not a representative action brought by individuals on behalf of the society against other individuals as representatives of another society, but that it was an action brought by a number of individuals on their own account claiming to be members in their individual capacity of the defendant federation, and claiming to restrain the defendant federation from excluding them as individuals from membership of the federation. That is an entirely fresh case, and I desire to associate myself strongly with what the Master of the Rolls says on that subject; that this court ought to be firm in its refusal to entertain, or to allow to be presented to it, a case which might have been raised in the court below, and which, if so raised, would have given rise to different issues of fact and different considerations altogether from those which were presented to the court below, and to raise which in this court would mean a complete re-trial, on different materials, of the action as previously presented. Even if the plaintiffs had been allowed to raise that new case in this court, in my opinion, there would have been nothing in it. I have gone through the rules many times, I do not propose to go through them in detail. Although they are, as most rules of this nature in my experience are, carelessly and inaccurately drawn, if there is one thing more clear about them than another, it is that what the framers of the rules contemplated was that the federation should consist of a number of so-called districts, that is to say, of a number of trade unions representing workmen in the districts, and that those trade unions were to be the members of the federation. I think that wherever the word "member" is used in such a context, it clearly means a member of the district, that is to say a member of the affiliated district and not a member of the federation; and wherever the "districts" are referred to, they are referred to as the constituent parts of the federation. For these reasons I am of opinion that this appeal must be dismissed with costs.

YOUNGER, L.J.—I am of the same opinion. I think there can be no doubt that the National Federation of Glass Bottle Workers to which I shall refer as "the national union" is a trade union, one or more of whose objects or purposes is in restraint of trade. I further think on the fair reading of the statement of claim in this action that it is framed upon the footing that the Glasgow union is a con-

stituent member of the national union, and that the individual members of the districts do not stand towards the national union in the relation of member and union. Further I think that that is the only position that can be successfully maintained because it appears to me upon the true construction of the rules of the national union that the only members of that union recognised by the rules are the districts referred to in the rules, and that the only contracts of membership with the national union under the rules are contracts by each district union (in this case the Glasgow Union) and the national union. Such a contract of membership on the part of one trade union with another may or may not be possible in law. I confess that apart from the Trade Union Act, 1913, I should have had the very gravest doubt whether such a contract of membership was contemplated by the Act of 1871 or that of 1876 or could be formulated by a lawyer as permissible. But it may well be that the Act of 1913 in a case where the point definitely arises for decision would require the court to say that one trade union may be a member of another just as much as an individual person may be a member of such a union.

If, however, such a contract is permissible, and if there is such a contract of membership here, then the question arises, whether that is a contract or agreement between one trade union and another within s. 4 (4) of the Act of 1871. My view of s. 4 is that whether or not membership of one union by another is contemplated or covered by s. 4 (1), (2), or (3), there is no ground on which it is permissible so to qualify the comprehensive language of s. 4 (4) as to exclude such a contract of membership from the operation of the subsection. This action, which was for a declaration followed by an appropriate injunction, is, I cannot doubt, an action which was instituted with the object of directly enforcing the agreement of membership. It asks, and it is intended as a result of success in the action, that the existence of the membership of the Glasgow Union shall be declared and recognised by the court as existing today. It appears to me that s. 4 of the Act of 1871 precludes the court from entertaining, in the circumstances which I have set forth, any such proceedings. It was, however, suggested by counsel for the plaintiffs that, although there might be a difficulty in asking the court to grant an injunction, it was quite permissible and proper for the court—if, of course, it were satisfied on the facts that such a declaration was right—to make a declaration to the effect that the Glasgow district remained a constituent member of the national union—that that declaration would be proper for the court to make provided that no relief consequent upon it were either asked for or given. I gravely doubt whether, even if the objection to the declaration were not taken by the defendant society, it would be permissible for the court to make a declaration in the case of an agreement which, being between one trade union and another, is by s. 4 of the Act of 1871 declared to be one that cannot be directly enforced or otherwise recognised for the purpose of recovering damages by any court. But, whether that be so or not, it appears to me clear that if the defendant society repudiate all legal liability under the agreement sued upon, it would be improper for the plaintiff society to ask that the court should be asked to make any declaration at all. It follows, therefore, in my judgment, and for these reasons that the decision of the learned judge in the court below was correct.

Appeal dismissed.

Solicitors: *Mills, Lockyer, Mills & Evill*; *G. A. Herbert*, for *A. W. Willey*, Leeds.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

NYE *v.* DAVIS

[King's Bench Division (Horridge and Shearman, JJ.), December 19, 20, 1921]

[Reported [1922] 2 K.B. 56; 91 L.J.K.B. 545; 126 L.T. 537; 20 L.G.R. 483]

B

Rent Restriction—Application of Rent Acts—Rent including payment for "attendance"—Residential flat—Right of way through hall and staircase—Removal of refuse from flat—Carriage of coals thereto—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *& 11 Geo. 5, c. 17*), *s.* 12 (2) (*i*).

By a lease dated Jan. 7, 1921, a residential flat was let to the tenant "together with the use of the lessor's fixtures in upon and belonging to the said flat and together also with the right in common with the landlord and the tenants and occupiers of the other . . . residential flats in the same building to use the hall and staircase leading to the said flat." The landlord covenanted (inter alia): "To keep the entrance hall and the general staircase and other common parts of the said building . . . clean and in good order and to remove" house refuse from the flat and carry coals thereto once in every working day free of charge.

C

D

Held: the grant of the right to use the hall and staircase leading to the flat was merely the grant of a right of way and was not "attendance" within s. 12 (2) (i) of the Increase of Rent, &c. (Restrictions) Act, 1920, so as to take the letting out of the Rent Restriction Acts, but the removal of the refuse and the carrying of coals did constitute such attendance.

E

Notes. Distinguished: *King* v. *Millen*, [1922] All E.R.Rep. 309. Followed: *Dick* v. *Duncan* (1923), 92 L.J.Ch. 320. Considered: *Wilkes* v. *Goodwin*, [1923] All E.R.Rep. 61; *Wood* v. *Carwardine*, [1923] All E.R.Rep. 57. Referred to: *Palser* v. *Grinling*, *Property Holding Co.* v. *Mischeff*, [1948] 1 All E.R. 1; *Property Holding Co.* v. *Clark*, [1948] 1 All E.R. 165; *Alliance Property Co.* v. *Shaffer*, [1948] 1 All E.R. 165.

F

As to board, attendance, and use of furniture, see 23 Halsbury's Laws (3rd Edn.) 748–751; and for cases see 31 Digest (Repl.) 650–655. For Increase of Rent, &c. (Restrictions) Act, 1920, see 13 Halsbury's Statutes (2nd Edn.) 981.

Appeal from an order of His Honour Judge Cann sitting at Brighton County Court.

G

By a lease dated Jan. 7, 1921, the landlord demised to the tenant, in consideration of a rent of £250 a year

> "All that tenement or residential flat (thereinafter called the said flat) known as No. 5, forming part of the building then, or lately, known as 17 and 19, Palmeira Avenue Mansions, Hove, in the county of Sussex (thereinafter called the said building) Together with the use of the lessor's fixtures in upon and belonging to the said flat And together also with the right in common with the landlord and the tenants and occupiers of the other tenements or residential flats (thereinafter called the other tenants) in the said building, to use the hall and staircase leading to the said flat, paying therefor yearly during the said term thereby granted and so in proportion for any less time than a year the rent of £250."

H

I

By para. 3 of cl. 1 the lessor covenanted:

> "To keep the entrance hall and the general staircase and other common parts of the said building (subject, nevertheless, to the conditions thereinbefore contained) clean and in good order and to remove such house refuse as cannot be burnt from the said flat and carry the lessee's coals thereto once in every week day free of charge to the lessee."

When the quarter's rent of £62 10s. became due at Michaelmas the tenant claimed

the protection of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, on the ground that the rateable value of the premises on Aug. 3, 1914, was £66, which, under s. 12 (2) of the Act, rendered the premises subject to the provisions of the Act. The premises were let on Aug. 3, 1914, at a rent of £120 per annum, and when the landlord commenced this action the tenant paid into court the sum of £43 1s. 1d. as the quarter's rent calculated on the basis of the 1914 rent plus the statutory increases. The learned county court judge held that the Act applied because the rent did not include payments in respect of board, attendance, or use of furniture, and he gave judgment for the tenant. The landlord appealed.

Compston, K.C., and *R. J. Sutcliffe* for the landlord.
J. G. Hurst, K.C., and *J. Flowers* for the tenant.

HORRIDGE, J.—This action is one to recover rent. The rent was not recoverable if the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied to it, but it was recoverable if that Act did not apply. The reason why it is said that the Act did not apply to the premises was because of s. 12 (2) (i), which provides that:

> "this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture."

The lease provided that the premises to be held in respect of the rent were the tenement or residential flat known as No. 5, Palmeira Avenue Mansions, Hove, Sussex, together with the use of the lessor's fixtures belonging to the said flat,

> "together also with the right in common with the landlord and the tenants and occupiers of the other tenements or residential flats (thereinafter called the other tenants) in the said building to use the hall and staircase leading to the said flat."

Those are the premises to be held in consideration of the rent, but one of the other things which was in consideration of the rent, was this covenant by the landlord:

> "To keep the entrance hall and the general staircase and other common parts of the said building (subject nevertheless to the conditions hereinbefore contained) clean and in good order and to remove such house refuse as cannot be burnt from the said flat and carry the lessee's coals thereto once in every week-day free of charge to the lessee."

Are those services, the taking up of the coal and the bringing down of the refuse, "attendance" within the meaning of the subsection to which I have referred? I am not going to enter into speculative inquiries whether or not a man who watered the garden or attended to the lift would be rendering attendance to the occupier of the flat, but I am absolutely clear in my own mind that a man who does the work which is necessary upon the flat itself, taking up the coals and taking away the refuse, is rendering attendance in respect of the demised premises, and that, therefore, this case is within the proviso and the learned county court judge ought to have given judgment for the landlord for the amount claimed. This appeal must be allowed.

SHEARMAN, J.—I am of the same opinion. The short question is whether this letting was exempt from the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by virtue of the exception contained in s. 12 (2) (i). I think it is quite clear that the rent in that paragraph means the total payment made under the document of letting, because it is assumed that the rent includes board, which is not rent—"board, attendance, or the use of furniture." Then it says "bona fide." That means to say that you must not evade the Act by a colourable use of furniture, or something which is colourable attendance and not a bona fide part of the bargain. The letting is of a flat together with the use of the lessor's fixtures and

"the right in common with the landlord and the tenants and occupiers of the other tenements or residential flats (thereinafter called the other tenants) in the said building, to use the hall and staircase leading to the said flat."

That contains nothing which does more than give a right of way. It is conceivable that the landlord might give the right of way and leave the tenants to arrange by bargain among themselves to pay something extra to have the hall and staircase cleaned at their expense, but the landlord covenants to

"keep the entrance hall and the general staircase and other common parts of the said building (subject, nevertheless, to the conditions hereinbefore contained) clean and in good order and to remove such house refuse as cannot be burnt from the said flat and carry the lessee's coals thereto once in every week-day free of charge to the lessee."

It is argued because one says, "free of charge to the lessee," that means there is no payment, but one has to look at the document as a whole. The rent is to include certain free services and I think it quite clear that the last two of them—I do not want to say anything about the others—are attendance. Therefore I think that the learned county court judge was wrong and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Adkin & Son*, for *Nye & Clewer*, Brighton; *Walmsley & Stansbury*, for *Robert Breach*, Hove.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

MACKWORTH *v.* HELLARD

[Court of Appeal (Lord Sterndale, M.R., Scrutton and Younger, L.JJ.), March 9, 1921]

[Reported [1921] 2 K.B. 755; 90 L.J.K.B. 693; 125 L.T. 451; 85 J.P. 197; 37 T.L.R. 469]

Rent Restriction—Application of Rent Acts—"Rent payable less than two-thirds of rateable value"—"Rent"—Inclusion of sum payable in respect of rates—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (7).

By s. 12 (7) of the Increase of Rent &c. (Restrictions) Act, 1920: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy. . . ."

"Rent payable" in this subsection means the sum payable by the tenant under his agreement with the landlord, and not, in the case of an "inclusive rent," the sum remaining in the hands of the landlord after the payment by him of the rates payable in respect of the demised property.

Notes. Considered: *Property Holding Co.* v. *Clark*, [1948] 1 All E.R. 165. Referred to: *Glossop* v. *Ashley* (1921), 90 L.J.K.B. 1237; *Roberts* v. *Poplar Metropolitan Borough Assessment Committee*, [1922] 1 K.B. 25; *Rouson* v. *Photi*, [1939] 4 All E.R. 616; *Somershield* v. *Robin*, [1946] 1 All E.R. 218.

As to lettings at less than two-thirds of the rateable value, see 23 Halsbury's Laws (3rd Edn.) 756–758; and for cases see 31 Digest (Repl.) 667–668. For Increase of Rent &c. (Restrictions) Act, 1920, see 13 Halsbury's Statutes (2nd Edn.) 981.

A Cases referred to:

(1) *Sheffield Waterworks Co.* v. *Bennett* (1873), L.R. 8 Exch. 196; 42 L.J.Ex. 121; 28 L.T. 509; 21 W.R. 686, Ex. Ch.; 43 Digest 1088, *209*.

(2) *Westminster and General Properties and Investment Co.* v. *Simmons* (1919), 35 T.L.R. 669, N.P.; 31 Digest (Repl.) 670, *7671*.

B **Appeal** from an order of LUSH, J.

The plaintiff, the landlord, claimed to recover from the defendant tenant possession of a dwelling-house occupied by the tenant.

On July 12, 1916, the landlord let the dwelling-house in question to the tenant on a monthly tenancy at a rent of £2 10s. per month or £30 per annum. The landlord orally agreed to pay rates and taxes, and these, in 1919, amounted to C £31 18s. The rateable value of the house on Aug. 3, 1914, was £40. The tenancy was duly terminated by the landlord giving the tenant one month's notice to quit, expiring on July 12, 1920, but the tenant refused to give up possession, relying on the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The landlord thereupon brought this action of ejectment, and contended that the rent was less than two-thirds of the rateable value, and that, by virtue D of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenancy was outside the Act.

Section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [as amended by the Rent Act, 1957, Sched. 8, Part 1], provides that:

> "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply E to that rent or tenancy, nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house . . ."

The landlord contended that "rent" in the subsection meant the agreed rent less the amount of the rates and taxes paid by the landlord. LUSH, J., decided that the tenant was entitled to rely upon the protection afforded by the Act of 1920, and that therefore there must be judgment for him. The landlord appealed.

F *E. Foà* for the landlord.

G. Sanders (*S. H. Leonard* with him) for the tenant.

LORD STERNDALE, M.R.—This appeal from the decision of LUSH, J., raises a question as to the construction of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. I am not going to discuss the general meaning G of that subsection. It has nothing to do with the question before us. The question before us is: What in the circumstances of this case is the "rent payable" in respect of the tenancy of the dwelling-house?

The rateable value of the house is £40, the rent, speaking in popular language, by which I mean the amount which the tenant when he went into possession agreed to pay, is £30; the landlord, however, pays the rates which amount to H more than the £30 received from the tenant. Naturally the landlord desired to determine the tenancy, as she would have been able to do but for this Act. She says that the letting does not come within the Act because the rent which is really payable is less than two-thirds of the rateable value of the house; to see what the rent is one must look at what is the net result of the transaction. The tenant says that the rent which must be considered for the purposes of s. 12 (7) is the rent less I the deduction for rates and taxes, and £30 is more than two-thirds of £40. I cannot agree with that contention. LUSH, J., could not agree with it, and I think he was right. Unless one is to disregard all the ordinary meaning of language, it is obvious that "rent payable" means the rent which the tenant has to pay, and does not mean the net amount which on the ascertainment of the result of the whole transaction remains in the landlord's pocket.

But it is said that that ought to be so in the present case, and the only argument at all that has impressed me on the matter is this. It is said that it ought to be so for the reason that the rent has to be compared with the rateable value, and as the

rateable value is the net rateable value—namely, the amount less rates and taxes —therefore, the rent ought to be the same. I think, if I may say so, that that would have been a very reasonable provision for the legislature to have made—that the two things ought to be comparable—but the question is whether the legislature has said so. We must take the framers of the Act to have had some knowledge of what, in ordinary parlance, "rent" means. They have in s. 12 (1) (a) and (c) of the Act stated the meaning that they attach to "standard rent," which is also an artificial expression, and to "net rent," which is also an artificial expression arising from the standard rent. But they have nowhere defined what is meant by "rent," and I think that, that being so, there is good ground for thinking that they started with the idea that "rent," unless there was something to alter its meaning, meant rent as ordinarily undersood. There undoubtedly are provisions in the statute in which it does mean rent as ordinarily understood. There may be some where it does not—I do not know.

Looking at this matter in that light, it is to be observed that it is not only "rent" which is mentioned in s. 12 (7), but "rent payable in respect of the tenancy"—not "value received in respect of the tenancy," but "rent payable in respect of the tenancy." The rent payable in respect of this tenancy is £30. That is what the tenant agreed to pay. It is quite true it is not what the landlord in the net result of the whole transaction gets, but it is the rent which the tenant has agreed to pay, and, in my opinion, that is the rent payable in respect of the tenancy. I cannot find anything in the Act whereby to attach any other meaning to the expression. We were referred to an authority in the Exchequer Chamber—namely, *Sheffield Waterworks Co.* v. *Bennett* (1)—which seems to me not to touch the present case at all, because what was held there was that in the particular statute with which the learned judges were dealing "rent" must be taken to mean annual value. That was arrived at by a reasoning very much derived from earlier Acts of Parliament with respect to the supply of water—general Acts to be read with a special Act in which obviously annual value was intended. That does not give us any guidance at all. There is, however, some guidance, I think, to be obtained, although I do not consider that it is very much, from a decision of Bray, J., in *Westminster and General Properties and Investment Co.* v. *Simmons* (2), in which "rent" was interpreted in the way in which I interpret "rent" here. I do not, I repeat, think that much guidance is to be obtained from that decision, because it is on a different section and a different Act. I decide the present case on the ground that anybody applying ordinary terms and ordinary language would say that the rent payable here was the £30, and that that must be taken as the meaning of the word in the Act of Parliament unless there is something in the Act which shows that it is not to be so taken. I can find nothing there. I can see that such an interpretation may lead to consequences which were probably never intended, but that is no reason for construing the Act in a way in which I think it ought not to be construed. I have not inquired into subtle conditions which might arise in adopting that interpretation. I take that construction which I think is the right one. There is nothing ambiguous in the meaning of it to my mind, and, therefore, I think that this appeal must be dismissed with costs.

SCRUTTON, L.J.—This is one of those very numerous cases in which it has been made plain to the court that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was drafted and passed through Parliament without any very careful consideration of how the provisions would apply in the ordinary transactions of life.

[His Lordship referred to the Rent Restriction Acts, 1915 and 1917 (repealed by the Act of 1920) and continued:] The Act of 1920 extended rent restriction provisions to a large number of houses, recognised the fact that the landlord had some rights—the previous legislation having been entirely concerned with the tenant—and allowed him to increase the rent in certain very limited circumstances. The standard rent was the rent at which a house was let on Aug. 3, 1914. A

question arose before BRAY, J., whether that meant the rent payable, or what you may describe as the net result to the landlord. That is *Westminster and General Properties and Investment Co.* v. *Simmons* (2). It was attempted to be argued in that case that "standard rent" meant the net rent that you had to take into account whether the landlord was or was not paying rates and taxes, but BRAY, J., decided that rent meant the amount the tenant paid, the money rent certified in the lease, and you were not to go into the net result of rental or any provision as to rates and taxes. After that decision of BRAY, J., the Act of 1920 was passed, and it recognised that in certain cases you were to deduct rates and taxes from the amount of rent received. It included a definition of "net rent," which was the standard rent less the amount of rates where the landlord paid them. Parliament having, therefore, presumably had its attention called to a decision that "rent" by itself meant rent without taking into consideration rates and taxes adopted a new definition—"net rent," being the standard rent paid in Aug., 1914, less the rates and taxes if paid by the landlord, and applied that term "net rent" to two cases only. It allowed, by s. 2 (1) (c), (d), the landlord to increase the rent by the extra cost of repairs not exceeding 25 per cent. of the net rent, and a general increase not exceeding 15 per cent. of the net rent. Parliament put in a similar provision with regard to business premises, and there it stopped using the term "net rent." When the matter of increase of rates was brought to its attention, it allowed the landlord to increase his rent [s. 2 (1) (b)] by an amount not exceeding an increase in the amount for the time being payable by the landlord in respect of rates over the amount which he had paid on Aug. 3, 1914.

That remedy is still open to the landlord in the present case. She can increase her rent of £30 a year by the difference between the rates which she paid in 1914 for this house and the rates which she is paying today. But she wants to do more and terminate the tenancy on the ground that the premises are not subject to the Act of 1920. That depends upon whether when Parliament, in sub-s. (7) of s. 12, said "Where the rent payable . . . is less than two-thirds of the rateable value" it meant the rent which the tenant paid or the net rent which the landlord received. Personally I can give no other meaning to be ascribed to the phrase "rent payable" than the sum which the tenant is called upon to pay by way of rent, namely, £30 in the present case. It has been pointed out that in the form prescribed in the first schedule to the Act the words are: "Take notice that I [the landlord] intend to increase the rent of £ at present payable by you as tenant." I have no doubt that in the present case the landlord would have to put in £30 as the rent "at present payable by you as tenant." Whatever might be reasonable if we were considering what law we should pass and what would be a desirable provision to enact, Parliament having enacted in terms the rent payable, I cannot think that it meant anything else but the sum which the tenant paid. It is the tenant that Parliament was thinking of in this matter. It was the increase of rent on the tenant that it was stopping; and the "rent payable" appears to me to point to the sum payable by the tenant. For these reasons I agree with the judgment of LUSH, J., and the judgment which has been delivered by the Master of the Rolls.

YOUNGER, L.J.—I am of the same opinion. If I had found it possible as a matter of construction to place upon the word "rent" as used in s. 12 (7) of the Act of 1920 a meaning equivalent to the expression "net rent" as defined elsewhere in the Act I should very gladly have done so, for we cannot, I think, look at this subsection and see the measure of relief from the working of the Act which it purports to give without seeing this result. Unless that interpretation to the word "rent" can be properly given to that word, the subsection will, first of all, not have the operation which presumably was intended that it should have; and, secondly, in every case in which the landlord pays the rates, having regard to the height to which rates have risen in this country, it is not too much to say that there is probably no case to which the section will apply at all if the word "rent" does not mean "net rent." I apprehend that no district of England will

be found where the rates are paid by the landlord out of the rent in which the rent will ever be two-thirds of the rateable value. Further, in support of that view, if it were at all possible that rent should be interpreted as "net rent," there is the fact that "rateable value," with two-thirds of which the rent is to be compared, is rateable value ascertained upon the footing that no part of the rates falls on the landlord.

Comparing the rent with the rateable value, it would appear to be a proper subject of comparison that the rent should equally be free from deduction for rates or taxes on the part of the landlord. That view is further confirmed by this, were it possible for a natural interpretation to be given to it: If one refers to s. 2 (3) of the Act of 1920 one finds that there is a proviso inserted in that subsection by which it is declared that the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent. As applied to the subsection that we are now considering, that means this: If before this question arose this landlord and this tenant had met together and the landlord had said to the tenant, "I will no longer ask you to pay me £30 as rent if you in place of that rent will pay the rates and taxes," the effect of that arrangement would presumably have been under the Act to reduce the rent to a point which would have brought it expressly within the terms of sub-s. (7) of s. 12 without affecting the real relation between the parties in the way of payment and receiving of money except to the advantage of the landlord. Nevertheless, if that arrangement had been made, presumably the landlord would have been entitled under s. 12 (7) to say that the tenancy as so adjusted was no longer within the Act. But that arrangement not having been made—unless "rent" can be taken to mean "net rent"—the court is bound to say that the existing arrangement, which is in fact of least benefit to the landlord, is outside the Act.

Therefore there are very strong reasons for coming to the conclusion—if, as a matter of interpretation it were possible—that "rent" in this particular subsection means the equivalent of "net rent" as defined in the statute, but I arrive very reluctantly at the conclusion—strong as are the reasons for that construction and unforeseen as I think one must presume it to be from the point of view of the legislature—that the words "rent payable" as used in this subsection must as a matter of interpretation have the meaning of rent payable under the terms of the letting by the tenant to the landlord—in this case £30. I am driven to that conclusion by the use of the word "rent" elsewhere in the Act, and I am also confirmed reluctantly in that conclusion by the use of the words "standard rent" by Bray, J., in *Westminster and General Properties and Investment Co.* v. *Simmons* (2), where he held what has already been pointed out by Scrutton, L.J. As the lord justice has stated, the framers of the Act must be deemed to have known of that decision under which it was held that the amount payable by way of rent meant that amount irrespective altogether of whether the lessee does or does not have to pay the rates. Accordingly, it appears to me that it is not possible as a matter of interpretation to place upon the word "rent" any other meaning than the popular meaning in the sense of rent payable under the terms of the letting and not as "net rent." Reluctantly, therefore, I am bound to concur in the view expressed by my Lord and the lord justice that the judgment of Lush, J., was right and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Winter & Plowman*; *Montgomery, White & Harcourt* for *Thompson & Wright*, Horsham.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE

[House of Lords (Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor and Lord Wrenbury), May 6, 9, 10, July 1, 1921]

[Reported [1921] 2 A.C. 438; 90 L.J.K.B. 1089; 126 L.T. 35; 37 T.L.R. 919; 65 Sol. Jo. 733]

Declaratory Judgment—Discretion to grant—Exercise with utmost caution—Declaration as to amount of indebtedness—Claim in King's Bench Division Question which could be raised in redemption action in Chancery Division—Matter of importance to plaintiffs—Decision whether to redeem security R.S.C., Ord **25**, *r.* **5.**

In June, 1914, the appellants advanced to the respondents a sum of £77,000 in Russian roubles on the security of certain bonds which the respondents deposited with them. After the war of 1914–18 the respondents brought an action in the King's Bench Division (which was transferred to the Commercial Court) claiming a declaration that they were entitled to possession of the bonds on payment to the appellants of the amount of the loan in roubles, which, since 1914, had greatly deteriorated in exchange value, and not in sterling—a difference of more than £70,000.

Held (Viscount Finlay and Lord Wrenbury dissentiente): the discretion to grant a declaration must be exercised by the court with the utmost caution and if the declaration had been sought in the Chancery Division it would not, according to the prevailing practice, be granted unless the action had been so amended as to be turned into a redemption action in which the appellants as mortgagors must plead an offer to redeem, yet the question raised was not theoretical, but was a matter of real importance and interest to the respondents as enabling them to determine whether or not they would redeem the bonds, and, in exercise of the discretion, the declaration could be granted.

Notes. Considered: *Ruislip-Northwood U.D.C.* v. *Lee* (1931), 145 L.T. 208; *Odhams Press, Ltd.* v. *London and Provincial Sporting News Agency* (1929), *Ltd.*, [1936] 1 All E.R. 297. Referred to: *Prosperity* v. *Lloyds Bank* (1923), 39 T.L.R. 372; *London Passenger Transport Board* v. *Moscrop*, [1942] 1 All E.R. 97; *Marshall* v. *English Electric Co.*, [1945] 1 All E.R. 653.

As to declaratory judgments, see 22 Halsbury's Laws (3rd Edn.) 746–752; and for cases see 30 Digest (Repl.) 165 et seq.

Cases referred to:

(1) *Re Staples, Owen* v. *Owen*, [1916] 1 Ch. 322; 85 L.J.Ch. 495; 114 L.T. 682; 60 Sol. Jo. 321; 30 Digest (Repl.) 171, *222.*

(2) *Austin* v. *Collins* (1886), 54 L.T. 903; 30 Digest (Repl.) 172, *228.*

(3) *Faber* v. *Gosworth Urban District Council* (1903) 88 L.T. 549; 67 J.P. 197; 19 T.L.R. 435; 1 L.G.R. 579; 30 Digest (Repl.) 169, *208.*

(4) *Grand Junction Waterworks Co.* v. *Hampton U.D.C.*, [1898] 2 Ch. 331; 67 L.J.Ch. 603; 78 L.T. 673; 62 J.P. 566; 46 W.R. 644; 14 T.L.R. 467; 42 Sol. Jo. 571; 30 Digest (Repl.) 175, *244.*

(5) *Markwald* v. *A.-G.*, [1920] 1 Ch. 348; 89 L.J.Ch. 225; 122 L.T. 603; 36 T.L.R. 197; 64 Sol. Jo. 239; 2 Digest (Repl.) 210, *252.*

(6) *Earl of Mansfield* v. *Stewart* (1846), 5 Bell, Sc. App. 139.

(7) *Chaplin's Trustees* v. *Hoile* (1890), 18 R. (Ct. of Sess.) 27.

(8) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67, C.A.; 30 Digest (Repl.) 174, *239.*

(9) *Continental Tyre and Rubber Co. (Great Britain), Ltd.* v. *Daimler Co., Ltd.*, *Continental Tyre and Rubber Co. (Great Britain), Ltd.* v. *Tilling (Thomas), Ltd.*, [1915] 1 K.B. 893; 84 L.J.K.B. 926; 112 L.T. 324, C.A.; reversed [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 718, *4762*.

Appeal from an order of the Court of Appeal (BANKES, SCRUTTON, and ATKIN, L.JJ.), setting aside a judgment of ROCHE, J., sitting as a judge of the Commercial Court.

In June, 1914, the appellants, the Russian bank, advanced to the respondents a sum of £77,000 odd upon the security of certain Baku bonds and Chinese bonds. The loans were made at Petrograd. The respondents, the British bank, brought an action in the King's Bench Division, which was transferred to the Commercial Court, claiming a declaration that they were entitled to the possession of the Baku and Chinese bonds upon payment to the appellants at their London branch of 750,000 roubles or the equivalent thereof in British currency, an injunction to restrain the appellants from parting with the securities except by delivering up the same to the respondents, a receiver or other relief. ROCHE, J., held upon the construction of the correspondence which passed between the parties that the loan was a sterling loan and dismissed the action. He expressed a doubt whether the declaration asked for by the respondents ought to have been made in any court inasmuch as it was ancillary to the relief which would be granted in an action for redemption. The Court of Appeal made a declaration that the loan was a rouble loan, but expressed the opinion that it was not possible for the Commercial Court to grant any further relief in the action. The appellants appealed.

Douglas Hogg, K.C., and *W. P. Spens* for the appellants.

Sir John Simon, K.C., and *R. A. Wright, K.C.*, *Sir Cassie Holden* and *du Parcq* for the respondents.

The House took time for consideration.

July 1. The following opinions were read.

VISCOUNT FINLAY.—The appellants are a Russian bank with their head office in Petrograd and a branch in the city of London. The respondents are a British bank incorporated under the Companies Acts carrying on business in the city of London. The action was begun on Sept. 12, 1919. The British bank had borrowed from the Russian bank, depositing certain securities. The writ claimed a declaration that the British company were entitled to the possession of the securities upon payment to the Russian bank at their London branch of 750,000 roubles, or the equivalent value thereof in British currency. The question which the action was intended to settle is whether the loan which the Russian bank has made was a sterling loan or a rouble loan. Owing to the enormous depreciation in the value of the rouble the lenders would, if the loan was a rouble loan, be entitled to receive a mere fraction of the sum to which they would be entitled if the loan was a loan in pounds sterling.

The case has been argued at your Lordships' Bar on two points which are quite distinct, namely, whether a declaration of this nature can properly be asked for in a declaratory action, or whether it should be left for determination in a suit for redemption, and whether the loan in the present case was a sterling or a rouble loan.

[HIS LORDSHIP dealt with the evidence on the latter question and continued:] The jurisdiction to give a declaratory judgment rests on Ord. 25, r. 5, which is as follows:

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

This is a very wide power and it is obvious that it is one that should be exercised

with the utmost caution. The appellants (the Russian bank) objected to its exercise before ROCHE, J., and also before the Court of Appeal. We are informed that they also objected to the making of the order of Nov. 19, 1919, by which the case was transferred to the Commercial List. They ought, I think, to have made a much more determined stand at that point than they did, and they should have applied to have the action stayed on the ground that it was not a case for a declaration, and that the point should be decided in due course in a suit for redemption. There are grave objections to permitting a mortgagor to pick out one point and ask the court to give its opinion on it to help him to make up his mind whether it is in his interest to apply to redeem. The appellants, however, did press in both courts below the objection to making any declaration of the kind. I think they ought to have acted more decisively and at some earlier stage. But the matter is not one which concerns the parties merely; it concerns also the proper administration of justice, and it appears to me that we ought to express our opinion on the point whether the suit was rightly brought and should be entertained.

The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by counsel for the appellants. It should be exercised "sparingly": *Re Staples, Owen* v. *Owen* (1); "with care and jealousy": *Austin* v. *Collins* (2), 54 L.T. at p. 905; "with extreme caution": *Faber* v. *Gosworth U.D.C.* (3). STIRLING, J., took the same view on this subject (*Grand Junction Waterworks* v. *Hampton U.D.C.* (4), ([1898] 2 Ch. at p. 345)), and LORD STERNDALE, in *Markwald* v. *A.-G.* (5), said that there had been "too great a tendency of late years to ask for declarations." Of course, it is true that there are at present no courts in Russia in which it is possible to have questions of this kind conveniently decided, but if the case is one in which the English court are to exercise jurisdiction it must be in the regular way. Ord. 25, r. 5, was never intended to enable the mortgagor to pick out a point on which it might be convenient for him to know the law before applying to redeem and ask the Commercial Court to decide it for him in this summary way by declaration. It is also by no means clear that further evidence may not be available bearing upon the question on which a declaration is asked. This is indeed the vital question as between the mortgagor and mortgagee in the case of this loan. There ought to be a suit for redemption, and it would be, in my opinion, very rash to rush into a decision on this most important point in proceedings irregularly instituted and when it is uncertain whether we have all the proper materials before us. It is to be decided now I think that the order of ROCHE, J., should be restored, but, in my view, the proper course to take is to dismiss the action, giving the appellants the costs of this appeal but no costs in the courts below.

LORD DUNEDIN stated the facts, agreed with the finding of the Court of Appeal that the loan was a rouble loan, and continued: Though I have, for convenience' sake, dealt with the merits of the dispute between the parties, there is another question raised, and very strenuously argued, before your Lordships, which logically comes first; and that is, whether this was a proper case for granting such a declaration as the one asked and given. As I am aware that your Lordships are divided in opinion on this point, I have considered the question with repeated care. The power to grant a declaration rests on Ord. 25, r. 5, which is in the following terms:

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is, or could be, claimed or not."

It is said that it ought not to have been granted by the Court of Appeal in a case coming to them from the Commercial Court, in view of the fact that an action of redemption can only be raised in the Chancery Division. Now, the Chancery Division, as I understand it, is not in the strictest sense of the word a separate

court from the King's Bench Division. They are each of them parts of the High Court of Justice. I do not think, therefore, that it can be successfully urged that this is the case of a court granting a declaration in a matter where it was powerless to grant consequential relief. But then it is said that the granting of a mere declaration is a matter of discretion, and that that discretion ought to be shown in granting such declaration "sparingly," "with care and jealousy" and "with extreme caution." I confess that, to my mind, such expressions give little guidance. It may be that I am swayed by my experience of another system of law, but a rule which can be expressed in the form of a principle may well be proper to any legal system. Your Lordships are aware that the action of declarator has existed for hundreds of years in Scotland. It was praised, with envy, by LORD BROUGHAM, in your Lordships' House, in *Earl of Mansfield* v. *Stewart* (6) (5 Bell, Sc. App. at p. 160), long before the genesis of Ord. 25, r. 5. The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarised thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor—that is to say, someone presently existing who has a true interest to oppose the declaration sought. Applying this rule to the present case, this is in no sense a theoretical question. Moreover, it is obvious that it is a matter of real importance to the appellants, as guiding their rule of conduct, to know whether the loan is truly a rouble loan or a sterling loan. In the one case, they will probably redeem; in the other case, they will not. Further, there is no doubt that there is here secured a proper—and, indeed, the only—contradictor.

In my opinion, unless one is to rob declarations of much of their real value, this is a case in which a declaration ought to be given. It was argued by the appellants' counsel that this was a mere device on the part of the respondents to evade the liability which would necessarily ensue if they raised an action of redemption in which no progress could be made until they had become bound to pay what the courts should find due. But was it not a legitimate device? I think it was. May I here give an illustration of the same sort of position from one of the many decided cases in Scotland, *Chaplin's Trustees* v. *Hoile* (7). In that case an estate was held by a person in liferent under a disposition by a testator. The deed contained a provision by which the liferenter was debarred from voluntarily selling his liferent, and the provision was fortified by clauses of forfeiture and irritancy. The liferenter raised an action to have it declared that the clauses of forfeiture and irritancy were bad, and he called as defender the fiar in whose favour the clause of forfeiture would operate. Beside pleading on the merits the fiar tabled a plea to the competency of the action. The competency was sustained, and the action dismissed on the merits. LORD YOUNG, who gave the leading judgment in the Inner House, said that it would be out of the question to hold that the liferenter could only find out what were his rights by the test of actual experiment—an experiment that would be fatal to him if his views as to his legal position were wrong. I confess I can see no impropriety, but rather the reverse, in the respondents wishing to know whether they or the appellants were right on the point whether the loan was a sterling loan or a rouble loan before they made up their minds whether they should or should not set up an action of redemption. I should say the same if persons asking for declaration were contemplating an action of foreclosure.

I have had the advantage of reading the opinion which is about to be delivered by LORD WRENBURY. I note that he says that if a declaration such as this had been asked for in the Chancery Division the action would have had short shrift unless amended so as to turn it into an action of redemption. I accept my noble friend's statement, and I find that SCRUTTON, L.J., refers to this practice of the Chancery Division as the Ark of the Covenant. Perchance I venture the fate of Uzzah at the threshing floor of Nachon (2 Samuel, chap. 6), yet I say that, in my opinion, the practice is wrong; that it stultifies Ord. 25, r. 5, and denies justice to the litigant who asks it; and that the sooner it is altered the better. While these

A are my opinions, I should not feel justified in giving a vote which is virtually a casting vote on this ground, for I recognise that I can scarcely lay down by myself in this House rules for exercise of discretion by the English Courts when such discretion has not hitherto been administered so far as I can see by any rule. I can only hope that my remarks will be taken as obiter dicta and that when the occasion next arises they will be considered on their merits. But taking the B matter as one of pure discretion, then I find that a discretion has been exercised, and I do not see why I should interfere with it. And it is not sufficient reason, in my view, for denying a declaration that, if a declaration is not given and the respondents are driven to a fresh action, something may turn up which may help the appellants' case. I am, therefore, of opinion that the appeal should be dismissed, and that there should be no costs of this appeal, and I move accordingly.

C **LORD SUMNER.**—The defendants had such a branch in London as made service of a writ there good service and obliged them, though a foreign corporation, to appear or allow judgment to go by default. The action was, therefore, validly begun, and the High Court had jurisdiction to try it. This does not appear to be disputed or disputable. In what Division of the High Court ought such a writ to have been issued? It is endorsed thus:

D

> "The plaintiffs' claim is for (i) A declaration that the plaintiffs are entitled to the possession of [certain securities] upon payment to the defendants at their London branch of 750,000 roubles or the equivalent thereof in British currency. (ii) An injunction to restrain the defendants . . . from parting with [. . . the securities aforesaid] except by delivering up the same to the E plaintiffs against payment of 750,000 roubles. . . . (iii) A receiver. (iv) Further or other relief."

I think it is fairly plain that this endorsement is a claim for a declaration that the plaintiffs, as borrowers, are entitled to redeem a security on certain terms, and for intermediate relief, but that the words "redeem" and "redemption" have been advisedly omitted. The action, therefore, was one which the Judicature Act F assigns to the Chancery Division. It may be that in that Division the action might have been dismissed forthwith in the form in which it was begun, leaving the plaintiffs to commence another action claiming redemption in the usual way. In any case, it should not have been allowed to proceed without amendment of the endorsement, and, as will be seen later, I do not think anything more would have been heard of the claim for a declaration, but it is a different question which G arises now.

There is, no doubt, a preliminary question, I will not say a separable one, namely, whether the loan was a rouble loan or a sterling loan or, more precisely, whether in order to redeem the plaintiffs ought to tender roubles or sterling. This was not a mere question for the plaintiffs to decide for themselves with or without legal advice; a sufficient issue had arisen before writ between borrowers H and lenders to make the question one in actual dispute between them. The borrowers had asserted an obligation on their part to repay roubles only. The value of the rouble, or the absence of it, is such that nothing but meek assent on the lenders' part could be taken as less than a dissent from this suggestion. The lenders replied tactfully and tried to gain time, but plainly they had no mind to assent except on compulsion, and upon this point the parties were at arm's length. I For many years it has been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real, and not a fictitious or academic, question is involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, when at last the matter is brought before the court. I believe this practice, as hitherto applied, to be warranted by the rules, and that the decision of the Court of Appeal to that effect in the *Guaranty Trust Co. of New York* v. *Hannay & Co.* (8) was correct. I do not question that those who were concerned in endorsing this writ, issuing it out

of the King's Bench Division, and asking for transfer of the cause to the Commercial List as one proper to be transferred, acted in the belief that this course was correct, though to avoid awkward questions they avoided calling it a redemption action. For all that I am sure that what was done was wrong. The cause should have gone to the Chancery Division at the outset. It is, however, no easy matter to ensure this. The judge who takes the Commercial List cannot be expected, in the press of dealing with business which in other cases would go to a master in chambers, to scrutinise with distrust an application, which both sides concur in treating as proper, and although we were informed that in this case the gentleman who attended the summons on the defendants' behalf pointed out that the case was not one for transfer and may even have done so with insistence, the issue was certainly commercial in its nature and I can quite understand that the claim might pass muster; indeed, the spirit of the maxim, boni est judicis ampliare jurisdictionem, has not been unknown in dealing with these summonses to transfer. In any case, even after transfer, it would be possible on further information and after the close of the pleadings to discharge the order for transfer and either direct steps to be taken to remove the case to the proper Division or to stay it. The plaintiffs were at risk as to costs, and it was the defendant's affair, either by immediate appeal against the order to transfer or at a subsequent stage by a substantive application, to take this course. If they failed to do so, they laid themselves open to the charge of taking their chance of succeeding on the issue at the trial and of thus depriving themselves of the right to take the objection in any higher court. It does not seem to me that before ROCHE, J., much was really made of the fact that the action was a redemption action. From his judgment it would seem that he understood the objection to have been, in the first place, to the making of any declaration in the circumstances, and, in the second, to the grant of an injunction in any case. At any rate, the defendants took their chance of winning before him and they won.

For my own part, I think that, as a matter of discretion, it would have been better if no declaration of right had been made. I am far from saying there was no jurisdiction to do it, but practice is practice and if the trial of this preliminary question in the Commercial List was in itself desirable, it was for a judge of the Chancery Division, if he thought fit to do so, to direct an application to be made to the judge of the King's Bench Division in charge of the Commercial List, to hear and determine as a preliminary commercial question, if he in turn thought fit to do so, the issue whether this was a rouble or a sterling loan. This is not a mere question of etiquette; it is the only way of complying with the Act. I know that it seems roundabout and would have cost the parties sundry six and eightpences, but that is a small matter. Practitioners, who know their business, will always be able to keep down expense and short cuts are always perilous. As a matter of fact, the hearing of preliminary questions generally decides nothing, and they have to stand over till the trial. As it is, an action has been begun in the Chancery Division in the long run, which ought to have been brought there in the first instance. The declaration in effect was sought to enable the plaintiff bank to ascertain whether, by a mere tender of roubles, they could save costs in the redemption action, and I am sorry that they got any assistance in the matter.

There are two questions of discretion involved, namely, whether any declaration should have been made in the circumstances and whether any amendment of the pleadings should have been allowed. Both courts below have elected to make declarations and in each case, though in the alternative, the defendants sought a declaration in their favour. Further, the Court of Appeal has allowed the necessary amendment.

As to the first point, if your Lordships were to dismiss the action on the ground that no declaration either way should be made, what will be the result? The Chancery action will proceed and, as I know no power that your Lordships have to direct that the judge who tries another action shall pay no attention to judgments which your Lordships may think should not have been given in this action,

it is fairly certain that that learned judge will read them all, and that, as one party or the other will certainly be dissatisfied, whichever lead he follows, the case will presently come here again after a good deal more money has been spent. I cannot bring myself to advise your Lordships to refuse to decide the preliminary issue on this ground. It is true that in the result your Lordships' freedom is clogged by errors which occurred below, but this is always liable to happen in cases where a discretionary jurisdiction is exercisable in the court of first instance. Here only one of two answers is possible. If the case were such that the judgments given could be pronounced wrong in any event and so got rid of and the issue be freely raised in a new proceeding a different course might be taken. Then is there any ground for saying that the defendants were seriously surprised and taken at a disadvantage by the plaintiffs' abandonment of their pleaded case or any likelihood that further evidence will be forthcoming which ought to be heard? As the transaction is mainly on letters and telegrams, the whole of which were in counsel's possession and apparently were brought to the attention of ROCHE, J., the contention that the contract was not limited to the two letters pleaded cannot have surprised anyone, nor could their new mode of stating the contract have required more than an attentive re-perusal of a few documents. An amendment ought to have been asked for at the trial, but to allow it on appeal is a common exercise of discretion, which, little as I like it, I cannot say is wrong, and of course the court must have satisfied itself that in doing so no injustice was done to the defendants. As to the second matter, I can see no reasonable prospect that any fresh relevant evidence will be forthcoming hereafter so far as this issue is concerned. The defendants entirely failed to suggest what it would be or who would give it; nor should it be forgotten that this was a short-term loan and doubtless would have been cleared off within a few months but for the fact that the German occupation of Brussels put it out of the appellants' power to re-deliver the security. This was the beginning and for a considerable time was the whole of the difficulty. At least the lenders should then have prepared themselves to deal with any question arising upon redemption, when that should become practicable, and if they have failed to do so, they are not entitled to further indulgence or delay. In 1915 and 1916 the Russian office was, in fact, conferring about redemption with a representative of the borrowers, Mr. Wincey, and it was Mr. Friedland, the officer who signs one of the 1914 letters, who represented the lenders on those occasions. Was no information then given to the London branch for purposes of record? The plaintiffs' evidence at the trial in 1919 shows that Mr. Kôn, who negotiated the transaction in 1914, was then believed to be in Paris. The defendants did not question this. Their cross-examination of the plaintiffs' witnesses shows that they had considerable familiarity with the calculations by which the amount of the plaintiffs' requirements was originally fixed. In any case, the Court of Appeal could and would have given relief if a case of surprise had been made out before them. On the other hand, though counsel is instructed to say that the lenders' London branch knows nothing about the transaction beyond these letters and documents, no evidence was called on their behalf to found this statement. Before we can be asked to act on it I think someone should have been called to say what inquiries have been made and where the persons who would naturally know the facts now are, and what further evidence it is suggested that further time might make available. The matter cannot be one within the personal knowledge of the solicitors instructing counsel.

My conclusion is that, as it cannot be said that this is an action over which the High Court had no jurisdiction, or that the relief sought is relief which the High Court could not give, or that the respondents had no cause of action at all, and as the appellants have participated in and at first have profited by the irregularities which have occurred, we cannot at their instance simply dismiss the action. No useful purpose would be served by setting aside all proceedings subsequent to appearance beyond the expression of a costly censure, which can equally well be expressed otherwise, and as this course would cause much expense and delay, I

think we ought finally to deal with this issue, which has been sufficiently contested already. [His Lordship considered the question of the loan, expressed the opinion that it was a rouble loan, and concluded:] I venture to advise that the appeal should be dismissed, but without costs.

LORD PARMOOR.—The respondents were plaintiffs in an action against the appellants asking (inter alia) for a declaration that they are entitled to the possession of £60,000 Chinese government 5 per cent. gold bonds and £30,000 city of Baku 5 per cent. bonds upon payment to the appellants at their London branch of 750,000 roubles or the equivalent thereof in British currency. The action was brought in the King's Bench Division, and transferred to the Commercial List under an order made by Bailhache, J., on Nov. 19, 1919. It does not appear that at this stage any objection was taken either to the commencement of an action of this character in the King's Bench Division, or to its transfer to the Commercial List. Points of claim and points of defence were duly delivered, and the case came on for trial before Roche, J. The main question in issue between the parties was whether the loan was a rouble loan repayable in roubles or a sterling loan repayable in sterling. Roche, J., decided against the respondents that the loan was a sterling loan repayable in sterling, and dismissed the action, entering judgment for the appellants. Although it was not material to his decision, he expressed his opinion that there was a great deal in the contention of the appellants, that the declaration asked for ought not to be made, on the ground that the relief asked for was really ancillary to, or in lieu of, the relief which would be granted to a mortgagee of securities in a redemption action. In my opinion, it would certainly have been within the discretion of Roche, J., to have dismissed the action on this ground, without expressing any opinion on the merits. The respondents appealed to the Court of Appeal. The Court of Appeal granted an amendment, reversed the decision of Roche, J., on the merits, and declared that the loan made by the appellants to the respondents was a rouble loan repayable in roubles, and not a sterling loan. I think that the amendment was properly allowed, but the court were unanimously of opinion that it was not possible for the Commercial Court to grant the relief asked for in the action, and, therefore, refused to do more than grant a declaration. The view of the court was that by granting the declaration the court could afford considerable relief to the parties, and that it would be open to the respondents by other proceedings, such as they might be advised to take, to obtain the necessary relief with a view to obtaining possession of their securities. The result is that a declaration adverse to the appellants has been made by the Court of Appeal. Against this decision the appellants have appealed to this House. They are entitled to a reversal of the order which contains the declaration if they can show that on the merits the decision of the Court of Appeal should be set aside, and the judgment of Roche, J., restored. [His Lordship examined the evidence and concluded:] In my opinion the Court of Appeal was right in declaring that the loan made by the respondents to the appellants was a rouble loan repayable in roubles and not a sterling loan. The appeal should be dismissed without costs in this House, but the costs in the courts below should be left as they stand.

LORD WRENBURY.—We have here before the House a mortgagor who has brought his mortgagee into court claiming a declaration as to the amount due in respect of the mortgage, and a declaration that he is entitled to the mortgaged property on payment of that amount, but making no offer to redeem. He has obtained a declaration as to the amount due in respect of the mortgage. He did not bring his action in the Chancery Division. Had he done so and had he managed to get his action into court for trial, his counsel in opening must in the first five minutes have disclosed that the position is such as stated in the initial sentence of this judgment. He would have had short shrift. The judge would at once have asked whether he would then and there amend his pleading by adding an offer to redeem, and upon his refusing to do so would have dismissed his action

with costs. If, on the other hand, he had assented to add an offer to redeem, the mortgagee would have been assured his right to have sale or foreclosure if the amount due for redemption were not paid. But he brought his action in the King's Bench Division. It was tried in the Commercial Court. The plaintiff there obtained a declaration, but not the declaration he wanted, so he brought no action to redeem. He appealed. The Court of Appeal reversed the trial judge and gave him a declaration in his favour, the declaration he wanted. Thereupon he brought an action to redeem. That action is pending. Meanwhile the mortgagee has appealed to this House.

The first question, and that which as regard its general importance is, to my mind, far the most important question in the case, is whether the action ought ever to have been entertained at all, whether it ought not to have been dismissed, and whether your Lordships ought not now to dismiss it and to refuse to determine in this action what is the amount on payment of which the plaintiff, the mortgagor can redeem. My judgment is that the action ought to be dismissed and I offer no apology to your Lordships for giving my reasons for that opinion at length. Before doing so it will be convenient to outline the facts of which the result only is indicated above. In June, 1914, the appellants, the mortgagees, advanced to the respondents, the mortgagors, a sum of £77,000 odd upon the security of certain Baku bonds and Chinese bonds. One of the parties is a Russian bank. The loan was made in Petrograd. A very serious question has arisen between the parties whether the loan is repayable in sterling or in roubles. If the latter the mortgagor can redeem on payment of about, say, £5,000. If the former he must pay £77,000. In the action brought in the King's Bench Division, the mortgagor claimed a declaration that he was entitled to the possession of the mortgaged bonds upon payment of roubles, and an injunction to restrain the mortgagees from parting or dealing with the bonds. It seems that in the course of the proceedings the mortgagor moved for an injunction to restrain the mortgagees from collecting the money due on the coupons of the bonds. It is no matter for surprise that he failed. His ideas as to the relative rights of mortgagor and mortgagee seem to be unique. With this exception we have heard nothing of the claim for an injunction.

Some propositions require no argument, and may be stated as obvious. The rights of mortgagor and mortgagee are different at law, and in equity. At law the mortgagee is the owner of the mortgaged property. In equity his right in that respect is subject to the equity of redemption, but he has the benefit of sale or foreclosure if the mortgagor fails to redeem. Any cause of action as between mortgagor and mortgagee arises solely upon the mortgage contract. In equity the mortgagor can reach the mortgaged property, but only by enforcing the equity of redemption. If he sues he must offer to redeem, and if having done so he fails to redeem he will be exposed to sale or foreclosure. A redemption action is assigned business. It can be brought only in the Chancery Division. This being so, the mortgagor has in this case sued, not in the Chancery Division, but in the King's Bench Division. He is in the wrong court, and the Court of Appeal has rightly held that he is in the wrong court. He cannot, even if he offered it, have redemption in that court, and cannot be exposed to sale or foreclosure in that court. But, nevertheless, that court has made a declaration as to the mortgagor's liability which will bind the mortgagees when an action is brought as it has since been brought in the right court.

First, was there jurisdiction to entertain this action at all? I think there was, and for two reasons. The one is that the High Court of Justice is, after all, one court, although divided into Divisions and with certain business assigned to one Division to the exclusion of another. When this writ was issued it was issued in the High Court of Justice, and if it was issued in the wrong Division the proper course was not to dismiss it, but to transfer it to the right Division, where it could have been prosecuted if the plaintiff offered to redeem. The second is that there is jurisdiction in the court to determine the construction of any document, although I have no doubt at all that there are cases in which the court would

without hesitation refuse to exercise the jurisdiction. Suppose there were documents comprising a correspondence between a man and a girl, and an action were brought for a declaration that upon their construction there was or was not a promise of marriage with a view to bringing or not bringing an action for breach of promise of marriage according to the result. It may be that there would be jurisdiction in that case, but I can have no doubt at all as to the fate of such an action.

Assuming that there was jurisdiction in the King's Bench Division to entertain this action, the next question is whether Ord. 25, r. 5, applies, and if it does how the court ought to have acted in applying the rule. It may be, and I think it is the case, that to call Ord. 25, r. 5, into operation nothing more is essential than that "an action or other proceeding" shall be competent to the plaintiff and shall have been brought. I doubt, however, whether it applies when the action brought is not a competent action duly instituted in the proper court, but an action brought in the wrong court to evade the consequences which would ensue to the plaintiff for the benefit of the defendant if it were brought in the right court. The duty of the primary judge when this action was brought before him was I think to refuse to entertain it at all unless the plaintiff amended his pleadings by adding an offer to redeem, and then to have transferred the action to the court which alone could exercise the jurisdiction of the High Court in that class of action. By not taking this course he was depriving the defendant of his right as mortgagee to have in that action sale or foreclosure if the plaintiff failed to redeem. Upon this ground I incline to the opinion that Ord. 25, r. 5, does not apply at all.

Next, assuming that it does apply, the authorities are numerous that the discretion of the court to make a declaration "whether any consequential relief is or could be claimed or not" is to be most carefully and jealously exercised. The present case is so extreme that if the discretion is to be exercised in favour of entertaining an action for a declaration without relief in this case, I cannot at the moment picture any state of facts in which the court might not exercise its discretion in that direction—for it is here exercising its discretion with the result that the mortgagor gets a decision upon the point on which he desires it without exposing himself by an offer to redeem to the consequences of sale or foreclosure if the declaration should be against his interests. He seeks and has here sought successfully to put himself in a position to redeem or not to redeem according as the construction is for him or against him. Even upon the low ground of costs he has no right to bring his mortgagee into court and expose him to the defence of an action in which, even if the mortgagor is ordered (as, in my opinion, he certainly ought to be) to pay in any event all the costs of the action, the mortgagee will not be fully reimbursed.

So far as I can see, the principles upon which I have been insisting have been very imperfectly understood in the conduct of this case. If the mortgagee had adequately presented them to the attention of the court I should have expected to have traced the result more clearly in the judgments delivered. It is plain that something was argued upon it, but the trial judge, ROCHE, J., deals with it only by this sentence in his judgment:

> "It is said on behalf of the defendants that at all events this declaration that is asked for ought not to be made, and the injunction which is asked for ought not to be granted, because if it is a rouble loan, contrary to my decision, then the plaintiffs are not able to repay the persons who have made it in the currency of the country, or at the place where the payment ought to be made. Therefore, this relief that is asked for, that is really ancillary to or in relief of the relief which would be granted to a mortgagee of securities in a redemption action, ought not to be granted, and I think there is a great deal in that contention."

The ground which he assigns, namely "because if it is a rouble loan, &c.," shows that he was not appreciating the real point. In the Court of Appeal, SCRUTTON,

L.J., appreciated its importance up to a certain point, but I cannot think that he had obtained from counsel in argument an adequate explanation of the rights of the mortgagee in the matter particularly as regards sale or foreclosure and of the consequences of the course which the court was taking. When BANKES, L.J., affirmed that "the remedy which the plaintiffs sought was quite inappropriate," that the plaintiffs' real claim was to redeem, and the proper place to decide that was the Court of Chancery, he seems to be quite unconscious that upon those statements, which were quite accurate, he ought to have gone on to say that the court would not allow the plaintiffs to evade making the offer to redeem which the Court of Chancery would have required as a condition precedent to listening to them at all and the right of sale or foreclosure which would have ensued. The concluding paragraph of ATKIN, L.J.'s judgment is this:

> "Having decided that I entirely agree that it really was not possible for the Commercial Court to grant the relief asked for in this action, I think there are many matters to be determined that would be much better determined, and, indeed, can only be properly determined according to the rules of the Chancery Division, and, to my mind, the right view is to merely make this declaration, which does, I think, afford considerable relief to the parties, in the sense that it sets at rest, at present at any rate, the important question in difference between them, and having determined that it would be open to the plaintiffs by other proceedings, such as they may be advised, to obtain the necessary relief with a view to obtaining possession of their securities."

I cannot trace in this that the point I have been discussing was present to his mind. I have felt my responsibility in this case to be the greater because not one of the four judges before whom this case has come below is a judge who has been trained in courts of equity, and (a fact which is to myself the keenest matter of regret) no one of your Lordships with whom I am privileged to sit in deciding this case hails from Lincoln's Inn. In these circumstances, I feel my voice to be indeed a voice crying in the wilderness, but I have felt bound to cry even though I cry in vain. I am, indeed, in the present case in a worse plight than I was in the full Court of Appeal in the *Continental Tyre Case* (9), for, although I there found myself standing alone, there was in that case (being in the Court of Appeal) an opportunity (and it was utilised) of putting the matter right in your Lordships' House. But from the decision of this House there is no appeal nor even opportunity for reconsideration even by the House itself.

So far I have not even touched upon that which is to the parties the really important point, namely, whether this is a loan repayable in sterling or a loan repayable in roubles. I do not intend to say anything whatever upon that point. If I did, I should be doing the very thing which, as I think, the court below had no business to do. Had your Lordships been divided two and two upon that point I might have been compelled to do violence to my own convictions and to have expressed an opinion upon it. But as a majority of your Lordships think it to be a rouble loan it is immaterial whether I agree in that view or not. I ought, I think, to add (although in the circumstances it is not a matter of moment) that I am far from satisfied with the course taken in the Court of Appeal in giving leave to amend. The plaintiffs' case down to reply in the Court of Appeal was rested upon two documents and two documents only, namely, those of June 1 and 3. In reply to the Court of Appeal they asked for and obtained leave to amend by introducing on the question of construction several other subsequent documents and it was upon those subsequent documents that they succeeded. It may be, and I think it is the fact, that the defendants might then have asked that the further hearing should stand over and that they should be allowed to call further evidence in the Court of Appeal. But I do not think the plaintiffs can be allowed to treat that which was done as a fair trial of this new case. It would have been only right and just, I think, that the court itself should have allowed the amendment only upon the condition that the defendants should have an opportunity of

advancing further evidence if they desired to do so. The action and the proceedings in the action are, to my mind, alike unsatisfactory. I am, however, satisfied to rest my judgment in this case upon the ground which I have discussed at length. In my opinion, the action, in the absence of an offer to redeem, ought never to have been entertained. It ought, I think, to have been dismissed with costs at the outset. It ought, I think, to be dismissed now, and the mortgagees ought to have their costs throughout the proceedings. It is scarcely necessary to add that the matter cannot be set right by the plaintiffs now making (if they are minded so to do) an offer to redeem, for in the Division in which this action is found, there is no power to make the order proper in a redemption action.

Solicitors: *Freshfields & Leese*; *Roney & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

URQUHART LINDSAY & CO., LTD. *v.* EASTERN BANK, LTD.

[King's Bench Division (Rowlatt, J.), November 24, December 5, 1921]

[Reported [1922] 1 K.B. 318; 91 L.J.K.B. 274; 126 L.T. 534; 27 Com. Cas. 124]

Bank—Letter of credit—Irrevocable credit—Sale of goods—Payment against documents—Refusal of payment by bank on instructions of buyers—Breach of contract—Measure of damages.

The plaintiffs contracted with buyers in Calcutta to manufacture and ship over several months a quantity of machinery at prices mentioned in a pro forma invoice, subject, however, to a stipulation that, should the cost of labour or wages increase, there would be a corresponding advance in the prices to be paid by the buyers. The goods were to be paid for by means of a confirmed irrevocable credit to be opened by the buyers in favour of the plaintiffs with a bank in this country, who were to pay the plaintiffs for each shipment as it took place. In pursuance of this arrangement, the defendant bank, at the instance of the buyers, issued to the plaintiffs a document, by the terms of which the bank undertook, up to a certain amount and up to a certain limit of time, to pay the plaintiffs to the extent of £70,000 against bills drawn on the buyers, accompanied by corresponding invoices and shipping documents. The plaintiffs manufactured the machinery and shipped two instalments, receiving payment from the bank under the letter of credit. Before the third shipment was made, the buyers, finding that the plaintiffs were including in their invoices an increase to the prices originally quoted in respect of a rise in the cost of wages and materials, instructed the bank only to pay so much of the next invoices as represented the original prices. These instructions were obeyed by the bank. The plaintiffs thereupon cancelled the contract and claimed damages from the bank as on a repudiation of the contract by the buyers.

Held: the credit being irrevocable, the bank had committed a breach of contract when they refused to pay the amount of the invoices as presented, and, therefore, the plaintiffs were entitled to damages based on the difference between, on the one hand, the value of the materials left on their hands and the cost of such as they would have further provided, and, on the other hand, what they would have been entitled to receive for the manufactured machinery

from the buyers, the whole being limited to the amount they could, in fact, have tendered before the expiry of the letter of credit.

Notes. Referred to: *Prosperity* v. *Lloyds Bank* (1923), 39 T.L.R. 372; *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen*, [1951] 2 All E.R. 866.

As to letters of credit, see 2 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 3 DIGEST 253–255.

Action in the commercial list.

In December, 1919, the plaintiffs contracted and agreed with the Benjamin Jute Mills Co., Ltd., Calcutta, to manufacture for them certain machinery for delivery f.o.b. Glasgow to the amount of £64,942. The contract contained (inter alia) the following terms and conditions: (i) that in the event of any increase taking place in wages or costs of materials or transit rates, or any further reduction taking place in working hours, the plaintiffs' prices would be correspondingly increased; and (ii) that the Benjamin Jute Mills Co., Ltd., should open in this country a confirmed irrevocable banker's credit to the amount of £70,000. In pursuance of instructions received from the Benjamin Jute Mills Co., Ltd., the defendants, on Feb. 14, 1920, wrote to the plaintiffs a letter in the following terms:

"4, Crosby Square, London, Feb. 14, 1920. Messrs. Urquhart Lindsay & Co., Ltd., Dundee.—

Dear Sirs,—We beg to advise that under instructions received from our Calcutta branch we are prepared to pay you the amounts of your bills on Mr. B. N. Elias, managing agent, the Benjamin Jute Mill Co., Ltd., Calcutta, to the extent of, but not exceeding, £70,000 in all (say seventy thousand pounds). The bills are to be accompanied by the following complete documents covering shipments of machinery to Calcutta, are to be drawn payable thirty days after sight, and are to be received by us for payment on or before April 14, 1921. Signed invoices in duplicate. Complete sets of bills of lading made out 'to order,' endorsed in blank, and marked by the shipping company 'freight paid.' Policies of insurance against marine and war risks. This is to be considered a confirmed and irrevocable credit, and the bills should bear a clause to the effect that they are drawn under credit No. 102 dated Calcutta, Jan. 15, 1920. Kindly acknowledge receipt.—Yours faithfully, M. HARKNESS, manager."

Relying on the terms of that letter, the plaintiffs bought raw material and did work and labour on the machinery during the year 1920. Further, the plaintiffs made certain shipments under the contract and tendered documents to the defendants in terms of the letter of Feb. 14, 1920, to the extent of £6,555 6s. 9d.: (a) bill of exchange for £1,177 5s. 3d., and shipping documents presented as on Feb. 11, 1921, in respect of shipments per steamship *City of York* and steamship *Melford Hall*; (b) bills of exchange for £2,000 and £2,883 9s. 4d., and shipping documents presented on Feb. 28, 1921, in respect of shipment per steamship *Melford Hall*; (c) bill of exchange for £494 12s. 2d. and shipping documents presented on Mar. 16, 1921, in respect of shipment per steamship *Manipur*. On Feb. 18, 1921, the defendants wrote to the plaintiffs in the following terms:

"4, Crosby Square, London, Feb. 18, 1921. Messrs. Urquhart Lindsay & Co., Dundee.—

Dear Sirs,—We refer to our letter of Feb. 14, 1920, advising you that we were prepared to pay you amounts not exceeding £70,000 in all in connection with shipments of machinery which you are making to the Benjamin Jute Mills Co., Ltd., Calcutta, and we beg to advise having now heard from Calcutta that should it be necessary for you to include an item in your invoice for extra cost of labour that this extra amount must be referred to the Benjamin Jute Mills Co., Ltd., Calcutta, before we may pay same.—Yours faithfully, R. P. YOUNG, sub-manager."

The defendants refused to meet the bills of exchange until a date subsequent to

April 14, 1921, when the confirmed credit had expired. In fact, the defendants honoured the bills of exchange on May 9, 1921. By their points of claim, the plaintiffs alleged that the defendants' letter of Feb. 18, 1921, was a repudiation and a breach by the defendants of the contract contained in the letter of Feb. 14, 1921, and that the plaintiffs had suffered damage and lost the profit which they otherwise would have made. There was no available market for the goods. The plaintiffs claimed damages for breach of contract and a declaration and order that the defendants pay them £6,555 1s. 9d., the total of the three bills of exchange. By their points of defence, the defendants alleged that, by the letter of Feb. 14, 1921, they agreed to pay the invoice value of the shipment, being the contract price, without any addition in respect of any increase, but did not undertake to pay any invoice containing any increase on such invoice value. They admitted that they refused to pay the bills so presented by the plaintiffs. By letters dated April 11 and 13, 1921, they agreed to pay under protest drafts drawn to include extra labour charges, and on or about May 9, 1921, paid to the plaintiffs the full amount of the three bills of exchange mentioned in the points of claim. They denied that the letter of Feb. 18, 1921, was a repudiation, and they contended that the damage alleged to have been suffered by the plaintiffs was too remote and irrecoverable.

Neilson, K.C., and *C. P. Blackwell* for the plaintiffs.
Stuart Bevan, K.C., and *Sir H. Cassie Holden* for the defendants.

Cur. adv. vult.

Dec. 5. **ROWLATT, J.**, read the following judgment: In this case, the essential facts are few and simple. The plaintiffs in this country arranged with the Benjamin Jute Mills of Calcutta to manufacture and ship to them over a series of months a quantity of machinery at prices mentioned in a pro forma invoice; subject, however, to a stipulation not infrequently insisted on by manufacturers at the date when the arrangement was made that, should the cost of labour or wages advance there would be a corresponding advance in the prices to be paid by the buyers. The goods were to be paid for by means of a confirmed, irrevocable credit to be opened by the buyers in favour of the plaintiffs with a bank in this country, who were to pay the plaintiffs for each shipment as it took place. In pursuance of this arrangement, the defendants, at the instance of the buyers, issued to the plaintiffs a document the terms of which I need not rehearse in detail, it being sufficient to state that the defendants undertook up to a certain amount within a certain limit of time to pay the plaintiffs against bills drawn on the buyers accompanied by corresponding invoices and shipping documents, the amount of the invoices. This credit was by its terms to be irrevocable and the invoices were to be for machinery. There can be no doubt that, on the plaintiffs acting on the undertaking contained in this letter of credit, consideration moved from the plaintiffs, which bound the defendants to the irrevocable character of the arrangement between the defendants and the plaintiffs; nor was it contended before me that this had not become the position when the circumstances giving rise to this action took place.

Having received the letter of credit, the plaintiffs proceeded to manufacture the machinery and actually shipped two shipments of it, receiving payment from the defendants under the letter of credit against bills accompanied by invoices and other documents called for by that instrument. Before the third shipment was made, the buyers, finding that the plaintiffs were including in their invoices an addition to the prices originally quoted, in respect of an alleged rise in the cost of wages or materials, instructed the defendants only to pay so much of the next invoices as represented the original prices. These instructions (very unfortunately, as I think, from many points of view) the defendants obeyed. The plaintiffs, however, refused to part with the documents representing their goods unless they received the full amount of the invoices, and, on the defendants maintaining their position, cancelled the contract as to further shipments, as on a repudiation by

A the buyers; and have brought this action against the defendants claiming as damages the loss on material thrown on their hands, and loss of profits; in other words, the same damages as they would claim against the buyers on their repudiation of the contract. After the action had been commenced, the defendants paid to the plaintiffs the amount of the invoices, the original refusal of which had caused the dispute.

B In my view, the defendants committed a breach of their contract with the plaintiffs when they refused to pay the amount of the invoices as presented. Counsel for the defendants contended that the letter of credit must be taken to incorporate the contract between the plaintiffs and their buyers; and that, according to the true meaning of that contract, the amount of any increase claimed in respect of an alleged advance in manufacturing costs was not to be included in C any invoice to be presented under the letter of credit, but was to be the subject of subsequent independent adjustment. The answer to this is that the defendants undertook to pay the amount of the invoices for machinery without qualification, the basis of this form of banking facility being that the buyer is taken for the purposes of all questions between himself and his banker, or between his banker and the seller, to be content to accept the invoices of the seller as correct. It D seems to me that, so far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit. The buyer having authorised his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller, and not by way of retention by the buyer.

There being thus, in my view, a breach of contract, the question arises what E damages the plaintiffs can recover. The point is a new one, and not free from difficulty. It is, of course, elementary that, as a general rule, the damages for non-payment of money is only the money itself. If, for instance, the defendants had merely undertaken to pay the price of goods as and when shipped, nothing being said about the undertaking being irrevocable within limits of time and amount, such undertaking would become binding only in respect of each shipment F on its being made, the successive shipments being the separable considerations for the separable undertakings referring to them respectively; and the engagement could be revoked at any time as to future shipments. In such a case, the damages in case of a refusal to pay for any shipment made before revocation would be merely the amount owing in respect of the shipment. In the present case, however, the credit was irrevocable; and the effect of that was that the bank really G agreed to buy the contemplated series of bills and documents representing the contemplated shipments just as the buyer agreed to take and pay for, by this means, the goods themselves. Now, if a buyer under a contract of this sort declines to pay for an instalment of the goods, the seller can cancel and claim damages on the footing of an anticipatory breach of the contract of sale as a whole. These damages are not for non-payment of money. It is true that non-payment H of money is what the buyer was guilty of; but such non-payment is evidence of a repudiation of the contract to accept and pay for the remainder of the goods; and the damages are in respect of such repudiation. I confess I cannot see why the refusal of the bank to take and pay for the bills with the documents representing the goods is not in the same way a repudiation of their contract to take the bills to be presented in future under the letter of credit; nor, if that is so, why the I damages are not the same. Counsel for the defendant argued that the sellers should go on shipping and sue the bank toties quoties. Why should they be put in this position vis à vis the bank any more than vis à vis the seller? What is the difference for this purpose between the obligation to take the goods and pay the invoice and the obligation to take bills and documents representing the goods and pay the invoice? The whole purpose of the arrangement is that the seller shall have a responsible paymaster in this country to protect him against the very contingency which has occurred and the very damages which he claimed.

Counsel for the defendants, however, further argued that the plaintiffs ought to

have minimised their damages by tendering bills only for so much of the invoices as, in view of the attitude of the buyer, the bank would pay; letting their goods and relative documents go against this reduced payment, and drawing other bills for the balance. These bills they would have to discount without documents, and, of course, without excluding recourse against themselves; but if the buyers refused them acceptance and the plaintiffs had to pay them, they could then, if right in their position, says counsel for the defendants, still sue the defendants. This is merely to contend that the plaintiffs should have let their documents go against such part of their invoices as the bank would pay, and sue them for the rest. This is not minimising damages but abandoning their right to be paid against documents.

The damages to which the plaintiffs are entitled are the difference between, on the one hand, the value of the materials left on their hands and the cost of such as they would have further provided, and, on the other hand, what they would have been entitled to receive for the manufactured machinery from the buyers; the whole being limited to the amount they could, in fact, have tendered before the expiry of the letter of credit. A subsidiary question arose whether the plaintiffs are entitled to interest on the money paid after action for the goods that had actually been shipped. I do not see on what ground I can award this interest.

The plaintiffs must have the costs of the action.

Judgment for plaintiffs.

Solicitors: *J. D. Langton & Passmore*; *Coward & Hawksley, Sons & Chance.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

R. *v.* CHESHIRE COUNTY COURT JUDGE AND OTHERS. Ex parte MALONE

[Court of Appeal (Lord Sterndale, M.R., Scrutton and Younger, L.JJ.), March 16, 17, 1921]

[Reported [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 37 T.L.R. 546; 65 Sol. Jo. 552]

County Court—Jurisdiction—Ancillary relief—Declaration—Injunction—No claim for damages in plaint—Application at trial to amend, by claiming damages within jurisdiction—"Demand"—Claim for declaration that act illegal—County Courts Act, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 56.

The county court has no jurisdiction to grant a declaration or an injunction except where that relief is ancillary to a valid money claim within the limit of the county court's jurisdiction.

The applicant was expelled from a registered trade union of which he was a member and for eleven weeks he was unable to get any work. He brought an action in the county court against the union, claiming (i) a declaration that his expulsion was illegal, and (ii) an injunction restraining the union from acting on the resolution expelling him, but he did not claim damages. At the trial his counsel applied for leave to amend the claim by adding a claim of £88—namely, loss of wages at £8 a week for eleven weeks. The county court judge refused to allow the amendment, and struck out the action on the ground that under s. 56 of the County Courts Act, 1888, the county court had no jurisdiction to grant a declaration or an injunction except as ancillary to a claim for damages within the limit of the jurisdiction of the county court. On an application by the applicant for a mandamus directed to the county court judge,

Held: (i) in the absence of a claim set out in the plaint for a sum of money within the jurisdiction of the court and established, the court had no jurisdiction to grant a declaration or an injunction; the applicant did not make the money claim necessary to give the court jurisdiction when he sought to amend the proceedings by adding a claim for £88; nor did his claim for a declaration that he had been illegally expelled amount to a "demand" within s. 56 of the County Courts Act, 1888 [see now s. 39 of the County Courts Act, 1959] which rendered the making of a money claim unnecessary; and, therefore, he was not entitled to succeed.

Notes. The provisions relating to the jurisdiction of the county court are now to be found in the County Courts Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 126 et seq.). See also notes in HALSBURY'S LAWS SUPPLEMENT amending paras. 276 to 325 of text and notes in vol. 10 of HALSBURY'S LAWS (3rd Edn.).

Explained: *Simpson* v. *Crowle*, [1921] 3 K.B. 243. Distinguished: *Davey* v. *Robinson*, [1923] 1 K.B. 563. Applied: *Smith* v. *Smith*, [1925] All E.R.Rep. 390. Followed: *De Vries* v. *Smallbridge*, [1927] All E.R.Rep. 613. Considered: *Upton* v. *Farmer* (1930), 142 L.T. 526. Referred to: *Humber Conservancy Board* v. *Federated Coal and Shipping Co.*, [1927] All E.R.Rep. 626; *Woodrow* v. *Trawlers (White Sea) and Grimsby* (1929), 141 L.T. 676; *Bonsor* v. *Musicians' Union*, [1954] 1 All E.R. 822.

As to ancillary jurisdiction in the county court, see 10 HALSBURY'S LAWS 142–144; and for cases see 13 DIGEST (Repl.) 381–383.

Cases referred to:

(1) *Stiles* v. *Ecclestone*, [1903] 1 K.B. 544; 72 L.J.K.B. 256; 88 L.T. 294; 51 W.R. 411; 47 Sol. Jo. 257; 67 J.P.Jo. 76, D.C.; 13 Digest (Repl.) 381, *103*.

(2) *Kelly* v. *National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236; 113 L.T. 1055; 31 T.L.R. 632; 59 Sol. Jo. 716, C.A.; 13 Digest (Repl.) 381, *101*.

(3) *Burghes* v. *A.-G.*, [1911] 2 Ch. 139; 80 L.J.Ch. 506; 105 L.T. 193; 27 T.L.R. 433; 55 Sol. Jo. 520; 30 Digest (Repl.) 169, *210*.

(4) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67, C.A.; 30 Digest (Repl.) 174, *239*.

(5) *Leader* v. *Rhys* (1861), 10 C.B.N.S. 369; 30 L.J.C.P. 345; 9 W.R. 704; 142 E.R. 495; 4 L.T. 330; 7 Jur.N.S. 1199; 13 Digest (Repl.) 387, *158*.

(6) *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 27 T.L.R. 289; C.A.; 43 Digest 93, *972*.

Rule Nisi for an order of mandamus directed to His Honour JUDGE PARSONS sitting at Birkenhead County Court requiring him to hear and determine an action in which Thomas Malone, the applicant for the rule, was plaintiff.

For seven years before Nov. 17, 1919, the applicant, who was twenty-seven years of age, was a first-class member of the No. 6 branch of the United Society of Boilermakers and Iron and Steel Shipbuilders, a trade union registered under the Trade Union Acts, 1871 to 1913. By a resolution dated on or about Sept. 2, 1919, the district committee of the society purported to expel the applicant from the society for non-payment of a private debt due from him to another member of the society, and on Oct. 17, 1919, the applicant was, in fact, expelled from the society and deprived of his right to the benefits provided by its rules. At the date of the applicant's expulsion he was working at Ellesmere Port for the Manchester Pontoon Company, and was earning £8 4s. a week on an average. On the afternoon of Oct. 17, 1919, the district delegate of the society telephoned to the foreman under whom the applicant was working, saying that the applicant was to be discharged forthwith. In consequence of this message the applicant was discharged forthwith, and for eleven weeks he was unable to get any work or to earn any money. The applicant's solicitor wrote to the society a letter stating that the applicant had a

claim for £150 damages. On Nov. 24, 1919, the applicant commenced an action against the society in the Birkenhead County Court, and by the particulars attached to the plaint note he claimed (a) a declaration that the resolution was (i) ultra vires the society and void and illegal and contrary to public policy, and (ii) ultra vires and void as being unauthorised by the constitution of the society or by any of its rules or by any of the provisions of the Trade Union Acts, and (b) an injunction restraining the society, its officers, agents, or servants, or the district committee from acting upon the resolution or any part thereof. About Dec. 20, 1919, a meeting took place between the applicant and the society's representatives, and a compromise of the dispute was arrived at, whereby the applicant was to be reinstated as a member as from Jan. 1, 1920. On or about Jan. 6, 1920, the applicant again obtained work, but he had lost his right to superannuation benefit under r. 26 of the society's rules, which provided that every first-class member of the society arriving at the age of fifty-five years, having thirty or more years of continuous membership, and in benefit, should be entitled to superannuation according to a certain scale. On Jan. 16, 1920, notice of special defence to his action in the county court was given by the society on the following grounds: (i) That the county court had no jurisdiction to entertain the claim, as the plaintiff ought under the rules to have appealed from the district committee to the society; (ii) that the county court had no jurisdiction to entertain the claim by virtue of the Trade Disputes Act, 1906, s. 4, and the Trade Union Act, 1913, s. 3 (1). The case came on to be heard before His Honour Judge Parsons on Feb. 24, 25, and 26, 1920, when the judge overruled the society's objections to the jurisdiction, and also refused an application by the plaintiff's counsel to amend the particulars of demand by adding a claim for £88 damages, being eleven weeks' loss of wages at £8 a week. On Mar. 3, 1920, the judge decided that he had no jurisdiction to hear and determine the action and ordered it to be struck out, but stated in his judgment that, if he had had jurisdiction, he would have granted the declaration asked for, though not an injunction. He also found as a fact that, if damages had been claimed, they would not have exceeded £100. The grounds on which the judge decided that he had no jurisdiction were not pleaded by the society, and were not raised by them in argument, but were taken by the judge himself, and were to the effect that the county court had no power to grant an injunction unless it appeared on the face of the particulars of the claim that the amount of the damage sustained was necessarily within the county court scope—i.e., £100 [the limit is now £400: see County Courts Act, 1959, ss. 39, 40], and that it had no power to make a declaration where there was no independent cause of action within the jurisdiction. In support of his decision that he had no jurisdiction to grant an injunction, the judge referred to *Stiles* v. *Ecclestone* (1). He also pointed out that in *Kelly* v. *National Society of Operative Printers' Assistants* (2), the Court of Appeal had struck out the judgment for damages, on the ground that the plaintiff could not recover damages from the society of which he was himself a member, and, although they had left the injunction standing, the question whether a mere claim for a declaration and an injunction without damages was within the county court jurisdiction was not considered. The plaintiff's application for a rule came on to be heard before the Divisional Court (Lord Reading, C.J., and Darling and Avory, JJ.) on Oct. 15, 1920, when their Lordships decided that, as a larger claim than £100 had never been put forward in the action and as the plaintiff had applied to amend by adding a claim for £88 damages he had "claimed" damages within the meaning of s. 56 of the County Courts Act, 1888, and the county court had jurisdiction to grant an injunction or a declaration even although the damages were not recoverable in law, and that, therefore, there must be an order to the county court judge to hear and determine the action. The rule was accordingly made absolute. From that decision the defendants appealed.

Merriman, K.C., and *O. S. Hooper* for the defendants.
W. J. Lias and *Elliott Gorst* for the plaintiff.

By s. 89 of the Supreme Court of Judicature Act, 1873 [see now County Courts Act, 1959, s. 74]:

> "Every inferior court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction, for the time being, have power to grant, and shall grant, in any proceeding before such court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

LORD STERNDALE, M.R.—I am not going into the facts more than to say that Malone was expelled by his trade union on a ground which I need not particularise. It was a ground which the learned county court judge held—and would have acted upon the holding, if he had held that he had jurisdiction—was insufficient and wrong and gave Malone the right to complain of the conduct of his trade union. But the learned county court judge was of opinion that he had no jurisdiction to entertain the action in the form in which it was before him. It becomes necessary, therefore, to see what the nature of the action was. Before doing so it is important to see what the jurisdiction of the county court is.

The jurisdiction of the county court is derived from the County Courts Acts, 1888 and 1903 [see now County Courts Act, 1959, ss. 39–75]. Section 56 of the Act of 1888 provides that:

> "All personal actions, where the debt, demand, or damage claimed is not more than £50 [now £400] whether on balance of account or otherwise, may be commenced in the court. . . ."

Therefore the jurisdiction, in so far as this case is concerned, is limited to a personal action where the debt, demand, or damage claimed is not more than £100. Section 89 of the Judicature Act, 1873 [see now County Courts Act, 1959, s. 74], provides that:

> "Every inferior court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim equitable or legal . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

The powers conferred by that section are, therefore, powers of giving relief, and in so far as they give the right to grant injunctions or to make declarations, they are injunctions or declarations in aid of the relief which the county court has power to give. That is, I think, important to notice for this reason. What was claimed in the present case was a declaration and an injunction. Now, unless s. 89 of the Judicature Act, 1873, gives a power to make declarations, there is no power in the county court to make declarations on this part of its jurisdiction. There is, as is well known, in the High Court now a power, under Ord. 25, r. 5, by which declarations of rights may be made although no consequential relief is claimed or can be given. That jurisdiction was clearly established in the High Court by what are ordinarily called Form IV cases, among them being *Burghes* v. *A.-G.* (3) and by *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4). That order and that power, however, have nothing whatever to do with the county court, which derives its power to make declarations, if at all, under s. 89 of the Judicature Act, 1873, as one of the reliefs, remedies, or combination of remedies, which it can give.

The question is whether the county court has jurisdiction to do that in the present case. I think it follows, if I am right in what I have said, that the declaration or the injunction can only be granted where there is an action such as is described in s. 56 of the County Courts Act, 1888, and the plaintiff has established a right to relief in that action. If the declaration or the injunction is merely ancillary to the other relief as I think it is, then you must have established the right to the other relief in the action. Having said that, one has to look to see what the nature of the action was.

There is no doubt that this was an attempt—not an improper attempt—to extend the rights of parties in the county court by asking for a declaration instead of for damages or anything of that sort. The particulars of demand were:

> "A declaration that a resolution of the district committee of the Birkenhead branch of the defendant's society, passed on or about April, 1919, whereby it was resolved (inter alia) that the plaintiff be expelled from the society was ultra vires the society and void and that the resolution was illegal, unconstitutional and against public policy."

Then a declaration that the resolution was ultra vires and void on other grounds; a declaration that the action of the executive committee in certain matters was wrong, and "an injunction restraining the defendants, their officers, agents, or servants, or the said district committee, from acting upon or enforcing the said resolution or any part thereof," and there it stops. There was no claim for damages at all. There is nothing to show what the money value of this remedy, if it were granted, would be. It is possible that it might be very considerably over the limit, and it was argued that, because no damages were claimed, it could not be said to be outside the limit of the county court. I do not agree with that at all. There is no indication of a claim for damages here. There is simply an omission to make any claim at the time, and that there was not originally intended to be any claim for damages is shown by the fact that during the course of the case counsel for the plaintiff asked for leave to claim damages. He did not, in the first place, mean to negative his right to make the claim, he simply left it out in order, quite rightly if he could, to get within the jurisdiction of the county court, whereas, if he had quantified it and put it into money, it would have been very difficult at the time the claim was originally lodged consistently with the attitude which up to that time had been taken up to bring it within the limit of the county court jurisdiction, because a claim that had been made in the correspondence was £150. Therefore the claim was left out in order that the same remedy and same advantage might be got without naming the sum. It seems to me that that cannot be done. It entirely ignores the limited jurisdiction of the county court. It is not at all difficult to suppose cases in which declarations of right might be asked for in this way, which might actually involve many thousands of pounds in money; and if such a case as that could be got into the county court simply by leaving out the technical claim for damages, the limit of the county court jurisdiction might be entirely abolished whenever there was a right to ask for a declaration. That cannot be done.

At the hearing of the case objection was taken to the claim on the ground that no damages were claimed, and therefore the claim could not be quantified. Thereupon counsel asked to be allowed to amend his particulars of claim, by claiming £88 for loss of wages in consequence of the action of the defendants. The learned county court judge refused that application to amend. He had a perfect right to do so. It was a matter for his discretion, and I think he might very well say: "No, you have framed this claim without a money demand for damages in order to escape any difficulty as to the jurisdiction, and I will not now allow you to amend by introducing a claim which is nominally within my jurisdiction."

I say nominally for this reason. The amount eventually claimed was only a part of the money result that might have followed if the declaration had been granted. The plaintiff would, perhaps, have been entitled to that amount for loss of wages, but he would also have been restored to an amount of benefit in the society which

A he had lost by the expulsion, and which had not been regained by his reinstatement, because he was only reinstated as a new member. The learned county court judge, at any rate, had a discretion to grant or refuse that application, and he refused it. Then he said, in accordance with the law as it now stands, that, even if the claim for £88 had been made, it could not succeed because of the decision in *Kelly* v. *National Society of Operative Printers' Assistants* (2). That was a decision of this B court, which binds us till the House of Lords reverses it, that such damages as were claimed here cannot be recovered in law, because a member of a voluntary society like this cannot sue the society for damages which he alleges he has suffered by their action. I do not think it necessary to go into the reasons which the court gave for its decision. That, as I have just remarked, is the law until the House of Lords alters it. Therefore the learned county court judge said that, even if he had C taken that question of damages into account, there could have been no recovery of any damages, and he held that he had no jurisdiction to grant either the injunction or the declaration which was asked for. I think that he was right. I myself think—I am prepared to go so far as this—that a claim for such a declaration as this cannot be brought in the county court without anything to limit the money result of it, so as to disregard the limit of the jurisdiction of the county court D altogether. As I have pointed out, it would be possible by simply omitting a claim for damages to bring into the county court an action for a declaration which might involve a money result of many thousands of pounds. I do not think that that can be done. I do not think it matters very much whether you say that the limit must be put in the particulars or not. My personal opinion is that it ought to be put in the particulars, but, at any rate, where there is a claim of this kind, which cannot E be tested by any money test upon the face of the claim, it seems to me not a claim which can be made in the county court.

In my opinion, however, there is another objection. As I have said, this power of granting an injunction or declaration is simply ancillary to a right of relief in such an action as is mentioned in s. 56 of the County Court Act, 1888. When the learned county court judge once ascertained that according to *Kelly* v. *National* F *Society of Operative Printers' Assistants* (2), he had no power to give any damages at all, he had no power to give the ancillary relief of either injunction or declaration. Therefore, on that ground also I think that he was right. It is true that in *Kelly* v. *National Society of Operative Printers' Assistants* (2) the Court of Appeal, dealing with that case, in which the county court judge and the Divisional Court had given damages and an injunction and a declaration, struck out the claim for damages on G the ground that they were not recoverable, but left the injunction and the declaration standing. It was argued that that is an authority, which we must follow, that there may be such a declaration in the county court, although there cannot be an action for damages. If the point had been under the consideration of the court in that case, I should have felt bound to follow it. But it is obvious that the point which is now before us was never even remotely hinted to the court, and that the H court from beginning to end there dealt with the whole matter as if there were no distinction between the jurisdiction of the county court and the jurisdiction of the High Court. Having regard to those considerations I do not think the decision in that case binds us upon that point.

For these reasons I think that the Divisional Court was wrong, and that the learned county court judge was right. I cannot agree, with the greatest respect, I with the Lord Chief Justice sitting in that court that, when an application was made to amend, there was then a claim which would come within s. 56. That section refers to a claim that is made according to the Act of Parliament and the rules of the county court, and not to some additional items which the plaintiff seeks to bring in in the course of the case when he finds himself in a difficulty, because he has not included it in his particulars of claim. Nor can I agree, I say with respect, to one of the grounds of Darling, J.'s decision in the present case that "demand" is something very much wider than "debt or damages." It is difficult to say what a "demand" is, but it must be one which does not exceed £100. It,

therefore, must be a demand of the same nature as "debt" and "damages" which can be estimated in money, and does not exceed £100. I think that the distinction which AVORY, J., drew in the present case between limit of jurisdiction and the existence of a good cause of action is a sound one. But I do not think it is of importance in the present case, because, as soon as it is ascertained that the main relief claimed in a personal action—namely, a sum of money—cannot be recovered because it exceeds the statutory limit, then at once the jurisdiction of the county court ceases and the court cannot therefore give the ancillary relief either by way of injunction or declaration. Therefore, I think that the decision of the Divisional Court should be reversed, and the decision of the county court judge restored with costs here and below.

SCRUTTON, L.J., stated the facts and continued: It seems to me that the first and fundamental question is, What is the meaning of s. 56 of the County Courts Act, 1888 [now County Courts Act, 1959, s. 39], which confers jurisdiction on the county court?

> "All personal actions, when the debt, demand, or damage claimed is not more than £100, whether on balance of account or otherwise, may be commenced in the court . . ."

That carries the natural implication that actions which do not come within that description cannot be commenced in the court. In my view, there are two possible meanings of that section. First, it might be said that the section means that all personal actions may be commenced unless there is a money claim of more than £100, in which case, if you have no money claim at all, you have not a personal action with a money claim of more than £100. Having regard to the fact that the county court is an inferior court, obviously intended to be limited to actions of small monetary consequence, I cannot take the view that the section means that any question in a personal action may be raised provided you do not make a money claim in respect of it. You may be raising questions of enormous importance both as to character and ultimate business results, and I cannot think that Parliament intended such questions to be decided by an inferior court, if any money claim was omitted from the particular plaint. The other view is that it is essential to the jurisdiction of the court that there should be a money claim not exceeding £100. That, I think, is the true view of the section, and in that view it is essential that the plaint should show that the money claim made does not exceed £100.

I do not know that it is necessary for us finally to decide it, but I am inclined to agree with the view of the Master of the Rolls that, the county court being a court of inferior jurisdiction, the plaint should show that the matter is within the jurisdiction of the court, and, therefore, that the plaint itself should state the limit of the claim or of the value of the subject-matter so as to show that the case comes within the jurisdiction of the court. At any rate, the authorities seem to go to this, that if in the course of a case it appears by the evidence that the money claim, or the value of the matter in dispute, exceeds the statutory limit the jurisdiction of the judge ceases. For instance, to take one case only, in detinue you do not start with a money claim, you start with a demand for the return of the goods, and you go on to state "or their value" in the case of goods which are not returned, and in *Leader* v. *Rhys* (5), where the value of the piano for which detinue was brought was £130, KEATING, J., said (10 C.B.N.S. at p. 374):

> "The plaintiff, therefore, could not have entered a plaint in the county court; for the moment it appeared that the value for which the plaintiff was suing exceeded £50, that court could have proceeded no further."

That is to say, where the claim turns out to be in excess of the jurisdiction, the moment it is made to appear to the judge that there is that excess of value of claim, his jurisdiction under the statute ceases. The same result happens when it appears that there is no money claim at all, if, as I have stated, the statute requires a quantified money claim to found jurisdiction in the county court.

In the present case there is no claim for money. There is intentionally no claim for money. I do not take the view of the Divisional Court that you make a claim for money when you ask to amend the proceedings in which there is no claim for money by adding such a claim. What you are doing is asking to introduce a claim into a proceeding and if that application is refused there is no money claim in the proceeding, the proceeding remains as it was before, without a money claim. I cannot, therefore, agree with the first reason given by the Divisional Court. The second reason given by the Divisional Court is this, and for part of it a great deal may be said. You must not confuse jurisdiction with weakness of claim. The judge may have jurisdiction to decide a claim although he decides against it, which I understand is the view taken particularly by AVORY, J., and also by the Lord Chief Justice. But, in my view, where the jurisdiction of the county court depends upon a money claim not exceeding a particular amount, and requires that there should be a money claim, then once it is decided that there is no such claim in law the jurisdiction of the court to do anything further ceases.

It may be put as a matter of jurisdiction ceasing. It may be put in this way. The principle is that there must be a money claim. If there is no valid or justifiable money claim the ancillary remedies, such as injunction and declaration, cannot be granted. For that reason I should dissent also from the second ground on which the Divisional Court reversed the judgment of the county court judge. To take AVORY, J.'s own illustration. Supposing that a plaint is brought in the county court against a highway authority for damages for non-repair of a highway. I agree that it is a personal claim, and there is jurisdiction in the court to hear it. But, in my view, the moment the county court judge decides that there is no valid claim, because no claim against a highway authority for damages for non-repair will lie, his jurisdiction to do anything further ceases. It would not be open to the county court judge to go on to say: "I will make a declaration that the highway is a public highway repairable by the highway authority." To take a case of detinue, when once it appears either that there is no money claim respecting the thing detained, or that the value of that thing exceeds the limit, the ordinary jurisdiction would cease and the court could not make a declaration that the plaintiff was the owner of the thing detained.

As I understood the argument for the plaintiff in the present case it was this. It is quite true there is here no claim for debt and no claim for damages, but there is a demand, and a demand need not be followed by a money claim; and I understood the demand suggested was a demand that the plaintiff should be reinstated as a member of the society from which he had been expelled, and he said such a demand could be enforced by means of a declaration in a personal action. I cannot help thinking that would have much astonished the learned men who first used the phrase "personal action." I think they had not the advantage of being acquainted with such a thing as a declaration, and they would have been very much puzzled by an action for a declaration in a case where no other relief was claimed. I refer merely to one authority—BLACKSTONE'S COMMENTARIES, vol. 3, p. 117—and I find:

> "Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs."

The idea of something which was not a claim for money founded on contract, or on tort, but was a demand for a declaration, never, I think, occurred to SIR WILLIAM BLACKSTONE, and I do not think, when the legislature used the phrase "personal actions," it was thinking of any such matter as declarations, which were practically unknown in the county court. It was thinking of the old distinction which is dealt with in the statute between personal and real actions, for, having dealt with personal actions in s. 56, the legislature goes on to real actions, or actions similar to real actions in s. 59, where it deals with the recovery of lands and tenements [see s. 48 of County Courts Act, 1959]. For that reason I think that the ingenious

suggestion of the plaintiff's counsel in the present case as to the meaning to be given to "demand" in s. 56 fails. A

I am glad it is unnecessary for us in the present case to go into the question of the exact relation of *Kelly* v. *National Society of Operative Printers' Assistants* (2) and *Osborne* v. *Amalgamated Society of Railway Servants* (6). I do not understand them. In *Kelly's Case* (2) the court decided that a person in the position of the present plaintiff could not recover damages against a society of which he was a B member, because he himself was a member of that unincorporated body, and you cannot, on a contract between yourself and yourself, recover damages against yourself. But the court in *Kelly's Case* (2) did grant a declaration and injunction to the plaintiff against himself, without apparently seeing that there was any inconsistency. If they had considered this point we should have been bound by their decision, whatever the result of it was. But I cannot find any trace in the judg- C ment that it occurred to anybody to consider the effect of the limited jurisdiction of the county court upon that point. In *Osborne's Case* (6) a declaration and injunction in the High Court were granted to the plaintiff, who was a member of an unincorporated body which he sued, and I do not see that in that case the point taken in *Kelly's Case* (2) about damages was considered by the court—that is, whether a man can get damages or any other relief against himself or against a D body by its trade name which includes himself. It may be that in some future trade union litigation that important point may come up for consideration. I only desire at present to guard myself from expressing any opinion one way or the other about it, except by saying that I do not understand the relation of *Kelly's Case* (2) and *Osborne's Case* (6) to each other. I think that, for the reasons I have given, the reasons given by the Divisional Court for reversing the decision of the county E court judge, on the proper view of the statute, fail, and that the county court judge was, therefore, right in the view which he took that he had no jurisdiction to give relief by way of declaration or injunction in a case where no money claim was made to found his jurisdiction under s. 56 of the County Courts Act, 1888. For these reasons I agree that the judgment of the Divisional Court should be reversed.

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YOUNGER, L.J.—I am of the same opinion. One has only to look at the particulars of demand filed by the plaintiff in the county court to see that his action against the defendant society was based, and was intended to be based, exclusively upon the rights declared to be competent in respect of such a complaint by the Court of Appeal in *Osborne's Case* (6). The form of the particulars of demand follow almost textually, with the necessary adaptations, the statement of claim in G *Osborne's Case* (6), and this is of importance, particularly in view of one of the arguments put forward on behalf of the plaintiff. The fact that this action is based upon *Osborne's Case* (6) necessarily connotes that the plaintiff was deliberately refraining from bringing against the defendants any claim which could, on the true construction of the Trades Union Act, 1871, s. 4, be said to have been withdrawn from the cognisance of any court by virtue of that section. The decision on H *Osborne's Case* (6) was that the claim there successfully made by the plaintiff was one of which the court could take cognisance because it was not a claim within that section. The plaintiff's claim here is equally a claim not within that section, and it is one which he is in a position in a proper court to maintain, whether in point of fact the rules of this particular society are rules in restraint of trade or are not. I But as soon as one finds that the plaintiff has instituted proceedings which exclude from their range any matter of complaint which is referred to in s. 4 of the Trades Union Act, 1871, one finds also that there is necessarily excluded from those proceedings any claim for damages in respect of such claim, and the result is that the plaintiff, maintaining this action on the footing of the claim in *Osborne's Case* (6), if he be entitled to claim anything in the nature of damages, the damages must be other than those covered by s. 4. In other words, they must be just such damages as he did at one stage of these proceedings particularise—namely, the loss that he

had sustained through his expulsion from the defendant society, in that for a particular period of time he was unable to obtain employment elsewhere.

Unfortunately for the plaintiff in the present case it has been decided by the Court of Appeal in *Kelly's Case* (2) that no court, neither a county court, nor any other court, is entitled to award damages in respect of such a claim brought by a member of a trade union against his union. These are not damages cognisable by any court at all as founding any legal claim to relief. Accordingly, until *Kelly's Case* (2) is set aside by some tribunal superior to this, such a plaintiff as we have here must be in a position to say that his action was within the jurisdiction of the county court, although it was an action in respect of which no sum, however small, could have been awarded to him by the judge, however successful in his claim he might be. In other words, the question that has to be determined on this appeal is whether so long as *Kelly's Case* (2) stands unreversed the plaintiff, a member of a trade union, is entitled to maintain an action in the county court for the relief which the plaintiff obtained in *Osborne's Case* (6)—that is to say, for a declaration and an injunction followed by no award of any money compensation. That depends entirely upon the question whether such an action or such a claim is within s. 56 of the County Courts Act, 1888, the first sentence of which I will read:

> "All personal actions, where the debt, demand, or damage claimed is not more than £50 whether on balance of account or otherwise, may be commenced in the court. . . ."

The first question one asks oneself is this. What are the personal actions which under that section may be brought into the county court? As a matter of construction, I myself have no doubt that the words which follow the words "personal actions"—namely: "when the debt, demand, or damage claimed is not more than £50, whether on balance of account or otherwise" are all of them words of qualification of the words "personal actions," and that no personal action with regard to which you are unable to say that it is one where the debt, demand, or damage claimed is not more than £50, whether on balance of account or otherwise, is a personal action within the jurisdiction of the County Courts Act under this section at all. If I had any doubt upon the question whether the section could be construed as extending, as has been suggested, to actions for declarations or other ancillary relief, or for any form of order that may be made in any personal action not in itself involving the payment by the defendant of any sum of money, it would, I think, be resolved by the last words of the sentence which I have read that "all such actions"—that is to say, the personal actions which are previously referred to—"shall be heard and determined in a summary way." It appears to me that those words undoubtedly confirm the view that one would, apart from them, take of the section, that what is referred to are actions of the description stated resulting in a money claim and money payment, either in the form of debt or damages, and that it is not intended to comprise vague things like declarations which, not resulting in payment directly by the defendant to the plaintiff, may, nevertheless, affect their relations in respect of property which in point of value is beyond any limit of value in any section of the County Courts Act.

Accordingly, it does appear to me that the answer which has to be given to the question: May an action asking for the relief in *Osborne's Case* (6), in respect of which no kind of award can be made at all by the court which would secure for the plaintiff any payment in money, be brought within s. 56 of the County Courts Act, 1888? is in the negative. The Divisional Court have held otherwise, and, so far as I understand the judgment of the learned judges, one of the grounds of their decision was based upon *Stiles* v. *Ecclestone* (1), where there was on the plaint no demand or claim for any sum of money at all, and an injunction only was asked for. But that was an action for breach of a covenant in restraint of trade by a former master against his servant, under which a sum of £40 was fixed as the sum to be recoverable, by way of liquidated damages or a penalty, in the event of any breach. Therefore, whether you regard the claim made in that action as being one in respect

of breach of contract, which would necessarily carry with it nominal damages, or whether, as the court in that case were inclined to regard it, as an action brought in respect of a breach of contract in respect of which no more than £40 damages could be recovered, it seems to me that it is entirely different from the present case because there the claim for damages, whether substantial or considered as being nominal only, brought the case entirely within the cognisance of the county court. The difference between that case and the present is that here there is no sum, however small, which the county court judge in this case could legally award to the plaintiff in respect of damages.

DARLING, J., in the court below, took the view that, while that was right, so far as the words of s. 56 "debt" or "damage" were concerned—that is to say, he felt that no action would lie within s. 56 unless the debt were a legal debt and the damages were damages which could be legally recovered—nevertheless, he was, I think, somewhat reluctantly led to the conclusion that he could hold that the action was maintainable by reason of the use of the word "demand." In other words, he seems to have taken the view that an irrecoverable debt or irrecoverable damages might within the meaning of s. 56, be converted into a "demand." When you find that the irrecoverable demand, because this we must assume to be the meaning of the word, must be nevertheless limited to £100, one does ask oneself why there should be any limit in money at all in respect of the thing that is irrecoverable, and when one asks oneself that question, I think one sees that the demand equally with the debt, and equally with the damage, must be a legal one, of which the court can take cognisance. Accordingly, it does seem to me that none of the reasons so far given by the Divisional Court is such as to show that s. 56 gives any jurisdiction.

I take the other case which was put by AVORY, J., in the court below, when he figured to himself an action brought against a highway authority for non-repair of a highway, in respect of which damages are not recoverable, but which he seemed to think might nevertheless be within the cognisance of the county court. AVORY, J., did not say in express terms that, in such an action, where damages were not recoverable, it would be permissible for the county court to make a declaration and grant an injunction. If he had thought of that point I think he would have hesitated to say that it would have been permissible for the county court to award such an injunction or to make such a declaration, because I think that, having regard to the express terms of s. 56 of the County Courts Act, 1888, and also to s. 89 of the Judicature Act, 1873, which enables a county court to give all relief and all proper relief in respect of actions within its cognisance, it must follow that there can be no declaration made by the county court, nor can there be any injunction granted by the county court, except in a personal action in respect of which it has originally jurisdiction.

If one arrives at the conclusion that the personal action which has been framed in the way I have described, and, for the reasons that I have given is not on its true construction within s. 56, then it appears to me to follow that there can be no incidental relief in an action which is itself without the cognisance of the county court judge. I think it may very well be that an action would not necessarily in the first instance appear on the face of the proceedings to be beyond the cognisance of the court, so that some actions would have to stop in limine, and others might have to go on to a particular stage until the obstacle, which prevented the further proceedings under the terms of the statute, became apparent. But so soon as it is made plain to the county court judge that the action is not within s. 56, and that he is being asked to deal with a dispute which is beyond his jurisdiction, then it becomes at once his duty to stop the proceedings and dismiss the action. For these reasons I am of opinion that the view taken by the Divisional Court was erroneous, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *John A. Behn*, Liverpool; *Arthur Sugden*, for *R. Barrow-Sicree*, Liverpool.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

JOHN STIRK & SONS, LTD. *v.* HALIFAX ASSESSMENT COMMITTEE AND OTHERS

[KING'S BENCH DIVISION (Sankey and Branson, JJ.), November 8, 1921]

[Reported [1922] 1 K.B. 264; 91 L.J.K.B. 258; 126 L.T. 338; 86 J.P. 9; 38 T.L.R. 83; 66 Sol. Jo. 236; 20 L.G.R. 43; 2 B.R.A. 838]

Rates—Valuation list—Validity—Need for individual valuation of each hereditament—Supplemental list made by adding fixed percentage of existing valuations.

For a valuation list to be valid each hereditament inserted therein must have been valued individually and the value so arrived at set against the appropriate hereditament.

Where, therefore, overseers made a supplemental valuation list in which the valuation of the hereditaments therein was arrived at by increasing by a fixed percentage the values appearing in the list in force without any consideration of the value of any individual hereditament,

Held: that the list was unfair and unequal, and, consequently, invalid.

Notes. Since this decision considerable alteration has been made in rating law. The present provisions are summarised in HALSBURY'S LAWS, 1960 Supplement, title RATES AND RATING.

Considered: *Hunter* v. *Swindon Assessment Committee*, [1922] 2 K.B. 630; *Shillito* v. *Hinchcliffe*, [1922] All E.R.Rep. 703; *Ladies' Hosiery and Underwear, Ltd.* v. *West Middlesex Assessment Area Assessment Committee*, [1932] All E.R.Rep. 427; *R.* v. *Cornwall County Valuation Committee, Ex parte Falmouth Borough Council*, [1937] 2 All E.R. 266. Distinguished: *Norwich Rating Authority* v. *Norwich Assessment Committee*, [1941] 3 All E.R. 225. Considered: *Pratt* v. *North-West Norfolk Assessment Committee*, [1945] 2 All E.R. 78.

As to valuation lists under recent amending statutes, see 32 HALSBURY'S LAWS (3rd Edn.) 99 et seq. For cases see 38 DIGEST 579–582. For statutes see HALSBURY'S STATUTES (2nd Edn.), vol. 20, pp. 1–30, and also vol. 32, p. 670, vol. 33, pp. 414, 583, vol. 35, p. 377, vol. 37, p. 900, and vol. 39, p. 1146.

Case Stated by quarter sessions for the West Riding of Yorkshire on an appeal by the ratepayers, Messrs. John Stirk & Sons, Ltd., against a rate made for the Halifax Union.

It was agreed that on Jan. 14, the assessment committee of the Halifax Union passed the following resolution:

"Resolved that, pursuant to the provisions of the Union Assessment Committee Act, 1862, this committee hereby orders and directs that a supplemental valuation list shall be made for each and every parish and township in the union, and that such supplemental list shall contain a list of all rateable properties in the said parish or township contained in the valuation list in force under the following descriptions, viz., mills or factories; workshops; warehouses; shops where the tenant does not reside on the premises or where so residing are over £52 gross rental; public houses over £52 gross rental; cinemas, theatres, music halls and other places of entertainment; and that in such supplemental list, the rateable value appearing in the valuation list in force shall be increased by £25 per centum over the rateable value of each individual assessment of properties of the descriptions aforesaid, and that with the addition of such £25 per centum, the rateable value of each individual assessment as aforesaid shall be inserted in such supplemental valuation list in substitution for the rateable value appearing in the existing valuation list as aforesaid. Further, that the gross estimated rental of each of the properties of the description aforesaid so inserted in the said supplemental valuation list

shall be such a sum as is arrived at by adding to such rateable value a percentage of the same amount as was allowed in respect of the properties of the descriptions aforesaid in the existing valuation list."

On Feb. 14, 1920, a supplemental valuation list in and for the parish of Halifax in the Halifax Union was made by the overseers of the poor for the parish of Halifax. This supplemental valuation list was put in evidence before the quarter sessions. There was no evidence of any individual valuation of any of the rateable hereditaments having been made, but the supplemental list was arrived at by adding 25 per cent. to the gross and net values of such hereditaments in the previous list as were included in the resolution, together with all hereditaments comprised in the following classes, which the overseers dealt with on their own initiative: banks, offices, cricket and football clubs, clubs, stables, lodging-houses, restaurants, garages, billiard rooms, markets, parcels offices, schools and education offices, golf club, technical school, quarry and workshop, bonding warehouse, &c. The supplemental valuation list did not include residential property other than that attached to business premises. On April 1, 1920, a rate for the relief of the poor was made in accordance with the supplemental valuation list, and demand therefor was duly made on the appellants. On June 1, 1920, the ratepayers gave notice in writing of their objection to the supplemental valuation list, on the ground that it was an "unfair and irregular imposition of 25 per cent. advance in assessment." The ratepayers having failed to obtain relief from the assessment committee, on Sept. 20, 1920, gave notice of appeal to quarter sessions on the grounds (inter alia) were: that the said list was unfair, unequal, incorrect and not made by a duly appointed person. The court of quarter sessions found as a fact that no individual valuation had been made of any of the hereditaments concerned for the purpose of the list, and that the effect of the increase of the value of the premises in accordance with the resolution was to make the list unfair and unequal. Accordingly, quarter sessions held that the supplemental valuation list and the rate made thereon were bad in law, and that the ratepayers were entitled to the relief claimed, and accordingly allowed the appeal.

Talbot, K.C. (*J. A. Greene* with him), for the assessment committee.
Waugh, K.C. (*R. A. Shepherd* with him), for the ratepayers.

SANKEY, J.—The question for the opinion of this court is whether the court of quarter sessions were right in coming to the determination to which they came. Counsel for the assessment committee says that we should first of all consider the two points upon which the ratepayers grounded their objections and were successful. They never took the point, he says, that their particular assessment was excessive. The only points that they took were (i) that the assessment was improperly made, and (ii) that other assessments, that is to say, the assessments of the residential properties, had not been raised. He says, with regard to (ii), that the residential assessments had not been raised and that no notice of objection had been given by the ratepayers to any of the occupiers of those residential properties, and he refers to s. 6 of the Poor Rate Act, 1801, and to ss. 18 and 19 of the Union Assessment Committee Act, 1862 [repealed by Local Government Act, 1948]. I desire to point out, not because it is conclusive of the case, but because it shows the inconvenience of this practice, how difficult it would have been for the ratepayers to have given notice. I do not know, nor, indeed, are we told, how many occupiers of residential properties there are in the Halifax union, but it seems to me that it would be most inconvenient, if not almost impossible, for the ratepayers to have given notice to every one of the persons who occupy such residential properties upon the ground that they, too, ought to have had their assessments raised. Counsel says that notice might have been given to two or three in order to test the matter. That, I think, would have tested the matter as far as the two or three are concerned, but it would have made no difference to the vast majority of the residential occupiers whose assessment had not been raised at all. But I think that the objection to this particular form of procedure goes

far deeper than that, and it is necessary, in order to explain the view that we take of the case, to go somewhat carefully into the sections which bear upon this matter.

Before going to those sections it appears to me that it is necessary to make two observations—first of all, that there is not the slightest suggestion that the overseers did anything which was wrong and improper in any moral sense, although I daresay they did something which was highly convenient, and it appears to me that what has occurred here is (i) that they have not made a valuation list within the meaning of the Act at all, and (ii) that they have not, as I think they ought to have done, made assessments on individuals, but have made assessments on classes.

With regard to the first of those two points, namely, that they have not made a valuation list within the meaning of the Act at all, that depends upon the proper construction to the placed upon certain sections of the Union Assessment Committee Act, 1862. It is to be observed that the persons who have the primary duty to prepare a valuation list are the overseers, and by s. 14 of that Act it is enacted:

> "Subject to any order as hereinafter referred to which may be made by the [assessment committee] the overseers of each parish in the union shall within three calendar months after the appointment of such committee make a list of all the rateable hereditaments in such parish with the annual valuation thereof respectively."

That looks to me as if, at any rate in the original list, the overseers have to consider each of the individual hereditaments and set it out with its annual value. [As stated above the Act of 1862 has been repealed. For the present law with regard to the preparation of valuation lists and the procedure thereon, see HALSBURY'S LAWS, 1960 Supplement, Rates and Rating, para. 909 et seq. By s. 1 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the list is to be prepared by the valuation officer, and, by s. 21 of the Rating and Valuation Act, 1925, there is to be inserted in it "such particulars with respect to every hereditament in the rating area and the value thereof as may be prescribed."] Sections 18 and 19 show the method by which objections can be made to the valuation list, and it is only necessary to refer to s. 18 for the purposes of my judgment:

> "Any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein; or on the ground of the omission of any rateable hereditament from such list, may at any time [after a certain time] give to the committee and to the overseers a notice in writing of his objection."

[See now Local Government Act, 1948, s. 40.] Section 19 governs the procedure of the committee when it meets to hear objections. So far I have only dealt with the original valuation list, s. 14, and I again repeat that it seems to me the duty of the overseers is to make a list of all the rateable hereditaments in each parish with the annual value thereof respectively. It is perfectly true that s. 20 gives the committee power to correct any valuation list, and when corrected to approve the same. So far we have been dealing with the original valuation; but from time to time the valuation list may be altered and s. 25 gives power to the overseers to prepare supplemental valuation lists in case of addition to and alterations in the rateable property of the parish. Section 26 (probably the most important section in this case) is the section under which the committee in this case have acted. It provides that:

> "The committee by their order may from time to time, where they see fit, upon the application of any person aggrieved by the valuation list in force in any parish, or where they themselves think the same expedient, direct a new valuation of all or any of the rateable hereditaments in such parish and a

new valuation list in substitution for such valuation list as aforesaid, or a supplemental list in substitution for any part thereof, or in addition thereto, to be made by the overseers." A

Stopping there for a moment, that gives a power to the committee to direct the overseers to make a new or a supplemental valuation, or they may appoint a person for the purpose of making it, and then B

"the committee may in directing such new valuation and the making of such new or supplemental valuation list, give and make all such or the like directions and provisions in relation thereto as they are authorised under this Act to give and make in relation to the valuations and valuation lists first directed and authorised to be made under the Act."

Therefore, s. 26 does not give them any greater power in making the new valuation C list than they had in making the original valuation list. Counsel for the ratepayers says, first of all, that the committee has no power to pass a resolution of the character they did. The answer of counsel for the assessment committee is that that does not carry the matter any farther, because, even if they have not power under s. 26 to pass a resolution of the character they did, they have power under s. 20 to correct the valuation list, and, when corrected, to approve the same. I D think the matter of the resolution goes a good deal farther than that, and that the point in this case seems to be whether there was any valuation list made within the meaning of the Act? It appears to me that it cannot be said that any list within the meaning of the Act was made. The overseers do not purport to have made a list of all the rateable hereditaments in the parish with the annual value thereof respectively. All they have done is to give effect to a resolution that a E fancy figure should be placed opposite to each particular hereditament in the valuation list. When I say "fancy figure" I do not use the word "fancy" in an offensive sense; I use it in the sense that they have not considered any individual hereditaments, but have only considered classes of hereditaments.

The agreed facts are (i) "The resolution; (ii) that such resolution was considered by the overseers, who then made a supplemental valuation list now in question; F (iii) that such supplemental valuation list as put in was arrived at by adding 25 per cent. to the gross and net in the previous list; and (iv) that there were included in such supplemental valuation list the properties specified in the resolution and those added by the overseers on their own initiative, but it did not include residential property other than that attached to business premises." As counsel for the ratepayers has pointed out, the effect of putting 25 per cent. both G on the gross and the net was to apply an arbitrary rule of thumb of the same character to every property without considering either the situation of the property, the character of the property, or the age of the property. Take, for example, the illustration given by counsel of a mill. I do not know what the life of a mill is, but assume for the sake of argument that there is a mill twenty-five years old and another mill which is quite a modern one. It seems to me that you do not want H somebody to go into the witness-box and to give evidence that to put a 25 per cent. increase on both those properties is not making a real valuation of them. Take, for example, putting it on to the gross. Can it be suggested that if you have a mill of four years of age and another mill of twenty-five years of age the repairs of both will be identical? Counsel says that there was no evidence upon which quarter sessions could come to the conclusion they did that the valuation list was I unfair and unequal. I think that this is a case of the matter speaking for itself. When one considers the various classes of property upon the hypothesis that they must be scattered about here and there in the different wards of the township, and when one considers that they must be of different ages, I think that quarter sessions had evidence before them upon which they were not only entitled, but bound, to come to the conclusion that the effect of the increase in the value of the premises in accordance with the resolution was to make the valuation list unfair and unequal.

I am of opinion, therefore, that there was evidence upon which quarter sessions could find that the valuation list was unfair and unequal, and that no individual valuation had been made of any of the hereditaments concerned for the purpose of the supplemental valuation list, and, there being evidence that there was no individual valuation made of any of the hereditaments, I think that quarter sessions were entitled to say that this was not a proper supplemental valuation list within the meaning of the Act. For both these reasons—first, that there was no supplemental valuation list within the meaning of the Act, and, secondly, that the list which purported to be a valuation list was unfair and unequal—in my opinion, quarter sessions were justified in coming to the conclusion they did, and the ratepayers were entitled to the relief claimed, and this appeal should be dismissed.

BRANSON, J.—I agree on both the grounds which have been stated by my learned brother, and there is very little that I wish to add. It has been urged upon us that the assessment committee is left a free and unfettered discretion under the statute to make its list according to the best of its ability. I think that is true, but the committee has fallen into the error which has been made by other people who have a general discretion—instead of exercising its discretion, as it should do, in relation to particular hereditaments, it has fettered that discretion by applying a general rule, and has sought to apply to a number of hereditaments which must be subject to all sorts of varying considerations the one inflexible rule that the value is to be deemed to have risen by 25 per cent. That, in my opinion, is not the function which either the overseers, in the first instance, or the assessment committee, in sitting to revise their results, should exercise under the Act. The result is that I agree that this document which purports to be a supplemental valuation list is not in fact a valuation list. Upon that ground, and also for the other reasons, which I need not repeat, I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Longbotham & Sons*, Halifax; *Jubb, Booth & Helliwell*, Halifax.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

MAGNHILD (OWNERS) *v.* McINTYRE BROS. & CO.

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), February 4, 8, 1921]

[Reported [1921] 2 K.B. 97; 90 L.J.K.B. 527; 124 L.T. 771; 37 T.L.R. 413; 15 Asp.M.L.C. 230; 26 Com. Cas. 185]

Shipping—Charterparty—Hire—Cesser of hire clause—Construction—Ejusdem generis rule—Hire to cease "in event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull, or other accident"—Detention through "grounding or otherwise."

By a clause in a time charterparty: "In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until [the ship] be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account."

Held: (i) the ejusdem generis rule was not applicable to the words "or other accident" in the first part of the clause, and, therefore, those words, which were of large import, included any accident to the vessel preventing her from working for more than twenty-four consecutive hours; (ii) the words "where there are bars" in the latter part of the clause, which qualified the earlier part, described "ports" only and not also "shallow harbours" or "rivers," and, therefore, that part of the clause applied to the grounding of the ship when trading to a river which had no bar.

Per BANKES, L.J.: The ejusdem generis rule should be strictly applied to the words "or otherwise" following "grounding."

Judgment of McCARDIE, J., [1920] 3 K.B. 321, reversed.

Notes. Applied: *Ambatielos* v. *Anton Jurgens Margarine Works* (1922), 38 T.L.R. 294. Referred to: *Royal Greek Government* v. *Minister of Transport* (1949), 66 (pt. 1) T.L.R. 504; *Chandris* v. *Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768.

As to the ejusdem generis rule, see 11 HALSBURY'S LAWS (3rd Edn.) 430, 431; 30 HALSBURY'S LAWS (2nd Edn.) 367; ibid., vol. 31, pp. 495, 496. For cases see 17 DIGEST (Repl.) 282–285, 41 DIGEST 306–308, 42 DIGEST 672, 673.

Appeal by shipowners from an order of McCARDIE, J., upon an award stated in the form of a Special Case.

The charterparty was dated Aug. 7, 1916, and contained, inter alia, the following clauses:

"1. The said owners agree to let, and the said charterers agree to hire the said steamer for the term of six calendar months fifteen days more or less from the time . . . the said steamer is delivered and placed at the disposal of the charterers ready to load . . . to be employed in lawful trades . . . between good and safe ports or places within the following limits—United Kingdom, Continent, Calais-Sicily limits—where she can always safely lie afloat or safe aground as charterers or their agents shall direct.

"12. In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account."

The steamer loaded at Sunderland and was fixed by the charterers to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante in France. By the instructions of the French government the steamer was ordered to proceed to the Ile d'Aix for orders. She was then ordered by the French government to discharge at Marans, which was situated up a river. She arrived at Marans Roads at 6 p.m. on Oct. 16, 1916, and she got aground on soft clay while proceeding up the river at a little bend between two buoys. She remained so aground till 1 p.m. on Oct. 24, 1916. She then got off. She was damaged by the occurrence. Repairs commenced on or about Nov. 8 and they occupied a substantial time. Marans was a safe port within the meaning of the charterparty. There was no bar in the harbour, river, or port which caused detention through grounding or otherwise. The arbitrator awarded that hire ceased, (a) as from 6 p.m. on Oct. 16, 1916, till 1 p.m. on Oct. 24, 1916, while the steamer was aground as aforesaid, and (b) during the time occupied while the damage to the steamer, consequent upon such grounding, was being repaired; and he awarded that the owners should pay to the charterers as return of hire a certain sum. The question for the opinion of the

court was whether the umpire was right in his award. McCARDIE, J., held (affirming the award) that the ejusdem generis rule was not applicable to the words "or other accident" in the first part of cl. 12, and that those words included any accident to the steamer which prevented her from working for more than twenty-four consecutive hours. The owners appealed.

Leck, K.C., and *W. A. Jowitt* for the shipowners.
Stuart Bevan, K.C., and *Claughton Scott* for the charterers.

Cur. adv. vult.

Feb. 8. The following judgments were read.

BANKES, L.J.—This is an appeal from the judgment of McCARDIE, J., who affirmed the view of the umpire in an arbitration as to the proper construction of a clause in a time charter. The question in dispute between the parties is whether, during the time when the vessel was aground and in dock undergoing repairs occasioned by the grounding, hire ceased under the terms of the charter, or whether the charterers still remained liable to pay hire.

The question depends upon the proper construction of cl. 12 of the charterparty, which is in the nature of an exception clause, and deals with cesser of hire. The first part deals with the circumstances in which, if there is loss of time, the hire shall cease; and the second part, which to some extent is an exception upon the exception, enumerates circumstances in which time lost shall be for charterers' account. The first part of the clause is in these terms:

> "In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service."

Three matters are there specifically mentioned which may occasion loss of time: Deficiency of men or owners' stores, breakdown of machinery, damage to hull; and then there is added "or other accident." The judgment of McCARDIE, J., is entirely devoted to a consideration of the question whether the ejusdem generis rule applies to that language, and whether the particular accident which befell this vessel, the grounding in the river, was an "other accident" within the meaning of the first part of this clause. He held that the ejusdem generis rule did not apply, and for that reason he considered that the loss of time fell upon the shipowners. He gave his reasons at length and referred to a number of cases, and at the end of his judgment he gives this as one of the reasons for so holding: "The latter part of cl. 12, I also think, seems to assume a wide meaning of the first part." To my mind, it is clear that the ejusdem generis rule cannot be applied, partly because of the language of the first part of the clause, and partly also for the above-mentioned reason given by McCARDIE, J.

The learned judge does not refer to what seems to me to be the material part of this clause, the proper construction of which has caused me personally great difficulty. It certainly is not very happily worded; and does not clearly express what was the intention of the parties. The second part of the clause is an enumeration of the circumstances under which a loss of time is to be for charterers' account. It runs:

> "but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account."

It is plain from that language that it is to some extent, but only to some extent, an exception upon exception, because it includes some matters which do not come within the first part of the clause. It is, therefore, not only an exception upon an exception, but it is an express enumeration of events, as to which presumably

it was thought that some question might rise unless it was made plain that they were all for charterers' account. The circumstances are very diverse in character. "Should the steamer be driven into port, or to anchorage by" certain events, then "time so lost and expenses incurred (other than repairs) shall be for charterers' account." Those events are stress of weather or any accident to the cargo. Then follow the words which cause so much difficulty. There are two possible constructions of those words. One is to read them as meaning that if the vessel trades to shallow harbours, rivers, or ports in any of which places there are bars causing detention to the steamer through grounding or otherwise, then time so lost and expenses incurred shall be for charterers' account. The other is to read them as providing that, in the event of the steamer trading to either of these three classes of places, (a) shallow harbours, (b) rivers, or (c) ports where there are bars, and the trading there causes detention through grounding or otherwise, time so lost and expenses incurred shall be for charterers' account. One must try to give a meaning to all the words used, so as to realise the intention of the parties in inserting the clause. Having regard to the language used, it seems to me that the meaning of the parties may properly be taken to be that, in the event of the detention of the steamer through grounding or other similar accident owing to the charterers ordering her to trade to a shallow harbour, or to a river, or to a port where there is a bar, time so lost and expenses incurred shall be for charterers' account. I think that is what the parties must have intended by using this language, and I think their intention is sufficiently indicated if one gives a meaning to all the parts of the clause. I infer from the form of the umpire's finding that he read the clause as though, in order to give the owners the benefit of this part of the clause, there must have been a grounding upon some bar; and I assume that McCardie, J., took that view also, although he does not mention it in his judgment. In my opinion, that view does not give any meaning to the expression "shallow harbours." There was no need to use the word "shallow" in reference to "harbours" if what was contemplated was merely a grounding upon a bar. I think the meaning of the clause is that which I have already stated.

It is unnecessary to decide what meaning ought to be attached to those very general words "or otherwise" which follow "grounding." It is sufficient to say that my present opinion is that the ejusdem generis rule should be strictly applied to those words. We have, however, only to deal with a grounding, and giving my best consideration to this clause it appears to me that this grounding in the river causing detention to the steamer and occurring when the steamer was trading to the river, comes within the second part of cl. 12, and the time so lost and expenses incurred (other than repairs) are to be for charterers' account. For these reasons the appeal must be allowed, and the answer to the question in the special case must be in accordance with my judgment.

WARRINGTON, L.J.—I agree. The question turns on the construction of one clause in a time charter—namely, "in the event of loss of time from deficiency of men or owners' stores," which is one thing, "breakdown of machinery," which is a second, "or damage to hull," which is a third,

> "or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service."

I think the construction of that clause so far is fairly plain, and I agree with the extremely elaborate judgment of McCardie, J., on that point, though I think the result might have been obtained in a shorter and more direct way. The words on which so much discussion turned are "or other accident preventing the working of the steamer." I think that there is no difficulty in construing those words, and that they cover any accident which prevents the working of the steamer.

So far I agree with the judgment of the learned judge, and had there been nothing more in the clause the grounding of the vessel in the river to which she

A was directed to go would have been, within the meaning of that part of it, an "accident preventing the working of the steamer." But that exception from the time which is to be paid for by the charterers is qualified by the words which follow, which begin in this way, "but should the steamer." It seems to me that the mode in which that clause commences clearly shows that it is intended as a qualification of the wide provision contained in the previous words. The clause
B reads

> "but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account."

C The events there referred to as causing detention are, first, the steamer being driven into port or to anchorage by stress of weather or from any accident to the cargo. With those we are not concerned. We are only concerned with the second class of events referred to—namely, "or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars" causing detention through
D grounding. We are not concerned with anything but the detention caused by grounding.

The first thing to be determined is: What is the meaning of the words "trading to shallow harbours, rivers, or ports where there are bars." The umpire has clearly taken the view that the words "where there are bars" qualify "shallow harbours, rivers, or ports"—that is, all three of the places mentioned; and it was
E so contended before us on the part of the charterers. In my opinion, that is not the grammatical construction of this part of the clause. I think the place of the word "or" indicates that there are three categories of places all put under the same conditions, and those are "shallow harbours," "rivers," and "ports where there are bars." All those places are treated by the parties as places where detention may be caused to a ship trading thereto. In shallow harbours the
F detention may be caused by the ship getting aground in the harbour; in rivers by the ship having to go in a shallow channel, or in a narrow channel round what the umpire has described as "a little bend" in the river; in ports where there are bars the detention may be caused by the ship going aground on the bar, or, possibly having to wait until there is sufficient water for her to cross the bar. I think, therefore, that the word "rivers" is not qualified by the subsequent expression
G "where there are bars."

That being so, we have still to consider what it is that is described as "causing detention," and I agree with BANKES, L.J., that what is there referred to as "causing detention to the steamer through grounding" is the fact of her trading to one or other of the three categories of places described. If she is ordered to trade to a river, and the result of her being so ordered is that detention is caused through
H grounding, then the charterers are to be the parties who are to suffer by the detention so caused. For these reasons I think that the appeal ought to be allowed.

ATKIN, L.J.—I agree, though I have had great difficulty in putting a reasonable construction upon this clause, which seems to me so framed as to give rise to very serious difficulty in the way of construction. As to the first part, on
I which McCARDIE, J., concentrated his judgment, I do not find it necessary to say anything. I think it is sufficient to assume that the words "other accidents" are words of large import and need not necessarily be construed with reference to the proceeding words upon the ejusdem generis doctrine, as to which I find it quite unnecessary to speak with any kind of disrespect.

To my mind the real difficulty arises out of the second part of the clause, and it is unfortunate that we have not been assisted in that difficulty by the opinion of the learned judge. The words of the second part are intended to be an exception to the first part of the clause, but only in part, because it is plain to my mind that

they go beyond the scope of a mere exception, and, for extra caution no doubt, provide that in certain events detention shall be for charterers' account, even though there is no previous provision excepting such accidents from being for charterers' account. The second part of the clause begins as follows: "Should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo." Then the form of language changes—"or in the event of the steamer trading . . ." the consequence is "time so lost and expenses incurred (other than repairs) shall be for charterers' account." So far that clause, it seems to me, has no reference to grounding. "Or in the event of the steamer . . ." How is the event defined in that part of the clause? It has been read by the umpire and McCardie, J., presumably as being this, that if a steamer trades to shallow harbours where there are bars causing detention to the steamer, or to rivers where there are bars causing detention to the steamer, or to ports where there are bars causing detention to the steamer, then time so lost shall be for charterers' account. That does not seem to me to be a reasonable construction, because a reference to a shallow harbour having a bar is something which would never have occurred to anyone to provide against specially, and I find it very difficult to picture what could be meant by such a combination as that even by persons who are well versed in nautical matters. There certainly is nothing before us to show that there was some special class of shallow harbour with a bar which the parties would have been likely to guard against. On the contrary, I think that what the parties are guarding against is not the bar of a shallow harbour, but the shallowness of the harbour, and, if that is so, then the qualifying words, "where there are bars," must be read, not as applying to shallow harbours or to rivers—though in many cases a river has a bar—but as applying only to ports. Therefore the clause would read grammatically in this way: "In the event of the steamer trading to shallow harbours causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to rivers causing detention to the steamer through grounding or otherwise, or in the event of the steamer trading to ports where there are bars causing detention to the steamer through grounding or otherwise." In all those cases there is a common differentia in respect of each of the subjects enumerated, namely, an increased peril of grounding either by reason of the shallowness of the harbour, or by reason of the well-known attribute of tidal rivers where there is at any rate a narrow channel, or by reason of the fact that there is a bar; and it appears to me that the object of the clause must have been to protect the owners from the extra risk involved by the ship being ordered to such places as are mentioned. Where there is that extra risk I think it is meant that the charterers should take it.

I am confirmed in this view by reference to cl. 16, which again is not a well-constructed clause, because it begins by excluding certain ports:

> "The steamer shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded or where hostilities are being carried on or any icebound port or any ports where lights or lightships are or are about to be withdrawn by reason of ice or war, or where there is risk that in the ordinary course of things the steamer will not be able on account of ice to enter the port or to get out after having completed loading or discharging, nor shall steamer be obliged to force ice. . . . Should the steamer be detained by any of the above causes such detention shall be for charterers' account."

That is a provision that might very well have been brought into the clause which is an exception to the cesser of hire clause, but it is put into cl. 16 and it makes it plain that, in the case of those ports where there is an extra risk to the ship, in the first place the ship is not to go there at all, but, if the ship does go there, the detention is to be for the charterers' account.

In my view, therefore, the latter part of cl. 12 means that in the event of the steamer trading to shallow harbours time lost and expenses incurred by reason of such trading to a shallow harbour causing detention to the steamer through ground-

ing or otherwise shall be for charterers' account, and so as to rivers, and so as to ports where there are bars. That construction gives full effect to the clause and to every word in it; it does not strain the grammatical meaning; and it avoids a meaning which it appears to me the words are incapable of bearing, namely, making "where there are bars" apply to shallow harbours. On these grounds it seems to me that in this case the award was wrong.

Appeal allowed.

Solicitors: *Botterell & Roche*; *William A. Crump & Son.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

GASKILL *v.* GASKILL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Viscount Birkenhead, L.C., sitting as a judge of the Division), April 22, July 19, 29, 1921]

[Reported [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 37 T.L.R. 977; 38 T.L.R. 1]

Divorce—Adultery—Evidence—Birth of child—Standard of evidence required to prove illegitimacy—Birth 331 days after intercourse.

On Oct. 4, 1918, the husband had sexual intercourse with his wife, and on the same day he rejoined his regiment, going abroad a few days later. On Sept. 1, 1919, his wife gave birth to a child. The husband returned to this country in December, 1919. The period between Oct. 4, 1918, and Sept. 1, 1919, was one of 331 days. On a petition by the husband for divorce on the ground of the wife's adultery he adduced no evidence of improper conduct by the wife, but relied solely on the circumstances of the birth of the child.

Held: in considering the evidence the same principle must be applied as in a legitimacy suit, and so evidence sufficiently strong to exclude all doubt was needed to rebut the presumption of legitimacy in the case of a child born in lawful wedlock; prolongation of the period of gestation to 331 days from coition was not impossible; and, therefore, in the absence of any other evidence, adultery by the wife could not be inferred from the fact that the husband's paternity of the child involved such a period of gestation.

Notes. Considered: *Wood* v. *Wood*, [1947] 2 All E.R. 95; *Morris* v. *Morris, Morris and Manning*, [1947] 2 All E.R. 377; *Preston-Jones* v. *Preston-Jones* (1949), 65 T.L.R. 620. Referred to: *Sloggett* v. *Sloggett*, [1928] All E.R.Rep. 164; *M.* v. *M. and Official Solicitor*, [1949] L.J.R. 378; *Elliott* v. *Elliott*, [1956] 1 All E.R. 122.

As to proof of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 235 et seq.; and for cases see 27 DIGEST (Repl.) 312 et seq.

Cases referred to:

(1) *The Gardner Peerage* (1824), Le Marchant's Report 169; 22 Digest (Repl.) 505, *5590*.

(2) *Bosvile* v. *A.-G.* (1887), 12 P.D. 177; 56 L.J.P. 97; 57 L.T. 88; 36 W.R. 79; 3 T.L.R. 726, D.C.; 3 Digest 358, *3*.

(3) *Burnaby* v. *Baillie* (1889), 42 Ch.D. 282; 58 L.J.Ch. 842; 61 L.T. 634; 38 W.R. 125; 5 T.L.R. 556; 3 Digest 366, *70*.

(4) *Bowden* v. *Bowden* (1917), 62 Sol. Jo. 105; 27 Digest (Repl.) 321, *2671*.

(5) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 1 Jur. 911; 7 E.R. 365, H.L.; 3 Digest 359, *12*.

(6) *Banbury Peerage Case* (1811), 1 Sm. & St. 153; 57 E.R. 62; 3 Digest 358, *2.* A
(7) *Head* v. *Head* (1823), Turn. & R. 138; 1 Sim. & St. 150; 37 E.R. 1049, L.C.; 3 Digest 359, *11.*

Petition by the husband, Leonard Henry John Gaskill, for dissolution of his marriage with the respondent, Kathleen Ethel Gaskill, on the ground of her adultery with a man unknown. The respondent denied the alleged adultery. B
The facts appear in the judgment.

T. J. O'Connor appearing for the husband.
H. W. Barnard and *J. A. C. Skinner* for the wife.
The Attorney-General (*Sir Gordon Hewart, K.C.*) and *D. Cotes-Preedy* for the King's Proctor.

Cur. adv. vult. C

July 29. **VISCOUNT BIRKENHEAD, L.C.,** read the following judgment.—In this suit Leonard Henry John Gaskill petitions for a divorce from his wife Kathleen Ethel Gaskill, alleging that she has committed adultery with a man unknown, and that in consequence of that adultery a male child was born on Sept. 1, 1919. The respondent denies the alleged adultery, and asserts that the child is the offspring of her husband. D

The facts are unusual and raise a question, which is both curious and difficult. In September, 1918, the husband, who was then serving in the Royal Engineers, was granted leave of absence from Sept. 29 to Oct. 3, 1918. He spent his leave at home, overstayed the period by one day, and returned to duty on Oct. 4, 1918. On that day he had sexual intercourse with his wife for the last time. He sailed for Salonika on Oct. 12, 1918, and did not return to this country until December, E 1919. On Sept. 1, 1919, his wife gave birth to a child. The child was of more than the usual, though not of conspicuous, weight, and its head so far exceeded the normal as to make the confinement both lengthy and anxious. There elapsed between the date of coition and that of birth 331 days. Nothing is known to the husband and nothing has been brought forward by him which reflects upon the conduct of the wife. It is true that the wife admitted that soon after her husband's F departure she stayed away from home for a night in the company of a girl friend. She stated at the first hearing that the visit was to her mother-in-law. At the adjourned hearing an attempt was made to take advantage of this by calling the husband's father to prove that the wife never stayed at his house (though she visited there) after the husband went to Salonika. I decline to draw from this evidence any inference unfavourable to the wife. An allegation of adultery is a serious G allegation, which must be properly proved, and I was struck by the fact that the husband was unable to associate his wife with any lover or even with any act of indiscretion. No evidence of adultery proper even to be considered has been adduced by the husband. The position, therefore, remains exactly as it did at the conclusion of the evidence at the original hearing, namely, that the husband asks this court to give him a decree upon an inference, which he maintains is H scientifically irresistible, that it is impossible that so long a period as 331 days should intervene between coition and parturition, and, consequently, that he is not the father of the child, for whom a spurious paternity must be inferred. Certain minor circumstances require consideration. The wife consulted Dr. Munroe on May 9, 1919, and from the facts stated by her he came to the conclusion that the child would be born in July. His opinion, as he told me, depended upon her I assurance that her last period of menstruation was in October, 1918. He founded his conclusion upon certain tabular data which, as is well known, are consulted by medical men on such occasions. I have, therefore, to consider what inference, if any, ought to be drawn from the fact that the respondent apparently underwent a menstrual period either in October or November.

As it was obvious that any decision reached upon the matter must be of general importance I adjourned the case so that an opportunity could be given to produce further scientific material for my consideration. In so doing I did not reflect upon

the competence of the medical gentleman, who gave evidence on behalf of the wife. The point is of such importance that it was proper that the court should receive the most specialised medical advice available. Having regard to the humble position in life of the parties I directed the attention of the Attorney-General to this case, and thus have had the opportunity of hearing argument on the legal authorities, and of hearing the views of medical men with special reputation in such matters. The cases that have been decided do not afford much guidance, for, with one exception, no case has yet been decided upon the length of pregnancy alone without evidence as to conduct and other relevant circumstances. Four cases were cited by the Attorney-General. In *The Gardner Peerage* (1), the last opportunity of intercourse was on Jan. 30, 1802, and the child was born on Dec. 8, 1802. The report shows that a large body of evidence, both medical and lay, was called upon the point of the possible duration of pregnancy, but other evidence was given of conduct from which adultery could be inferred at a period more consonant with the normal expectation of the period of gestation. It is clear from the opinion expressed by the Lords of the committee (which were extremely short and without detailed reasons) that the committee, in finding that the child in question was illegitimate, acted not only on the medical and expert evidence, but also on the evidence of the woman's conduct, and the adverse conclusion was based expressly upon a consideration of the evidence as a whole. In *Bosvile* v. *A.-G.* (2) the child was born in wedlock 276 or 277 days after the last opportunity of intercourse between the husband and wife, and at the time when such opportunity occurred the wife's periodical menstruation had begun, a circumstance which made marital intercourse on that day improbable. The ordinary period of gestation was taken as 270 to 275 days, and between the 270th and 275th days before the birth of the child, reckoning backwards, the wife had slept with her paramour with whom she had eloped at a time when the menstruation was continuing. The conduct of the wife tended to show that the child was not the child of her husband, as the arrangements she made for the attendance of the monthly nurse were based on a calculation which made the commencement of gestation subsequent to the day on which she left her husband's house. Moreover, in letters to her husband imploring forgiveness, she not only refrained from suggesting that the child, with which she was pregnant, was his, but did not even mention the fact of her pregnancy. The jury found that the child was illegitimate, and the court refused to set the verdict on one side. It will be observed that in *Bosvile's Case* (2) the lapse of time was not sufficient of itself to negative the possibility of the husband being the father of the child, and the issue was whether there was such evidence as would justify the jury in concluding that the child was not begotten by the husband. *Burnaby* v. *Baillie* (3) was a case in which the facts were similar to, but somewhat stronger than, those in *Bosvile's Case* (2), and NORTH, J., after considering not merely the medical evidence but also evidence that no sexual intercourse had taken place between the husband and wife within a period to which, on the medical evidence, the birth of the child could be referred, and evidence that the relations between the wife and another man during the period to which the birth could refer had been adulterous, decided against legitimacy.

These three cases all turned on the question whether the evidence of the wife's conduct was such that the court was justified in holding that the presumption of legitimacy had been rebutted. The length of the particular pregnancy was not the sole material factor; it was only one of a number of relevant considerations all tending to disprove legitimacy. In *Bowden* v. *Bowden* (4) there was no evidence of adultery apart from the length of pregnancy. The last occasion on which the husband and wife slept together was on the night of Dec. 19, 1915. The next day the husband left for Egypt on active service, and there was evidence that the wife underwent menstruation after his departure. A child was born on Oct. 22, 1916, being 307 days after the husband left England. The medical evidence was to the effect that the average duration was 275 days, and the normal duration from 273 to 280 days, but evidence was also given of instances where pregnancy had lasted for

298, 306 and 309 days. Upon this evidence HORRIDGE, J., came to the conclusion that the child was legitimate, and consequently that adultery had not been proved. A

Three experts were called before me in the present case, and I am satisfied that I have in evidence all available information in the present state of scientific knowledge upon the issue which I have to decide. Professor Henry Briggs, who is professor of obstetrics and gynæcology of the University of Liverpool, president of the Obstetrical and Gynæcological Section of the Royal Society of Medicine, and a B member of the Central Midwives Board, stated that he had known one instance of gestation prolonged to 306 days from the last cessation of menstruation, but had not personally met with an instance of prolonged gestation dating from a single congress. In his opinion, fœtal oversize has not been proved to be a constant feature of prolonged gestation, and he, therefore, did not regard the physical characteristics at birth of the child in question as of supreme importance. In his C view, though prolongation of the gestation to 331 days is improbable, it is not impossible. It is not within the range of present scientific knowledge to allege such impossibility. His reasons are as follows. The actual date of conception, that is, the date of fusion of the cells, cannot be ascertained by any available means at present known to science. In obstetrical practice the commencement of pregnancy is usually reckoned with reference to the menstruation date, but sometimes to the D date of insemination. This reckoning is very uncertain. Between the time of fruitful coition and the time of conception there is an interval, the length of which cannot be determined. It is commonly a part of one menstrual cycle, except in cases where pregnancy occurs without menstruation. If one assumes in the present case that the ovum was fertilised, after the menstrual period ending Oct. 17, by a spermatozoon of the coitus of Oct. 4, then the ordinary full-time gestation of E 280 days would not fully account for the whole period of 331 days. There is, however, no means of ascertaining how soon after the cessation of the menstruation on Oct. 17 conception actually began, so that the witness is unable to say that the pregnancy could not be prolonged to Sept. 1, 1919. If, however, the blood loss deposed to as having occurred in November, 1918, was a normally recurring menstruation, as to which naturally he did not express an opinion, then in his F judgment the birth could not be assigned to the coitus of Oct. 4, 1918.

Dr. John S. Fairbairn, who has for long been engaged in consulting practice as an obstetric physician, and has held very important positions in midwifery and diseases of women, was also of opinion that a considerable delay may occur between coition and that union of the male and female cells, which marks the commencement of pregnancy. He cited authorities to show that spermatozoa may be found G alive in the female genital tract for three weeks after coitus, but the extreme limit of time for such survival is still unknown. At the latter end of gestation there are other factors which prolong pregnancy, such as the size of the child and of the maternal passages, and also the actual labour, which may be prolonged for three or four days. Calculations are not usually dated from insemination, because it is only rarely that pregnancy can be ascribed to a specific act of coition, and even then H much depends upon the accuracy of the woman. For this reason it is usual to calculate from the cessation of the last menstrual period. There is an almost general agreement that the mean duration of pregnancy so calculated is from 275 to 280 days. From coitus the mean duration is from 265 to 275 days. Having regard to the fact that the moment of fertilisation cannot be ascertained, and may conceivably be twenty-one days or more after coition (and longer still after the last I menstruation), it is impossible to say what period does in fact elapse between fertilisation and the commencement of labour, or whether that period is constant or varies with the individual woman. The witness definitely rejected the theory that pregnancy lasts for ten menstrual cycles on the ground that many investigations have made the fallacy obvious. Dr. Eden takes the same view, citing a well-known test made in 1893 by Dr. Issmer, of Munich, and also a case, which came under his own care, where the patient had a menstrual cycle of 38–42 days, which on the theory would give a period of 380 to 420 days. The child, however, was born on

A the 289th day, a period corresponding with the normal calculation, but altogether inconsistent with the theory based on the menstrual cycle. Dr. Fairbairn admitted the possibility of a long menstrual period affecting the duration of pregnancy, if such length means (which cannot be definitely held proved) that in such a case there is less frequent ovulation than usual. This possibility must not be lost sight of in view of the wife's evidence that her period was five-weekly. Dr. Fairbairn B also dealt with the question of menstruation during pregnancy. In his opinion, two or even three menstrual discharges are not inconsistent with pregnancy, for the changes in the lining of the womb may not be sufficiently complete to check menstruation until after the third month. Such later hæmorrhage as is not uncommonly met with must be ascribed to some other cause. It may, indeed, be an attempt at menstruation by the gravid uterus. Apart from the fact that C hæmorrhage does occur after pregnancy and, whether a true menstrual discharge or not, is commonly so regarded by the patient, the point is of little importance in this case.

The factors which Dr. Fairbairn regarded as important include the life of the placenta. According to him placental functions usually come to an end about the ninth month, and in such a case, if the child is not born immediately, it dies in D utero. Nevertheless, there are cases where the placenta continues to function, with the result that the child is more developed at birth than usual. Normally, therefore, he would expect the child to be more developed than usual when birth is delayed, but here there are relevant factors other than retention in utero, so that the size of the child at birth will not in itself give an accurate index of the duration of gestation. There would, however, be more advanced ossification, and the re- E sultant greater firmness and rigidity of the skull and body might cause difficulty in labour. On the other hand, there are cases of over-developed children without prolonged gestation, which cannot, therefore, be the sole factor in their production.

The actual number of cases, in which pregnancy calculated from coitus is prolonged for more than four weeks over the normal period, is, in the opinion of this witness, so small that a physician with a large hospital practice may never meet F with one, and no one individual is likely to meet with more than one or two undoubted cases. Recourse, therefore, must be had to reports. In his own practice he had not met with many cases of protracted gestation, but where the pregnancy was more than two or three weeks longer than the normal period, it was accompanied by special and unusual features in the labour or in the child. The longest case he had experienced was 315 days from menstruation. Labour lasted two days, G but the child was ultimately delivered by the Cæsarian operation. It was 22½ in. long and weighed 11 lb. In that case he accepted his patient's good faith and accuracy. In another case labour was induced after 296 days, and the child was 23 in. long and of 10¾ lb. weight. The woman's two previous confinements had been on the first occasion 308 days after menstruation and, on the second, labour was induced at 266 days. In both cases the child was beyond the normal length H and weight. He cited other cases from works by well-known authorities. Sir James Simpson reported four cases where the periods after menstruation were respectively 336, 332, 319, and 324 days. Dr. Playfair, in his book on the Science and Practice of Midwifery, mentioned cases where labour began at the calculated date, but was arrested and delivery delayed—in one case till 304 days had elapsed since menstruation. The great difficulty with regard to reported cases is that the I liability to error is so great that the strict proof which is essential is rarely forthcoming. Dr. Fairbairn, however, accepted a case reported by Thomson in vol. 27 of the Obstetrical Society's Transactions, in which pregnancy lasted 317 days from menstruation and 301 from coitus. He also refers to one case where pregnancy lasted for a year from the last menstrual period. This was recorded by Miller in The Practitioner in 1918; but Dr. Fairbairn gave reasons for requiring stricter proof than was apparently available, before accepting the case as authentic. He placed great reliance on the report of investigations by Von Winckel, printed in the Klinische Vortrage for January, 1901, p. 143. The conclusions that Von Winckel

arrived at, after considering some 30,500 cases, were that children of abnormal size formed about 3·15 per cent. of the total number of births, and of these 14·5 per cent. were over 302 days in utero. Calculating from menstruation, the shortest period for such heavy children was 240 days, and the longest 336 days. Von Winckel concluded with the details of eleven cases of prolonged pregnancy, which he accepted as correct. The longest was 336 days from the last menstruation and 315 from coitus. The child's weight was 12¾ lb. Dr. Fairbairn also cited Dr. Ellerman, of Copenhagen, and Professor Allen, of Maryland University, both of whom have discussed the relation of protracted gestation to over-development of the child, advising that special attention should be given to patients in cases of protracted gestation in order to terminate the pregnancy artificially. His considered opinion, based on the known scientific data as well as his own experience, is that considerable protraction of gestation may occur extending to 331 or 332 days from coitus; but in such a case some effect on the child of so extreme a prolongation would be expected, so that he would reject 331 days' gestation unless there were plainly written on the body of the child the signs of very long pregnancy.

Dr. Thomas Watts Eden, who is also an eminent consultant, gave 305, 300, and 298 days respectively from the last menstruation, as the longest cases in his own experience. The children were all large, about 50 per cent. above the normal weight of 7 lb. In his opinion, the methods of calculation adopted are necessarily inexact. To reckon from coitus is possible only in a restricted number of cases. Even then an error of so much as twenty-one days or even more is possible, for coition and conception are never simultaneous. Spermatozoa have, according to Duhrssen, an observer of repute, been found alive in the Fallopian tube twenty-one days after coition (Zentralblatt für Gynakologie (1893), p. 593), and consequently it follows that conception may be delayed for as much as three weeks after coition. To reckon from the last menstruation may itself be to admit error, for conception may occur at any time during the inter-menstrual period following, and this error is indefinitely increased where, as sometimes happens, menstruation ceases from some other cause other than pregnancy, and the inter-menstrual period is consequently extended. These errors tend to antedate conception, and therefore to make the duration of pregnancy seem longer than it really is. When allowance is made for such errors, there is, in my opinion, still reason to believe that the actual period of gestation is variable. Neither is it necessarily the same for all women, nor in successive pregnancies of the same woman. Dr. Eden cited statistics of forty cases of pregnancy after a single coitus, the shortest being 260 and the longest 294 days. This difference is too great, in his opinion, to be accounted for by errors of the kind that have just been referred to. Although the great majority of pregnancies terminate between the thirty-eighth and the forty-first weeks after menstruation (Simpson: Obstetrics (1853), p. 84), yet it is not very uncommon for gestation to last for more than 300 days. There are four reported instances of pregnancy lasting beyond 320 days, which Dr. Eden accepts as authentic. These are: 323 days, where the child weighed 12½ lb. (Taussig, American Journal of Obstetrics, 1901); 324 days, where the child weighed 14 lb. (Von Winckel, Klinische Vortrage, January, 1901); 331 days, where the child weighed 13¼ lb. (Von Winckel, N.S.); and 336 days, where the child weighed 16¼ lb. (Bensinger, Zentralblatt für Gynakologie (1893), p, 816). In his view in such cases the weight of the child will be above the average weight of children at birth, making the requisite allowance for the limit of error required for the method of calculation adopted.

I have no doubt that the principles upon which I should act in coming to a conclusion of fact upon the evidence in this case are laid down in *Morris* v. *Davies* (5) (5 C. & F. at p. 215) where Lord Lyndhurst, sitting as a judge of first instance, cited with approval the opinion of the judges in the *Banbury Peerage Case* (6):

"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is

presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of such child."

He goes on to point out that all that *Head* v. *Head* (7) decided was that the court must be satisfied that sexual intercourse did not take place

> "not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt (that is, of course, all reasonable doubt) in the minds of the court or jury to whom that question is submitted."

On the appeal his decision was affirmed. Lord Lyndhurst again stated his opinion (5 Cl. & Fin. at p. 265) that

> "that presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."

I need only mention that Lord Lyndhurst referred to a sentence of divorce pronounced in accordance with the law as it then existed, and the rule he stated must be modified to accord with the present state of the law; but no point arises here upon that aspect of his judgment. It is true that the observations are made in reference to a legitimacy suit, but I cannot conceive that in the present case any different principle can apply, otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband. In this case, the only evidence of adultery is the admittedly abnormal length of pregnancy. No other fact or circumstance has been adduced, which in the slightest degree casts any reflection upon the chastity or modesty of the wife, who has on oath denied the alleged adultery. I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the husband can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the wife, and find that she has not committed adultery, and accordingly I dismiss the petition.

I add a concluding observation, though I cannot tell whether it will be useful. The husband in this case—a most unusual one—conceived a natural anxiety as to the integrity of his wife. My decision, and the medical opinion upon which it is based, may have reassured him upon this point. The wife, on the other hand, ought not to resent the attitude which her husband adopted. Both have been the sport of nature. Both are still young. They were happy together until this suspicion arose. Now that it is dissipated, they should at least consider whether they cannot recapture that which they have lost.

Solicitors: *Waller & Mager*; *Macmullen, Bradford & Bennett*; *The King's Proctor.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

A

MERTENS *v.* HOME FREEHOLDS CO., LTD. AND OTHERS

[Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.), March 4, 8, 1921]

[Reported [1921] 2 K.B. 526; 90 L.J.K.B. 707; 125 L.T. 355]

B

Contract—Frustration—Event causing impossibility of performance act of party setting up frustration—Frustration through refusal of government licence to permit work—Refusal result of defendant's conduct.

Building Contract—Breach—Damages—Measure—Failure to perform work in contract time—Completion by building owner at greater cost.

C

By a contract dated May 12, 1916, and made between the plaintiffs and one L. on behalf of the defendants L. agreed to build for the plaintiff a dwelling-house at a specified price, the work to be completed in a specified time. The work was begun, but it became apparent to L. that the contract could not be fulfilled except at a considerable loss. By an Order made on July 14, 1916, by the Minister of Munitions building work was prohibited except under a licence granted by the Minister. L. applied for a licence, but he then delayed the work with the intention of securing that the licence should be refused and he would have an excuse for not performing the contract. The licence was refused, and, as a result, the plaintiff, who, under a clause in the contract, on default by L. was entitled to employ other persons to do the work, was unable to have the work proceeded with until 1919 when the cost of labour and building materials had considerably increased. In an action by the plaintiff against the defendants for damages for breach of contract,

D

E

Held: (i) the defendants were not entitled to take advantage of the frustration of the contract by the refusal of the Minister of Munitions to grant the licence since L., for whose actions they were responsible, had himself brought about that refusal; (ii) the measure of damages was what it cost the plaintiff in 1919 to complete the building of the house, less such amount as would have been due to the defendants if L. had completed the house at the date agreed on in the contract.

F

Notes. Referred to: *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corpn., Ltd., The Kingswood*, [1941] 2 All E.R. 165.

As to impossibility of performance and frustration of a contract, see 8 Halsbury's Laws (3rd Edn.) 178 et seq.; and for cases see 12 Digest (Repl.) 414 et seq.

G

Cases referred to:

(1) *Hirt* v. *Hahn* (1876), 61 Missouri 496.

(2) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*.

H

(3) *Equitable Steam Fishing Co.* v. *Cochrane*, Lloyd's List, May 20, 1919.

(4) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

Appeal from an order of the Divisional Court.

I

By his statement of claim the plaintiff alleged that the defendant R. M. Smith was at all material times the owner of and/or partner in the defendant company, the Home Freeholds Co., Ltd., and/or a co-adventurer with the defendant Lawrence, or, in the alternative, that he held out the defendant Lawrence to the plaintiff as his agent, whereby the plaintiff was induced to enter into a contract dated May 12, 1916, for the erection of a dwelling-house on a plot of land; that the defendants had failed and neglected to finish the house, and had in fact done work on the house to the value of £496 and no more; and that by reason thereof the plaintiff had suffered loss and damage, and, in order to finish the house, would

be compelled to expend thereon a sum of approximately £3,000. By their defence the defendants alleged that the defendant Lawrence was discharged from further performance of the contract by an Order of the Minister of Munitions of July 14, 1916, and his refusal on Sept. 30, 1916, to grant a licence to proceed. In February, 1918, the action came on for trial before AVORY, J., sitting with a jury, who found that the defendant Lawrence entered into the contract as agent for the defendant R. M. Smith. Judgment was entered for the plaintiff, and the question of the amount of the damages was referred to one of the official referees. In June, 1918, an order for a new trial was made by the Court of Appeal. In February, 1919, the action came on for trial before SANKEY, J., sitting with a jury, when judgment was entered for the plaintiff, and the question of damages was referred to one of the official referees. In May, 1920, the official referee reported as follows:

> "With regard to the second point, I find that the contract made by the defendant Lawrence with the plaintiff was one which he could not fulfil except at great loss, and that, apart from the order of the Minister of Munitions, Lawrence was desirous of putting an end to the contract. I find, if proper dispatch had been used in the building of the house for the plaintiff, the roof might have been on by the end of September, 1916, but that the work was intentionally delayed by Lawrence in the hope that the work would be stopped by a refusal of a licence under the order of the Minister of Munitions dated July 14, 1916. I find that the failure to carry out the agreement was not caused by the refusal of the licence to proceed, but by the neglect and failure of Lawrence to proceed with due diligence in the performance of his contract. I find that it would have cost the plaintiff £4,153 to complete the house in accordance with the contract, and deducting from that sum the contract price of £1,900, together with £495, being the value of the work already done, and deducting £825 paid to Lawrence, I estimate the damages due to plaintiff at the sum of £2,583, and I award the costs of the trial of the issue as to damages to the plaintiff."

The defendants appealed to the Divisional Court (ROWLATT and MCCARDIE, JJ.) on the question of damages, when it was held that the plaintiff was entitled to the difference between a fair price in September, 1916, for the building erected to the putting up of the roof and half the joinery which ought to have been done also at the price of the day and the amount which he ought to have paid for the same work on the terms of the contract. The plaintiff now appealed.

Colam, *K.C.*, and *Neilson*, *K.C.*, for the plaintiff.
J. B. Matthews, *K.C.*, and *J. H. Watts* for the defendants.

LORD STERNDALE, M.R.—This is an appeal from the decision of the Divisional Court, which reversed a decision of the official referee. The only question raised is as to the amount of damages which the plaintiff is entitled to recover from the defendants.

The matter arises out of a building contract by which a gentleman of the name of Charles Lawrence contracted with the plaintiff to build him a dwelling-house for £1,900 and to finish it in six months. The contract was made in May, 1916, in the middle of the war. Lawrence has been described by the defendants' counsel as a rogue. I do not know if that is a correct description or not. But there is no great objection to my applying it, as it was the defendants' counsel who suggested the epithet. The defendant R. M. Smith is a gentleman who has been found to be a partner in the transaction, and was, therefore, responsible for Lawrence's delinquencies. Lawrence made the contract at a ridiculous price according to the findings—very much too low a price—and undertook to finish the house in a period the sufficiency of which was extremely doubtful considering the circumstances in which it was made. In fact he did what one has seen constantly done; he gave any terms he could in order to obtain the contract, with the full intention

of breaking his contract, and that he did. The work went on more or less satisfactorily till August, 1916, but before that date an Order under the Defence of the Realm Act was issued by the Ministry of Munitions providing that on and after July 20, 1916, no person should carry on any building or construction work, with certain exceptions, without the licence of the Minister. But there was the proviso that where a first application for a licence under that Order had been made for the carrying on of work which had been commenced at the date when such licence first became necessary, nothing in the Order should prohibit the carrying on of the work until the licence had been refused. I agree with the construction put upon that clause by the Divisional Court. I think that it means that if the work was begun before July 20, 1916, and then an application for a licence was made, one might go on with the work though one did not make application till after July 20, 1916. Lawrence did make an application, but he never had any intention from the time he heard of this Order of carrying on the work properly. He said—and I do not think there is much doubt but that he meant it—that the Order was a godsend to him to help him to get out of his contract, and he proceeded to do so. He did not go on with his work and did not get the house roofed, and the result was that the licence was refused. The plaintiff, as the building owner, served upon him a notice under a clause in the contract which empowered him after thirty days' default following the receipt of the notice by Lawrence to take the house out of his hands and complete it himself. Three days before the expiration of the thirty days the licence had been refused as the result of the intentional delay of Lawrence in proceeding with the building. There was evidence to show that Lawrence knew what would happen if he did not erect the house somewhere towards the roofing of it—that he knew that the licence would be refused unless he did go on properly, and he did not go on properly with the object of inducing the refusal. The plaintiff, as the building owner, got tenders for the completion of the work. The tenders were for certain sums—I need not trouble to see what they were—but very much less than they were some considerable time afterwards when the work was, in fact, done. In the meantime the work could not go on because it was not allowed to go on by the Ministry of Munitions, and the permission to go on was not obtained till the beginning of 1919, when, as a great many of us know to our cost, the price of building materials and labour had gone up enormously. The official referee has given to the plaintiff the amount that it cost him when he could do the work in 1919. The defendants say that either the plaintiff was entitled to nothing, or, if he was entitled to anything, it was to a measure of damages fixed in the year 1916. The Divisional Court have adopted the defendants' contention. I cannot agree with them.

The first particular in which I differ from them is that I do not think that they ever looked at the contract in the right way. They have considered the contract as if it was a contract to deliver goods in September, 1916—a contract to deliver a roofed house on the ground in September, 1916—and what they have said is that all the plaintiff is entitled to is the difference between the price of what the defendants had, in fact, done through Lawrence and the price of a roofed house in September, 1916. That is to say, they are taking it as if it were a sale of goods and saying that the difference is between the market price which the plaintiff ought to have had and what he has got. In my opinion, that is an entirely wrong way of looking at the contract. There is no contract to deliver goods and there is no market price of a roofed house. There cannot be such a thing. The learned judges in the Divisional Court thus deal with the question of damages. ROWLATT, J., said that:

> "I think the damages that the plaintiff is entitled to are only the difference between a fair price for this building erected to the putting up of the roof, and half the joinery which ought to have been done, at the price of the day and the amount which he ought to have paid for the same work on the terms of the contract."

A McCARDIE, J., said:

> "The business of the tribunal which has to assess the damages is to find out what is the amount—the value or the price of the contract work which should have been carried out by Sept. 30, 1916, because up to that time there was no restraint. Having got the price of that work under the contract, it must be remembered that the contract price was, as I understand the evidence, much below the actual true value of the labour and material. Therefore, the next step is, having ascertained the amount for which the work could be done, you have to find out the difference between the contract price of the work which had been done up to that date as distinguished from the actual prevailing value of the work and material apart from the contract altogether, because it would have been the latter amount that the owner would have had upon his property if the builder had carried out his part of the bargain."

I do not think that is the right measure. I think that the right measure is properly stated in HUDSON ON BUILDING CONTRACTS (4th Edn.) vol. 1 at p. 491, citing from the American case of *Hirt* v. *Hahn* (1):

> "B. agreed to erect a house for the plaintiff according to plans by a certain date. The defendants were the sureties. After partly completing, B. ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. HELD, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended and in a reasonable manner, less any amount that would have been due and payable to B. by the plaintiff had B. completed the house at the time agreed by the terms of his contract."

It is true that that is an American case. Though I cannot put my finger on them for the moment, I feel satisfied, however, that there are English cases fixing the same measure of damages. At any rate, for the purpose of the present case, it is sufficient to say that we all think that that is the proper measure of damages for the breach of a building contract such as this.

It follows that the plaintiff, as the building owner, must set to work to build his house in a reasonable time and in a reasonable manner, and is not entitled to delay for several years, and then, when prices have gone up, if they have gone up, to charge the defaulting builder with the increased price. I quite agree that a man is not entitled to gamble on the chance of getting the work done cheaper, and then, when it is dearer, turn round and charge the defaulter with the enhanced price. That is not what the plaintiff did here. The plaintiff did his best to begin at once to complete the building of the house. He was not able to do so, and he was not able to do so because he was not allowed to do so under the Defence of the Realm Regulations. That being so, the question is whether the defaulting builder is entitled to say: "You cannot charge me with an increase of a price caused by a delay which is the result of the interference of a third person, a superior authority, which prevented you from doing the work." I offer no opinion as to what the result would be if those were all the facts. The Divisional Court have decided that both the building owner and the builder would have been entitled to assert that this contract was frustrated by the action of the government in preventing the work going on for so long, and they say that that is in accordance with the decision of the House of Lords in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2). The doctrine of frustration during the war has gone a very long way. There have been very great developments of it from the original cases which stated the principle. How far the decisions have gone I do not feel in a position to say with certainty. But so far as I know, it has never gone to this, that a man is entitled to take advantage of circumstances as a frustration of a contract if he has brought those circumstances about himself. That seems to have been the ground on which ROWLATT, J., based his decision in *Equitable Steam Fishing Co.* v. *Cochrane* (3). As an instance, one can go back to the case—I do not know if it was the beginning

of this principle—of *Taylor* v. *Caldwell* (4). There the frustration was the destruction of a music-hall, the letting of which was the subject-matter of the contract in that case. I do not think that the cases have ever gone so far as to say that, if the defendant had burned down the music-hall himself, he would have been entitled to assert that the subject-matter was gone and the contract was frustrated. I know of no authority that has gone that length, and I am certainly not prepared to go that length myself. In the present case what the official referee has found is expressed thus:

> "I find, if proper dispatch had been used in the building of the house for the plaintiff, the roof might have been on by the end of September, but that the work was intentionally delayed by Lawrence in the hope that the work would be stopped by a refusal of a licence under the Order of the Minister of Munitions dated July 14, 1916. I find that the failure to carry out the agreement was not caused by the refusal of the licence to proceed, but by the neglect and failure of Lawrence to proceed with due diligence in the performance of his contract."

Therefore, the official referee has found that Lawrence, knowing that he had a bad bargain, having made up his mind to get out of it, and knowing also of the Order under the Defence of the Realm Regulations, deliberately delayed in order to get the licence refused, and that in that he succeeded. That being so, it seems to me no advantage can be allowed to Lawrence because of the intervention of the Minister of Munitions, which is what he prayed for and what he got. To turn his counsel's argument the other way, just as the plaintiff cannot gamble on what may happen in the future as to price, so Lawrence cannot gamble on what is going to be the effect of the refusal to grant a licence which he himself had procured. The refusal was his fault.

I think that in these circumstances the official referee was right in saying that the amount which the defendants had to pay was the amount which the plaintiff, exercising all diligence, as the plaintiff undoubtedly did, had to pay to get the house built, and the effect of the Minister of Munitions' intervention cannot be prayed in aid by Lawrence when he brought it about himself. Therefore, this appeal should be allowed and the plaintiff have judgment for the amount found by the official referee, with costs both here and below.

WARRINGTON, L.J.—I am of the same opinion. This is an appeal from a decision of the Divisional Court, reversing the decision of the official referee, to whom the question of damages had been referred. The only question is as to the proper mode of calculating damages payable by the defendants to the plaintiff for breach of contract, the contract being a contract by the defendant Lawrence with the plaintiff to erect for him a certain house at a certain price. The official referee has adopted what I think is the true measure of damages, namely, "what it cost the plaintiff to complete the house substantially as it was originally intended and in a reasonable manner, less any amount that would have been due and payable" to the builder by the building owner—that is to say, in the present case, to the defendants by the plaintiff—had the defendant Lawrence "completed the house at the time agreed by the terms of his contract." I have read that from an example given in HUDSON ON BUILDING CONTRACTS (4th Edn.) vol. 1 at p. 491, from a case decided in America of *Hirt* v. *Hahn* (1). It seems to me to express properly the true measure of damages, and that statement is exactly applicable to the present case, substituting only for "completion of the house" completion of the house to the roofing of it—the period adopted by the official referee. The official referee has allowed to the plaintiff the cost of doing that work as in the year 1919, when he was first able to do it—of course with the necessary additions and allowances to which either side unquestionably was entitled by virtue of the contract. The Divisional Court have reversed that, and have substituted for the measure of damages adopted by the official referee what, with all respect, appears to me to be an incorrect measure of damages. They have treated this as if it were a contract

for the sale of goods, and they have said that the plaintiff is entitled to the difference between the value of the thing he got at the material time—that is to say, when the breach was committed—and the value of the thing which he would have got if the defendant Lawrence had done his duty.

In my opinion, that is not the true measure of damages in a contract of this kind. The correct principle is that laid down by the American case to which I have referred. Of course, the plaintiff, being entitled to what it cost him to do the work, the defendants are entitled to say: "You must proceed with all reasonable diligence; you must do the work of building in a diligent manner and in a reasonable manner; you must not wait in the hope that the costs of building materials will go down, and then, when you find that they have not gone down, but have gone up, claim against us the cost of doing the work at that higher price." That is undoubtedly right. But then the plaintiff answers thus, and I think, in the circumstances of the present case, at all events, the answer is a sufficient one: "The delay was not occasioned by any fault of mine. I made every effort that was in my power to obtain permission to go on with the work, but I was not able to obtain permission because a competent authority said I was not to do it. As soon as that prohibition was withdrawn, which was in the year 1919, then I did the work." To that the defendants' counsel said: "But that is introducing an entirely new principle—that the defendants may be responsible for delay occasioned by the act of a third body—in this case the Ministry of Munitions." Whether in an ordinary case that may be a valid answer to the plaintiff's contention I express no opinion. It may, or may not, be. But I am perfectly clear that, in the present case, the defendants cannot take advantage of the position occasioned by the intervention of the Minister of Munitions, because it was that very thing which was brought about by the defendant Lawrence's own act. The defendant Lawrence, having made an unprofitable contract, is found by the official referee deliberately to have abstained from doing that which would have obtained him a licence to proceed—at all events to the roofing of the house—in order that he might be relieved from the embarrassment of the contract. Then he seeks to say to the plaintiff: "That being so, although you have not been able to do this work except at the higher price at which materials were in 1919, you are to get no more than what it would have cost you if you had done it in 1916." In my judgment, no such contention can be listened to for a moment. I think that it is quite clear that if the defendant Lawrence had proceeded with sufficient diligence even to have got up to the first floor the authorities would have allowed him to go on to the extent of roofing the house. But he deliberately abstained from even doing that much in order that he might obtain the advantage of what he appears to have said was a godsend to himself.

For these reasons it seems to me that the decision of the official referee was right, that the Divisional Court were wrong, and that the order proposed by the Master of the Rolls is the right order to be made.

YOUNGER, L.J.—I am of the same opinion. The only question that we have to determine is: What is the proper measure of damages to be paid by the defendants to the plaintiff on account of the failure on the part of the defendant Lawrence to use due and proper diligence in completing up to the roof a house which he had contracted with the plaintiff to build. That the defendant R. M. Smith failed to use such diligence through his agent, the defendant Lawrence, for whom he is responsible, was not disputed by the defendants' counsel. Accordingly, the only question that we have to determine is, what is the compensation to which the plaintiff is entitled by reason of that breach of contract?

The contract was to build a house for the plaintiff, and to an extent for which the defendant R. M. Smith is responsible—because he is not responsible for the fact that the whole house has not been built—he has failed to fulfil his contract. The plaintiff accordingly is entitled to have that house which the defendant was bound partially to build and which has not been built for him, and the damage

which he has sustained by reason of the defendant's breach is naturally and properly, as it seems to me, along with the other members of the court, the cost to which the plaintiff will be put in reasonably carrying out, by himself and for himself, that work which the defendant has failed to do, less only the sum which the plaintiff was bound to pay the defendant under the contract for carrying out the same work. It is not, I think, disputed that that in principle is the correct way of assessing damages. But it is said that there is in the present case a special circumstance which could not have been foreseen by either of the parties to this contract at the date when it was entered into, which has, in point of fact, occasioned the greatly increased rate to the plaintiff of completing the house up to the roof, and for which the defendants cannot be made responsible by reason of the fact that that particular difficulty was not and could not have been foreseen. The difficulty was that in September, 1916, there was, in fulfilment of a previous warning given by the Ministry of Munitions in the month of July, an embargo placed upon further proceeding with this work. It has been, as I have said, found that, by due diligence on the part of the defendant, the work up to the roof could have been completed before the embargo became effective. It has also been found by the official referee that the defendant R. M. Smith, through his agent, the defendant Lawrence, deliberately abstained from completing the work in the way in which he might have done, in order that the work, being left in a state of complete, or almost complete, incompletion, the embargo would be made effective by the Ministry of Munitions, and the defendant Lawrence would be thereby relieved from a contract which was always burthensome, and which was obviously, by that time, highly unprofitable. It appears to me that, so soon as that is established, it follows that the defendant Lawrence not only did his best, by his abstention from doing work that he was bound to do, to bring about this embargo on which he now seeks to rely by way of escape from his bargain, but that, when he so abstained from work which he was bound to do under his contract, he must be taken to have had full notice of the natural and probable consequence to the plaintiff in relation to the extra expense or difficulty that he would be put to in completing the house for himself occasioned by that very embargo which the defendant did his best to make effective. It appears to me, therefore, that if the damage suffered by the plaintiff is increased by reason of the embargo, the defendants should be ordered to pay damages in respect of that increased damage. It is not disputed that if, notwithstanding the embargo, the plaintiff had proceeded in September, 1916, to complete the house up to the roof, he would have been entitled to charge the defendant with the cost of doing so, however much that might have been increased by circumstances arising out of the war. Two years later it was possible for the plaintiff to do that which, by reason of the embargo, it had previously been impossible for him even to commence, namely, to proceed to the completion of this house up to the roof. The cost was then greater, by reason, not of the embargo, but of the war, than it would have been had there been no war. One asks oneself why, if what the plaintiff did was a reasonable and proper course to take in providing himself with that house up to the roof which the defendant Lawrence had failed to provide for him under his contract, that additional cost should not also be borne by the defendants, and I confess I am unable to see any reason why it should not be so borne. It is not as if in this instance there was included in the damages which the defendants are sought to be made liable to pay to the plaintiff anything for loss or inconvenience sustained by the plaintiff in respect of the fact that he was for two or three years kept out of a house to which he desired to bring his bride three years before. The defendants are not being made to pay any damages in respect of that, which would be, I agree, directly attributable to the embargo. All that they are being called on to pay is the necessary and proper cost incurred by the plaintiff at the earliest moment which he could incur it to complete the work which the defendant Lawrence by reason of breach of contract failed to do. It is, to my mind, a mere accident that the cost two years afterwards was heavier than was the cost at

A the time when the breach was completed. And it is a mere accident that the embargo which existed for that time had any operation in bringing about the change in price. Counsel for the defendants, indeed, said that if at the close of the embargo the cost of building the house when the plaintiff built it would have been less to him than had he proceeded at once on the breach the plaintiff would still have been entitled to recover from the defendants the larger sum. I do not B think so. In my judgment, the plaintiff can only in such a case as this recover from the defendants the reasonable cost to which he has been put in providing himself with the house with which the defendant Lawrence was by his contract bound, and has failed, to provide him.

It appears to me, therefore, that notwithstanding the delay of two years the defendants are liable for the sum that has been found by the official referee to C be due to the plaintiff, that sum being the cost to the plaintiff of completing his house up to the roof in a reasonable manner and at the earliest moment at which it was possible for him to do so. I think, therefore, that this appeal must be allowed and the order of the official receiver restored.

Appeal allowed.

D Solicitors: *Woodham Smith & Borrodaile*; *Campbell, Hooper & Todd.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

E

SINCLAIR *v.* POWELL

F [COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), November 4, 7, December 16, 1921]

[Reported [1922] 1 K.B. 393; 91 L.J.K.B. 220; 126 L.T. 210; 38 T.L.R. 239; 66 Sol. Jo. 235; 20 L.G.R. 73]

Rent Restriction—Apportionment—House not within Rent Acts on Aug. 3, 1914—
G *Conversion into flats—Change of identity of house.*

Where a house, which was not within the Rent Restriction Acts, has been divided into separate and self-contained flats the test whether the rent [or rateable value] of each flat is to be ascertained by apportionment of the rent [or rateable value] of the whole of the house or whether it is the rent at which the flat is first let [or the rateable value at which it is first assessed] is whether H the conversion of the house into flats resulted in so substantial an alteration of the house as to change its identity.

Notes. Under the Rent Act, 1957, the permitted rent of dwelling-houses which come within the Act is based on rateable value, and the references to standard rent in s. 12 (3) of the Increase of Rent &c. (Restrictions) Act, 1920, which provides for apportionment, were repealed.

J Considered: *Sutton* v. *Begley*, [1923] All E.R.Rep. 388; *Stockham* v. *Easton*, [1923] All E.R.Rep. 618; *Barrett* v. *Hardy Bros (Alnwick), Ltd.*, [1925] All E.R.Rep. 139. Distinguished: *Phillips* v. *Potter* (1925), 94 L.J.K.B. 819. Referred to: *Darrall* v. *Whitaker*, [1923] All E.R.Rep. 492; *Woodhead* v. *Putman*, [1923] 1 K.B. 252; *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K.B. 294; *Hemns* v. *Wheeler*, [1948] 2 K.B. 61; *Mitchell* v. *Barnes*, *Mitchell* v. *Allen*, [1949] 2 All E.R. 719; *Capital and Provincial Property, Ltd.* v. *Rice*, [1951] 2 All E.R. 600.

As to apportionment of rateable value and conversion into flats, see 23 HALSBURY'S LAWS (3rd Edn.) 724–726, 753–755; and for cases see 31 DIGEST (Repl.) 666,

685–688. For Increase of Rent &c. (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Cases referred to:

(1) *Phillips* v. *Barnett*, post p. 385; [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1, C.A.; 31 Digest (Repl.) 674, *7695*.

(2) *Woodward* v. *Samuels* (1920), 89 L.J.K.B. 689; 122 L.T. 681; 84 J.P. 105, D.C.; 31 Digest (Repl.) 673, *7690*.

(3) *Hollands* v. *Cooper* (1921), 91 L.J.Ch. 297; 125 L.T. 850; 66 Sol. Jo. (W.R.) 10, C.A.; 35 Digest 698, *4410*.

(4) *Allchurch* v. *Hendon Union Assessment Committee*, [1891] 2 Q.B. 436; 61 L.J.M.C. 27; 65 L.T. 450; 56 J.P. 117; 40 W.R. 86; 7 T.L.R. 634, C.A.; 38 Digest 453, *200*.

Appeal from an order of the Divisional Court (LUSH and SANKEY, JJ.), reversing a decision of the judge of the West London (Brompton) County Court.

The tenant, Mrs. Sinclair, applied to the county court, under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for the apportionment of the rent of No. 21, Upper Addison Gardens, a dwelling-house which had been converted into flats. The object of the application was to have the standard rent of one of the flats (of which she was the tenant) determined for the purpose of the Act of 1920. The Divisional Court held that there should be no apportionment, and the tenant appealed.

Alexander Grant, K.C., and *Schultess Young* for the tenant.

L. S. Fletcher for the landlord.

Cur. adv. vult.

Dec. 16. The following judgments were read.

BANKES, L.J.—In this appeal from a Divisional Court yet another thorny question as to the true construction of the Rest Restriction Acts is raised.

The landlord was the owner of a house in Upper Addison Gardens, the rent of which in August, 1914, was £65 and the rateable value £65 gross and £55 rateable, both rent and rateable value being substantially above the limit laid down in s. 2 (2) (a) of the Increase of Rent &c. Act, 1915, and, therefore, the house did not come within the provisions of that Act. In 1917 the house was converted into three flats, each of which was let at a separate rent, as a separate dwelling, and was assessed separately. One of the flats was let to the tenant at a yearly rent of £50. By a provisional valuation list made in September, 1917, this flat was assessed at £33 gross, £27 rateable. In October, 1920, the landlord gave notice to the tenant of an increase of rent, and the tenant thereupon applied to the county court for an apportionment of rent under s. 12 (3) of the Act of 1920 in order that the standard rent of the flat might be determined. The tenant contended that the rent to be apportioned was the rent at which the unaltered and undivided house was let on Aug. 3, 1914. The landlord contended that the subsection had no application to the facts of the particular case. The county court judge accepted the tenant's contention, but his decision was reversed by the Divisional Court.

Apart from authority and the difficulty which must always arise in cases like the present as to the true inference which should be drawn from the facts, the construction to be placed upon the language of the statute as applicable to this case appears to me to be reasonably clear. A house, or a number of houses, may be so altered that it cannot be said of it, or them, that it or they can any longer be identified as being the same house or the same houses as before the alteration. In *Phillips* v. *Barnett* (1) (post p. 385), where three small and adjoining dwelling-houses had been gutted, altered, added to and converted into a factory, we held that, though the outer walls of the three houses to a large extent remained unaltered, and in a sense, therefore, the three original houses could be identified, yet the alterations were such as to render it impossible to say that the converted building had ever been let before its conversion and that the standard rents of the

three original houses could not be applied to the converted building, so as to arrive at the standard rent of that building. In a similar way I consider that a single house may be so altered by being converted into flats as to lose its identity, with the result that the standard rent of the original house becomes immaterial when considering what are the standard rents of the flats into which the original house has been converted. The Act of 1920 clearly recognises not only the possibility, but the desirability, of the conversion of single houses into separate flats. Section 12 (9) of the Act exempts from the operation of the Act any dwelling-house which since April 2, 1919, has been, or which at that date was being, bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. The subsection was presumably introduced into the statute because of the decision in *Woodward* v. *Samuels* (2), which must have been interpreted as a decision having a wider effect than I consider that it really has. April 2, 1919, was the date of the passing of the Rent Restriction Act, 1919. Why that date was introduced into the subsection, it is difficult to see. The subsection has no application to the present case as the conversion of the house into flats was made in 1917, but, in my opinion, the subsection cannot be construed as negativing such a reconstruction of a dwelling-house into flats before that date as to render the standard rent of the original house inapplicable in considering what the standard rents of the flats are. This subsection is important as indicating what is also manifested by the immediately preceding subsection—namely, that the policy of the legislature underlying the Rent Restriction Acts was to encourage an increase in the amount of dwelling accommodation as well as to restrict the rents which might be charged for dwelling-houses. In the present case the inference which I draw from the facts is that what was done to the house in question in 1917, was what the legislature has now termed "a bona fide reconstruction by way of conversion" into flats.

I do not think that this inference is different from that drawn by the county court judge. He considered himself bound by the decision of *Woodward* v. *Samuels* (2). I gather from the report of that case that the court considered that the work done in turning the original house into flats was not such as to destroy the identity of that house. SANKEY, J., speaks of the property in which the flats were comprised as the "undivided house." Upon this view of the facts, I see no reason to dissent from the decision in that case, but if it decided that no reconstruction of a house into separate flats before April 2, 1919, would permit of the flats being treated as dwelling-houses first let after the conversion of the house into flats, I do not agree with it. The court, whenever called upon to consider the question, must be astute to see that a landlord is not evading the restrictions upon increases of rent imposed by the statute, by some mere alteration in the character of the lettings, or by small and possibly colourable alterations of the structure or by a mere sub-dividing of the tenement. Nothing of the kind has, in my opinion, been done in this case, but the landlord has by a bona fide reconstruction of his house converted it into several self-contained flats which are capable of being, and have ever since they were created been, separately let, separately occupied and separately assessed and rated. Upon this view of the facts the application of the statute seems clear and no case arises for any apportionment of rent under s. 12 (3) of the Act of 1920. Each of the flats into which the house was converted had become a separate dwelling within the meaning of the statute. Each had its own standard rent, which by virtue of the provisions of the statute was the rent at which it was first let. It was unnecessary, therefore, for the purpose of determining what the standard rent of any one of the flats was, to apportion the rent of the property in which that dwelling-house was comprised. I agree with the result at which the Divisional Court arrived, though not with the grounds of their decision, and the appeal must be dismissed with costs.

SCRUTTON, L.J.—Yet another appeal raises a question of constant occurrence for which the Rent Restriction Acts make no clear provision. This time the

question is as to the effect of the Acts when a house is by structural alterations converted into flats. It is the converse of the case we recently decided, *Phillips* v. *Barnett* (1), in which three houses were by structural alterations converted into one factory. We held in that case that the standard rents in 1914 of the three houses respectively had nothing to do with the standard rent of the new factory, which was the rent at which it was first let after conversion. The facts in the present case are that a house whose rent (£65, tenant paying rates) and the rateable value (£65 gross) was not within the then Rent Restriction Act, was converted into three flats of which the flat in question was then let at £50, landlord paying rates, and rated at £33 gross, £27 net. The effect of this was, in my view, to create a new dwelling-house within the 1915 Act, first let after its creation at £50, which was, therefore, its standard rent. It would not have been possible at that time, in my opinion, to apply for apportionment of the rent of £65 for the whole house in 1914, for the house as a whole was not within the 1915 Act, and had, therefore, no limitation on the rent which might be charged for it. The flat was not let, or, indeed, in existence, at that date, 1914, and had no rent at that date.

The Act of 1920 extended the limits of its operation to houses in London, rented or rated at less than £105, and, therefore, the house as a whole, if unaltered, would be within the Act. Each of the three flats into which it had been converted certainly was within the Act. Section 1 of the Act of 1920 begins "where the rent of any dwelling-house to which this Act applies has been since the 25th March, 1920, increased, or is hereafter increased," certain consequences shall follow. If the rent of this flat, being a separate dwelling-house, separately rated, had continued at £50 after the Act, the sum it was let at before the Act, in my view the Act would not prevent £50 being recovered. The rent would not have been "increased," for I cannot construe the words of s. 1 to mean "is on the 25th March, 1920, or after, higher than the standard rent." Indeed, if one could get that meaning out of the words, as I have pointed out that the standard rent of the flat was £50, the rent at which it was first let at a time when the whole house was not within the Acts, the rent after March, 1920, would not be higher than the standard rent. Again, in my opinion, apportionment could not be applied for. The standard rent of the original house was not applicable to or apportionable between the three reconstructed flats which had taken the place of the whole house.

I note that ASTBURY, J., in *Hollands* v. *Cooper* (3), has in the matter of mortgage interest taken a somewhat different view of s. 1 of the Act of 1920. There are special provisions in the Acts as to mortgage interest which may justify this, but it is not necessary for the present case to consider them, or whether the learned judge was correct in his view of s. 1. I reserve the right to reconsider his decision, if it should come before me.

The judgment of the Divisional Court seems to have stopped at this point, and decided on the first ground I have stated that the landlord was entitled to continue receiving the rent which she had been receiving, which was not an increase of rent, and for the reasons stated I am of opinion that this was correct. But it appears that on Oct. 7, 1920, a notice was given increasing the rent from £50 a year to £78 3s. The judgment of the county court judge was given on Mar. 27, 1921, the case having been before the registrar on Feb. 7, 1921. It does not appear when the proceedings were started, nor does the county court judge mention the notice to increase rent, though such notice is obviously the reason why the proceedings for apportionment were started under s. 12 (9) of the Act of 1920. By s. 1 of the Act of 1920, if the rent is increased after Mar. 25, 1920, and the increased rent exceeds by more than the amount permissible under the Act the standard rent, such excess is irrecoverable by the landlord and can be recovered back by the tenant if paid. The tenant apparently desired to contend that there was such an excess, and for that purpose to get a standard rent, as one member of the comparison, and her view was that the rent of the whole house in 1914 was the standard rent which was to be apportioned under s. 12 (3) of the Act. As I

have said, this view is, in my opinion, erroneous. The standard rent applicable to this flat, separately rated, was the rent at which it was first let, provided there was at the time no legal objection to its first letting. There was in this case no such legal objection, and in my view the flat had a standard rent of £50, and there was no need to apportion any rent existing in 1914. If the whole house had been within the 1915 Act, a different question would have arisen, similar to the question raised in *Woodward* v. *Samuels* (2) where the house when divided and first let in flats was within the 1919 Act. The whole house here was not within any Rent Restriction Act at the time it was divided, and the Divisional Court on this ground distinguished the present case from *Woodward* v. *Samuels* (2), I think, correctly. I desire to reserve the question whether *Woodward* v. *Samuels* (2) was correctly decided, till the question arises before us on facts raising it. We have enough trouble in deciding the questions which do arise without looking for additional trouble before it arises; and I quite appreciate that difficult questions may arise as to the sub-letting of rooms in a house subject to the restrictions Acts, even though those rooms separately occupied may be separately rateable and rated: see the judgment of LORD ESHER, M.R., in *Allchurch* v. *Hendon Union Assessment Committee* (4). The answer may turn largely on a question of fact, the extent of alterations made in the original house; but I do not decide this now. The applicability of *Woodward* v. *Samuels* (2) to flats created after April 2, 1919, has been destroyed by sub-s. (9) of s. 12 of the Act of 1920 and the question reserved may not arise. The appeal on the present facts should be dismissed with costs. I am not deciding whether the proposed increases of rent are justifiable, but only that the standard rent of this flat for that purpose is to be taken at £50, and not an apportioned part of the rent in 1914.

ATKIN, L.J.—We are asked to construe an obscure clause in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, namely, s. 12 (3). I do not propose to recapitulate the facts. The clause is to be found verbatim in the first Increase of Rent, &c. Act, 1915, as s. 2 (3). It is legitimate to bear that fact in mind in attempting to construe the clause in the later Act, dealing with the same subject-matter.

In view of the grounds of the decision of the Divisional Court, I find it advisable to recall the provisions of the two principal Acts which preceded the present Increase of Rent, &c., Act (i.e., the Act of 1920), as they and the present Act have a common purpose—the protection of the poorer classes against the effects of an unrestricted competition for houses in raising rents—and seek to attain the purpose by a common method. This can be illustrated from the Act of 1915. The Act only applies to a particular class of dwellings. The class is defined by reference to the amount of rent of houses at a specified time. The specified time is either the day before the war, Aug. 3, 1914, or the first day at which a house was let thereafter; and the rent at the specified time is termed the standard rent. If the house in question is one where the standard rent did not exceed in the metropolitan area, £35, i.e., 13s. 6d. a week—it falls within the class to which the Act is applicable. It may be noted that in order to determine whether the Act applies, all houses have a standard rent; it is only where the standard rent does not exceed the amount of the statutory limit that the house falls within the Act. When the house falls within the Act any increase of rent made since a given period is irrecoverable. In the Act of 1915 the period is the beginning of the war; the Act itself was passed on Dec. 23, 1915, and therefore, necessarily, has a retrospective effect. We can compare the subsequent Acts in this respect. The Act of 1919 was passed on April 2, 1919, and relates to increases made since Dec. 25, 1918. It raises the corresponding statutory limit to £70—i.e., 27s. a week. The Act of 1920 was passed on July 2, 1920. It relates to increases from Mar. 25, 1920, and raises the statutory limit to £105—i.e., £2 0s. 6d. per week. For simplicity I have omitted any reference to rateable values. When a house comes within the statutory class the prohibited increase is an increase above not the

rent at which the house was let at the passing of the Act but—the standard rent with the authorised statutory additions, if any. In the first Act there were no such additions. An illustration will make clear what I mean. House let on Aug. 3, 1914, at £30, but in September, 1914, let to a tenant on a three years' agreement at £50 a year; and so held on Dec. 23, 1915. The extra £20 a year was irrecoverable on and after Dec. 23, 1915. House let on Aug. 3, 1914, at £50, but in January, 1919, let at £70. The difference between £70 and £50 and the additions authorised by the Act of 1919 is irrecoverable. If the last house had been let in September, 1918, on, say, a three years' tenancy at £70 a year, I am inclined to think that the landlord would not in receiving rent at the rate of £70 a year in March, 1919, be increasing the rent, but after Dec. 25, 1918, his powers of increasing the rent of £70 would be restricted by the statute to £50 and the additions authorised by the Act of 1919, which might amount to a sum less than £70. Similar instances may be given in respect of the Act of 1920.

In the three Acts, "house" includes part of a house let as a separate dwelling. Obviously the relief intended by the Act would be nugatory if it did not include the separate tenements in one house in which so many of the poorer classes live. Where such a separate tenement was let on Aug. 3, 1914, and is let in substantially the same form thereafter, precisely the same considerations apply to it as I have just mentioned. But a more difficult question arises when there is a change in the house as it was let on Aug. 3, 1914, whether it be a whole house or a separate tenement. Assume a house let at £30 on Aug. 3, 1914, and that in January, 1915, the landlord let it out without further alteration in two separate tenements at 13s. 6d. a week each—£35 a year each or £70 in all. Could the tenant of each of the tenements, in January, 1916, say that the rent had been increased since the war and that the standard rent must be taken to be the apportioned rent of the house as let on Aug. 3, 1914; or would the landlord be right in saying that the tenement was first let in January, 1915, and that the standard rent was the rent at that date? Assume that the house had not been divided into two tenements, but that having been let on Aug. 3 at £30, the landlord had locked up one room and let the house less the one room in January, 1915, at £70. Would the standard rent of such a house be the rent in August, 1914, or in January, 1915? *Woodward* v. *Samuels* (2) would appear to decide that the standard rent was the rent in August, 1914, as apportioned. The distinction suggested in the present case is that apportionment does not apply where the division is made at a time when the Act does not apply to the house. That would appear to be an odd distinction in the case of the Act of 1915, for the Act covers all increases of rent made after Aug. 4, 1914, and, therefore, at a period Aug. 4, 1914–Dec. 23, 1915, to which at that time no Act applied. If it applies to an increase of rent in letting the same tenement, why not to an increase of rent by dividing the tenement?

But what is the position after the Act of 1915 was passed? Could the landlord after the passing of the Act, by shutting off one room of a house let in August, 1914, less than £35, or of a tenement of three or four rooms let in August, 1914, at less than £35, let the house or tenement so altered at any unrestricted rent he chose to demand? It appears to me that so easy a means of evading the Act was foreseen by the legislature and provided for by the apportionment clause, and that *Woodward* v. *Samuels* (2) was rightly decided. If in that case the tenement was not let for the first time in May, 1919, assuming that the house was then converted into flats it seems to me impossible to say that it would have been let for the first time in November, 1918, if the house had then been converted into flats. The question whether the Rent Restrictions Act for the time being applied to the house seems to me, with respect, to be irrelevant to the question when the house was first let. It is relevant to the question whether the rent is being increased. For instance, in the present case, as long as the landlord is content to take the rent as fixed in June, 1917, of £50 a year, inclusive of rates, it seems to me that he is not increasing the rent. If, however, he seeks to increase the rent, and the standard rent is an apportioned rent, he can only increase the rent up to the appor-

tioned rent together with the authorised statutory additions. In the present case, however, I think that there is a grave question whether the apportionment section applies. To apply a rent of August, 1914, one must show that the house or part of a house was let at that date. If it has become something different one does not show it, as we held in *Phillips* v. *Barnett* (1), where three dwelling-houses had been structurally altered into a factory. If the part of a house was not let as a separate dwelling in August, 1914, one may show that substantially in the form in which it now is, it existed, and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned. But if the part has been substantially altered so that one cannot fairly predicate of it that in its present form it was as part of a whole let in 1914, I do not think that apportionment is possible. The apportioned values may be entirely misleading, as when by structural alterations the upper bedrooms of a house, ordinarily, I suppose, the least valuable, have become when fitted as a separate tenement of greater value than the lower floors. My own view on the statement of facts in this case is that it was impossible to predicate of the three flats of which that of the tenant is one that they were let in August, 1914, as parts of the whole undivided house. They seem to be quite different from the floors which together constituted the whole. My difficulty in this case is lest this should be an inference of fact, and lest this is a point not properly taken before the county court judge. On the whole I think that it is open here for consideration and that the facts have only one conclusion open in law. I, therefore, agree that the appeal should be dismissed, though for different reasons from those given by the Divisional Court.

Appeal dismissed.

Solicitors: *H. T. Nicholson*; *Herbert A. Phillips.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NOTE

PHILLIPS AND OTHERS *v.* BARNETT

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), October 21, 1921]

[Reported [1922] 1 K.B. 222; 91 L.J.K.B. 198; 126 L.T. 173; 38 T.L.R. 39; 66 Sol. Jo. 124; 20 L.G.R. 1]

Rent Restriction—Application of Rent Acts—Conversion of dwelling-house—Loss of identity—Conversion into factory.

Appeal by the tenants from an order of Clerkenwell County Court.

The plaintiffs, tenants of a factory, claimed to recover from the landlord, under s. 14 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the difference between the "standard rent" of the building and the amount paid by the plaintiff.

J. B. Matthews, K.C., Foà, and *Newman* for the tenants.

S. O. Henn Collins for the landlord.

BANKES, L.J.—At the time of the passing of the Rent Restriction Act, 1915, there were in existence three separate dwelling-houses, Nos. 26, 28, and 30, Shepperton Road, in the parish of St. Mary, Islington. They were all let upon rents, and were rateable at figures, which brought each one of those houses within the operation of the Act, and they remained subject to the provisions of the Act. In 1918 the landlord obtained vacant possession of the premises, and

she was then minded to convert those houses into a factory. There is no suggestion here of any colourable alteration in the premises for the purpose of evading the provisions of the statute. It is a clear case of bona fide alteration by the landlord, at very considerable expense, of what had been dwelling-houses into what was to be a factory. For the purpose of making the change, not only were the staircases, which were essential for the occupation of the premises as dwelling-houses, done away with, and only a factory staircase substituted for the three staircases of the three houses, but openings were made in the party walls sufficiently wide to enable the whole of the ground floor and basement to be used as one room. The whole of the domestic offices which were essential to the occupation of the original buildings as dwelling-houses were swept away, and there was erected in their place at the rear of two of these houses one room which extended the whole width of the two houses and formed part, and a very important part, of the new factory. So great was the alteration, and so excellent a factory was it when completed, that the plaintiff and his wife were prepared to enter into a lease to take these premises for twenty-one years at £700 a year. They having done that, it occurred to them, or somebody advised them, that the effect of the Rent Restriction Act, 1920, was that they need not pay more than the standard rent of the three separate dwelling-houses, and, having paid the first half-year in advance, they were entitled to recover back the difference between the amount they paid and the amount of the standard rent, and they brought an action for that purpose, and the learned county court judge gave judgment in their favour in a long and elaborate judgment. The Divisional Court have reversed that judgment, and entered judgment for the landlord, and from that judgment there is an appeal to this court.

In my opinion, the rights of these parties depend upon the true inference to be drawn from the facts, and the conclusion which is to be come to is perhaps a mixed question of fact and law. I do not think that the learned county court judge has found as a fact what it is necessary, in my opinion, for him to find in order to support his judgment, and, indeed, I think if upon the materials before him he had so found, there would not have been evidence upon which his finding could be supported. The question and the only question is: Aye or No, were the premises which are included in the lease let as dwelling-houses or as a dwelling-house at the time of the passing of the Act of 1915? My answer to that is, they obviously were not. Another way of stating the same proposition is that the statute of 1915 undoubtedly applied to each one of these houses and as long as those houses remained they were subject to the provisions of the statute, but when they ceased to be identifiable as those houses the statute no longer applied to them. I do not think that the statute applies any more to these premises than it would apply in a case where a building to which the statute applied has been entirely pulled down and a fresh and a different building has been erected on the original foundations. It would be impossible to say that the statute applied to the new building because it had applied to the previously existing building, and in exactly the same way here it seems to me that the identity of the original houses can no longer be established and a building existing upon the original foundations is for all practical purposes, and for the purposes of considering whether the Act applies, no longer the existing building, so that it cannot be said that it was let at a rent which would become the standard rent at the time of the passing of the statute in 1915. For these reasons, I think that the decision of the Divisional Court was right, and the appeal must be dismissed with costs.

SCRUTTON, L.J.—I agree. Counsel for the tenants have argued that when once one gets a dwelling-house to which the Rent Restriction Acts apply the restrictions of those Acts cling to that dwelling-house, although it ceases to be a dwelling-house and becomes a factory. I rather think the argument would go so far as saying that, though there is no dwelling-house at all, though it is entirely pulled down, still one cannot let the land at more than the rent which was originally imposed on the dwelling-house. In my view, that is a mistaken view of the Acts. The restrictions on dwelling-houses remained so long as they were dwelling-houses, and when they became entirely a factory up to the passing of the Act of 1920 there were no restrictions. When the Act of 1920 was passed, all business premises were brought within the Act. When one inquires whether for business premises there was in 1914 a rent which could become the standard rent, and finds that the premises were not let as business premises in 1914, standard

rent would be the rent at which the premises were first let as business premises—in this case £700. Looked at from that point of view, it appears to be quite a mistake to endeavour to apply to the restrictions applicable to the rent of dwelling-houses to a building which, as the county court judge finds, is not a dwelling-house at all, but is used as a factory, and only adapted to be a factory. Counsel for the tenants raised some argument upon sub-s. (6) of s. 12 of the Act of 1920: "Where this Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies." It appears to me that throughout that subsection there runs the condition that there shall be a dwelling-house—"shall continue to apply thereto," i.e., to the dwelling-house, whether or not the dwelling-house continues to be a dwelling-house within the Act. There are dwelling-houses to which the Act does not apply. Subsection (7) gives an instance, and it may be that the effect of the increase of rates or the addition to the standard rent made under the terms of the Act may raise difficulties as to whether a dwelling-house which is within the limit when the Act was passed has come out by reason of alteration in rating, or by addition to the standard rent. With that point in view, I think sub-s. (6), which was in the Act of 1915 in the same terms, has been inserted, but, in my view, it does not mean that, once a dwelling-house, anything on that land shall always be subject to the restrictions, whether there remains a dwelling-house or not.

ATKIN, L.J.—I agree. To my mind, the claim of the plaintiffs depends on s. 1 of the Act of 1920, which provides that where the rent of any dwelling-house to which the Act applies is increased, that increase shall be irrecoverable. The answer made by the landlord is that the premises are not premises to which the Rent Acts apply. Section 12 (2) of the Act of 1920 provides that the Act shall apply to a house let as a separate building where the annual amount of the standard rent or the rateable value does not exceed certain figures. If one looks at s. 12 (1) (a) one finds that "standard rent" means "the rent at which the dwelling-house was let on the 3rd day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let, and so as to rateable value. Therefore, the inquiry you have to make is whether these premises, the subject-matter of the letting to the present tenants, were let on Aug. 3. The answer is that they were not. The premises let to the tenants are a factory covering the ground previously occupied by three houses—Nos. 26, 28 and 30. The houses which were let on Aug. 3, 1914, by reference to which their standard rents would be fixed, appear to me to be quite different from the present factory and, that being so, inasmuch as the factory did not exist in August, 1914, and was let for the first time under this lease, it appears to me that it constitutes premises to which the Act did not apply, because it is not disputed that its rent and the rateable value exceeded the limits laid down in the Act of Parliament. Whether a house has or has not existed before, whether it has changed identity, involves the determination of a question of fact, and in this case the only inference of fact which could be drawn from the evidence is that this factory came into existence for the first time when it was let to the tenants, and that it was not identical with the three houses which existed in 1914.

Appeal dismissed.

Solicitors: *H. A. Phillips*; *A. D. Vandamm.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

PAYNE *v.* BRITISH TIME RECORDER CO., LTD. AND W. W. CURTIS, LTD.

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), January 11, 1921]

B

[Reported [1921] 2 K.B. 1; 90 L.J.K.B. 445; 124 L.T. 719; 37 T.L.R. 295]

Practice—Parties—Causes of action—Joinder—Common question of law or fact—Different causes of action—Different defendants—Action for breach of contract to pay for goods supplied and action for breach of contract to supply goods ordered—Discretion of court—R.S.C., Ord. 16, *r.* 4.

C

Where common questions of law or fact are involved in different causes of action by the same plaintiff against different defendants, all such causes of action and defendants may be joined in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties.

D

The plaintiff, who carried on a business of supplying office requisites, entered into a contract with the first defendant company to supply them with clock cards which should conform to specimens supplied to him by that company. To enable him to carry out that contract he entered into a contract with the second defendant company to supply him with the cards which he had agreed to supply to the first defendant company, and he paid most of the price to the second defendant company. On the cards being supplied by the second defendant company, the first defendant company refused to pay for them as they said that they did not conform to the specimen which they had contracted they should conform to. Thereupon the plaintiff brought an action against the first defendant company to recover the price of the cards sold, and, in the alternative, against the second defendant company for damages for breach of contract in not supplying the cards in accordance with the specimens, whereby he had suffered damage.

E

F

Held: although the action was brought against the two defendant companies on different contracts and on different facts, and the amount payable was not the same in both cases, the common question of fact whether the cards supplied were in accordance with the specimen gave the court discretion to allow both causes of action and both defendants to be joined in the action, and this question was so important that they should be so joined.

G

Compañia Sansinena de Carnes Congeladas v. *Houlder Bros. & Co., Ltd.* (1), [1910] 2 K.B. 354, *Thomas* v. *Moore* (2), [1918] 1 K.B. 555, and *Re Beck, Attia* v. *Seed* (3) (1918), 118 L.T. 629, applied.

Smurthwaite v. *Hannay* (4), [1894] A.C. 494, *Sadler* v. *Great Western Rail. Co.* (5), [1896] A.C. 450, and *Thompson* v. *London County Council* (6), [1899] 1 Q.B. 840, stated to be no longer good law on this point.

H

Per SCRUTTON, L.J. "It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of all such parties subject to its discretion how the action should be tried."

I

Notes. Applied: *Daws* v. *Daily Sketch*, [1960] 1 All E.R. 397. Referred to: *Green* v. *Berliner*, [1936] 1 All E.R. 199.

As to joinder of causes of action, see 30 HALSBURY'S LAWS (3rd Edn.) 308; as to joinder of defendants, see ibid., 317; and as to statement of claim against several defendants, see ibid., 22. For cases see DIGEST (Practice) 408.

A Cases referred to:

(1) *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.*, [1910] 2 K.B. 354; 79 L.J.K.B. 1094; 103 L.T. 333; 11 Asp.M.L.C. 525, C.A.; Digest (Practice) 400, *1015.*

(2) *Thomas* v. *Moore*, [1918] 1 K.B. 555; 87 L.J.K.B. 577; 118 L.T. 298, C.A.; Digest (Practice) 142, *1277.*

B (3) *Re Beck, Attia* v. *Seed* (1918), 87 L.J.Ch. 335; 118 L.T. 629; 34 T.L.R. 286, C.A.; Digest (Practice) 360, *724.*

(4) *Smurthwaite* v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; Digest (Practice) 141, *1265.*

(5) *Sadler* v. *Great Western Rail. Co.*, [1896] A.C. 450; 65 L.J.Q.B. 462; 74 C L.T. 561; 45 W.R. 51; 12 T.L.R. 394, H.L.; Digest (Practice) 141, *1270.*

(6) *Thompson* v. *L.C.C.*, [1899] 1 Q.B. 840; 62 L.J.Q.B. 625; 80 L.T. 512; 47 W.R. 433; 43 Sol. Jo. 379, C.A.; Digest (Practice) 142, *1271.*

(7) *Oesterreichische Export A.-G.* v. *British Indemnity Insurance Co., Ltd.*, [1914] 2 K.B. 747, 755, 756; 83 L.J.K.B. 971; 110 L.T. 955, C.A.; Digest (Practice) 400, *1017.*

D (8) *Collen* v. *Wright* (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest 665, *2795.*

Appeals by the defendant companies, W. W. Curtis, Ltd., and British Time Recorder Co., Ltd., respectively from the decision of A. T. LAWRENCE, J.

The facts of the case appear from the headnote and the judgments.

E *St. John Field* for the second defendant, W. W. Curtis, Ltd.

H. J. Rowlands for the first defendant, British Time Recorder Co., Ltd.

J. F. Eales for the plaintiff.

LORD STERNDALE, M.R.—These are appeals from two orders of A. T. LAWRENCE, J., affirming the decision of the master, the question being whether two defendant companies were properly joined in an action under Ord. 16, r. 4. The F appeals were argued on two grounds: First, that there was no power under the rule to join the defendant companies under the circumstances of the case; and, secondly, that, even if there were power, the joinder ought not to be allowed, and that the court in the exercise of its discretion ought to strike out one of the defendant companies.

The matter arises in this way. The plaintiff, who carries on a business of sup- G plying office requisites, entered into a contract with the British Time Recorder Co., Ltd., to supply them with certain clock cards which should conform to certain specimens supplied to him by that company. In order to enable him to carry out that contract he entered into a contract with W. W. Curtis, Ltd., to supply him with the cards which he had agreed to supply to the British Time Recorder Co., Ltd. He paid most of the price to W. W. Curtis, Ltd. The British Time Recorder H Co., Ltd., refused to pay for the cards as they said they did not conform to the specimens which they had contracted they should conform to. It does not appear on the pleadings that the specimens supplied by the British Time Recorder Co., Ltd., were the same as those supplied by the plaintiff to W. W. Curtis, Ltd., but I think that there is no substantial doubt that the specimens were all the same in each case. The plaintiff brings his action against the British Time Recorder Co., Ltd., I for the price of the cards sold, and, in the alternative, against W. W. Curtis, Ltd., for breach of contract in not supplying the cards in accordance with the specimens whereby he had suffered damage. The action was brought against the two defendant companies on different contracts, and the amount payable is not the same in each case. The plaintiff's claims are, therefore, inconsistent in the sense that the plaintiff can in one event recover against the British Time Recorder Co., Ltd., but not against W. W. Curtis, Ltd.

The first point taken was that the plaintiff had no right under Ord. 16, r. 4, to join the two defendant companies. That rule provides as follows:

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

The argument was that one must apply this test, that, in order to join two distinct causes of action, there must be some link between the two defendants, or the damage to the plaintiff must be common to both of them.

The first observation to be made on that is that that proposition is not to be found in the rule. But it is said that it is to be found in the decisions of the courts. I do not think that that is so. The decisions of the courts are certainly not consistent. Some part of the inconsistency is to be found in this, that, after the alteration of the rule to its present form in consequence of the decision in *Smurthwaite* v. *Hannay* (4), the courts have not always taken notice of the alteration. I think that the following remarks by FLETCHER MOULTON, L.J., in *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.* (1) with regard to those decisions are correct ([1910] 2 K.B. at p. 366):

"A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of r. 4, which, as I have said, appear to me clearly to contemplate such a case as the present."

I agree that the claims made by the plaintiff against the two defendant companies in the present case are not the same. They are sued on different contracts, in the one case for the price of goods sold and in the other for damages, and the amounts claimed differ in each case. But the words of limitation sought to be read into the rule are not to be found there. I think, as I said in *Thomas* v. *Moore* (2), that

"joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right."

I said that because I thought that that was the conclusion established by *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.* (1) and the subsequent case of *Oesterreichische Export A.-G.* v. *British Indemnity Insurance Co., Ltd.* (7). It was argued that both those cases did not support my proposition, but I think that the observations in those cases by FLETCHER MOULTON, L.J., and BUCKLEY, L.J., do support the proposition which I stated in *Thomas* v. *Moore* (2). In another case, *Re Beck, Attia* v. *Seed* (3), SWINFEN EADY, M.R., stated the proposition in much the same way. I think, therefore, that the first point fails, and that there is power to join these defendant companies, but that that is subject to the right of the court to order either one of them to be struck out.

I do not think that there is any decision which governs the exercise by the court of its discretion in this case. It has been laid down that what has to be ascertained is whether there is any question of fact or law common to the defendants, and that, if there is, it does not matter that there is an alternative remedy and that the reliefs claimed by the plaintiff are inconsistent with one another. That, in my opinion, was established by *Collen* v. *Wright* (8). I agree that as regards the question of discretion the present case is not the same as any of the decided cases. It is very near the line. Questions are raised between the plaintiff and one of the defendant companies which are not raised between him and the other defendant company, but there is one very important question which is common to both defendant companies, namely, whether the cards were up to sample. If that is decided, the rest of the case is mere fringe. But then there are other questions, as, for example, the question of custom, raised by one of the defendant companies, as to which I will only say that it is difficult at first sight to see how it applies to the plaintiff. Then there is the question of the separate counter-claims, and there is the question as between the plaintiff and one of the defendant companies whether the plaintiff did not admit that the clock cards were not up to sample and ask them

to return them. But there is, as I say, one main question which is common, and the learned judge who tries the case will be able under Ord. 16, r. 5, to avoid any injustice being occasioned to one of the defendant companies by reason of the fact that some of the questions do not concern them. That rule provides as follows:

> "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

That rule seems to me quite sufficient to prevent any injustice being done to a defendant who is not interested in subsidiary questions which concern only another defendant. I had some doubt at first whether the statement of claim in the present case was not embarrassing. But I have come to the conclusion that, on the whole, it is not so embarrassing that one of the defendant companies should be struck out. Even if the court were to strike out one of these defendant companies, the only result would be that another action would be brought by the plaintiff against them, and the two actions would be tried by the same judge. I think, therefore, that no good objection is shown for striking out one of these defendant companies. The appeals fail and must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The first question argued was whether as a matter of law on the construction of r. 4 of Ord. 16 there is the limitation contended for on behalf of the defendant companies. That limitation was that in order to join defendants in respect of two separate and distinct causes of action there must be some contractual or other link between the defendants, or there must in substance be one injury suffered by the plaintiff from one or the other of them. On that point I prefer not to express an independent opinion of my own, but to read what was said by FLETCHER MOULTON, L.J., in *Compañia Sansinena de Carnes Congeladas* v. *Houlder Bros. & Co., Ltd.* (1) ([1910] 2 K.B. at p. 365), and, in reading it, to adopt his remarks as part of my own judgment. He began by reading r. 1 of Ord. 16 and then said:

> "The terms of this rule to my mind make it clear that Ord. 16 does not now deal solely with joinder of parties, but also deals with joinder of causes of action. Considering that rule with reference to the interpretation of r. 4, it appears to me that, just as the House of Lords, before the alteration of that rule, construed the wide and general language of r. 1 by reference to the general scope of the order in which they could, as the rule then stood, find no intention to deal with joinder of causes of action, so now we are entitled to consider the meaning of the wide language of r. 4 as forming part of an order which purports to some extent to deal with joinder of causes of action. Turning to r. 1 in its new form, I find that the words inserted are in the nature of words of restriction or qualification, which, while they show that it is intended by the rule to deal with joinder of causes of action, at the same time put some limitation on the joinder of causes of action which may be made under it. Looking at r. 4 by the light of that rule, it appears that the Rule Committee deemed it to be unnecessary to insert similar words in r. 4, and that they thought it desirable to keep the terms of that rule of their original width, after having made it clear that the order was not limited to joinder of parties, but was intended to deal with joinder of causes of action. The result appears to me to be that we are not now bound to limit the plain meaning of the words of r. 4 by reference to a decision of the House of Lords given under a different state of circumstances, when Ord. 16 stood as it was originally framed."

It seems to me that that statement of the law expresses what I desire to express, namely, that the limitation, if it exists, must be found in the rule itself. In my opinion there is no such limitation as that on which the defendant companies insisted, and therefore, so far as the question of law is concerned, the appeals fail.

Then it is said that, even if that is right as a matter of law, yet as a matter of discretion the judge ought to have taken a different course from what he did inasmuch as success against one of these defendant companies was incompatible with success against the other, because the claims were not identical. But there is one outstanding question which is vital to the success of one or other of the defendant companies, and that is whether the goods delivered by the defendants W. W. Curtis, Ltd., to the defendants the British Time Recorder Co., Ltd., were in accordance with the specimens submitted to them, assuming them to be identical with those submitted by the latter to the plaintiff. If the goods were in accordance with the specimens, then it would appear practically certain that the action as against the defendants W. W. Curtis, Ltd., would fail. On the other hand, if the cards were shown not to be in accordance with the specimens, then the action against the defendants the British Time Recorder Co., Ltd., would primâ facie fail because the defendants the British Time Recorder Co., Ltd., would in that case be entitled to refuse to accept the goods. It seems to me, therefore, that one or other of the two defendant companies would in all probability be got rid of at an early stage in the action. There therefore seems no reason why the judge who tries the action should not exercise the discretion given him by r. 5 of Ord. 16. On the whole, it seems to me that it is impossible to interfere with the orders made in this case.

SCRUTTON, L.J.—I am the only member of this court who is fortunate enough to have heard two arguments in this case. I heard an argument of Mr. Rowlands last term when the appeals came before the other branch of this court of which I was then a member. I then formed the opinion, after hearing it, that the appeals ought not to succeed. I have now heard the argument of the present counsel for W. W. Curtis, Ltd., and my opinion remains the same. I hope that our judgments in the present case, added to the recent judgments of this court in previous cases, may put an end to the discussion as to the power of the court to allow the joinder of parties.

Order 16 deals with joinder of causes of action, and it was held in *Smurthwaite* v. *Hannay* (4) that several plaintiffs having separate and distinct causes of action against the defendants could not join them together in one action. In that case sixteen persons, nine shippers and seven consignees of cotton under different bills of lading, brought an action against the defendants, the shipowners, for short delivery, and it was held by the House of Lords that the causes of action were separate and distinct and could not be joined under r. 1 of Ord. 16 or under Ord. 18 or otherwise. There was a similar case in tort, *Sadler* v. *Great Western Rail. Co.* (5), where the plaintiff, who found the access to his premises blocked by the several and combined acts of the defendants, tried to deal with them in one action either as joint or several tortfeasors, and the same view was taken by the court. Immediately in consequence of those decisions an alteration was made in Ord. 16, r. 1, which dealt with joinder of plaintiffs, and it was extended so as to include amongst those who might be joined as plaintiffs persons as to whom, if they brought separate actions, any common question of law or fact would arise. But that alteration was made subject to the proviso

> "that if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials or make such other order as may be expedient."

Rule 4, which deals with joinder of defendants, was not altered. Why the proviso inserted in r. 1 was not inserted in r. 4 I do not know, but the result has been that it is now clear that the practice of the court has been to read r. 4 as if it contained similar powers to those contained in r. 1, applying to the case of joinder of defendants, and to put the same construction on r. 4 as upon r. 1. At first, as was said by the Master of the Rolls, this alteration of the rule was not appreciated. Thus, in *Thompson* v. *L.C.C.* (6), decided after the alteration of the rule, the court, following *Sadler* v. *Great Western Rail. Co.* (5), a case before the alteration, refused

to allow the joinder of defendants in respect of separate torts, and did not even allude to the alteration of the rule. In my view, having regard to the alteration of the rule, neither *Sadler* v. *Great Western Rail. Co.* (5) nor *Thompson* v. *L.C.C.* (6) would now be decided in the way they were. There are later decisions which lay down that r. 4 may be applied to causes of action as well as to parties, and that where there are common questions of law or fact defendants in respect of different causes of action may be joined. *Thomas* v. *Moore* (2) is one of the latest of such decisions, and since that case was decided there has been the decision in *Re Beck, Attia* v. *Seed* (3). The result of the latter decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of action you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties.

It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants subject to its discretion how the action should be tried. It appears to me, having regard to the recent decisions of the Court of Appeal, that the power of the court to allow the joinder of the present defendant companies in the present case is unquestionable. In the present case A. has entered into a contract with B. to supply him (A.) with certain goods according to sample, and has also entered into a contract with C. to sell the goods to be supplied to him by B. according to the same sample. C. now says that the goods supplied to him are not according to sample. B. says that they are according to sample. The first question of fact is whether the goods which have passed from B. through A. to C. are sold in each case on the same sample. That question would soon be disposed of at the trial. There is then the question common to both cases: Are the goods according to this sample or not? If the two defendant companies in the present case were not joined, the result would be that there would be two actions which would be set down to be heard together. An application would then be made to the judge at the trial not to dispose of one of them until he had heard the other, and the judge would endeavour to get in the evidence in both actions, and exactly the same result would follow as if the joinder of the two defendants were allowed. For these reasons I think that the orders of A. T. LAWRENCE, J., affirming those of the master, were right, and that the action should proceed as at present constituted. I agree, therefore, that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Roland Hollick & Co.*, Coventry; *White & Leonard*; *W. M. Arnold & Co.*, for *Harry Iliffe Mander*, Coventry.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

GRAHAM JOINT STOCK SHIPPING CO., LTD. *v.* MOTOR UNION INSURANCE CO., LTD.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), December 6, 1921]

[Reported [1922] 1 K.B. 563; 91 L.J.K.B. 370; 126 L.T. 620; 15 Asp.M.L.C. 445; 27 Com. Cas. 130]

Insurance—Marine insurance—Contract "one of greatest good faith"—Duty of assured to disclose every material fact—Discovery—Ship's papers—Duty of assured and persons interested—Insurance by mortgagees—Substantial interest of shipowner—Plea by insurers that ship wilfully cast away.

A contract of marine insurance is one of the greatest good faith. It is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who those persons are is entirely unknown to the insurers. When the contract is made it is the duty of the shipowner to make the fullest disclosure of every material fact to the insurers—not merely to abstain from active misrepresentation, but to tell the insurers all the material facts he knows. When a loss occurs the insurers know nothing about the circumstances, and the owner and persons interested may know everything. Consequently, for centuries it has been the practice in actions on policies of marine insurance to order the assured as soon as the writ is issued to make by himself, and do his utmost to procure other persons interested to make, an affidavit of ship's papers which should disclose not only every document in his possession, but every document in the possession of those interested, though they are not known to himself; otherwise he must show that he has made every endeavour to obtain those papers and why he has been unable to obtain them, and must account for the disappearance of documents which have been, but no longer are, in his possession or that of persons interested. His action will be stayed until he has complied with the order.

In an action on a policy of marine insurance in which the shipowner was substantially interested and the insurers pleaded that the loss was caused by "the wilful casting away of the steamer by her master or officers and crew",

Held: it was peculiarly a case in which the plaintiffs and all persons interested should be ordered to make an affidavit of ship's papers.

Fraser & Co. v. *Burrows* (1) (1877), 2 Q.B.D. 624, overruled.

Notes. Referred to: *Leon* v. *Casey*, [1932] All E.R.Rep. 484.

As to discovery of ship's papers, see 22 Halsbury's Laws (3rd Edn.) 173–175; and for cases see 18 Digest (Repl.) 60–62.

Cases referred to:

(1) *Fraser & Co.* v. *Burrows* (1877), 2 Q.B.D. 624; 46 L.J.Q.B. 501; 18 Digest (Repl.) 61, *479*.

(2) *West of England Bank* v. *Canton Insurance Co.* (1877), 2 Ex.D. 472; 18 Digest (Repl.) 60, *462*.

(3) *China S.S. Co.* v. *Commercial Assurance Co.* (1881), 8 Q.B.D. 142; 51 L.J.Q.B. 132; 45 L.T. 647; 30 W.R. 224, C.A.; 18 Digest (Repl.) 62, *483*.

Appeal by defendants from an order of Greer, J., in chambers dismissing an application by the defendants (i) that the plaintiffs should file a further and better affidavit of ship's papers; (ii) that an affidavit of ship's papers should be filed by one Elie Angelis and J. and C. Harrison (London), Ltd., and any other persons, firms, or corporations having an interest in the proceedings; (iii) that pending compliance with paras. (i) and (ii) the action should be stayed.

Raeburn, K.C., and *Beazley* for the defendants.

Hogg, K.C., and *Jowitt* for the plaintiffs.

BANKES, L.J.—This is an appeal from a decision of Greer, J., which raises the question whether there should be a further and better affidavit of ship's papers

in this action. The action is brought by the mortgagees of a ship called the *Ioanna* and owned by a Greek subject claiming against war risk underwriters an amount which the plaintiffs say is due to them upon their mortgage, the ship having been sunk through coming into collision with a mine. Among other defences the defence is raised that "the loss, if any, was caused by the wilful casting away of the steamer by her master or officers and crew." It is obvious, therefore, that a very serious issue is raised and a very large amount of money is involved. On April 28, 1921, on an order for directions, an order was made "that an affidavit as to ship's papers be given by the plaintiffs and parties interested." The order was in that general form, and an affidavit was made by Mr. Graham on behalf of the plaintiffs. The first affidavit that he made was clearly insufficient. A second affidavit was asked for and an order was made for a further and better affidavit, and it is said that the second affidavit is also wholly insufficient. The matter came before GREER, J., on an application for a further and better affidavit, and we are told by counsel for the plaintiffs that certain offers were made by the plaintiffs of an affidavit which they were prepared to have sworn by the agent in this country of the Greek owner. Apparently the learned judge thought that having regard to the date fixed for the trial and the offers which were made by the plaintiffs in reference to this further affidavit, and probably also some explanations that may have been given by counsel for the plaintiffs, he ought not to make any order. I do not agree with that view. I think this case is one in which the court ought to say that the defendants are entitled to a strict observance of the practice with regard to ship's papers. It now appears at a very late stage that the Greek owner is very largely interested in the policies on this vessel, which the defendants allege was cast away. One of the documents for which the defendants were pressing was the current account between the plaintiffs, the mortgagees, and the Greek owner. This was not disclosed either in the first or second affidavit of ship's papers, because, it is said, the materiality of it was not recognised. That means that sufficient attention was not paid to the real issues in this case, but, whatever was the reason, the fact of the non-disclosure is in itself a ground for saying that in this case the defendants are entitled to have the practice strictly followed. The plaintiffs' affidavits are defective in several respects; first, there is no affidavit by the Greek owner, who, it now appears, is a person deeply interested, and no reason is given for its absence. Documents which have been in the possession of the owner or the plaintiffs and are not forthcoming are not accounted for. The affidavits are insufficient on these points and on other points.

We are told that in the court below considerable reliance was placed upon *Fraser & Co.* v. *Burrows* (1), and the plaintiffs still rely upon it. That case was decided by a court which consisted of KELLY, C.B., and FIELD, J. The facts were that the plaintiffs were insurance brokers who had effected a policy on a cargo of oats on board the *Speedwell* on a voyage from Prince Edward's Island to the United Kingdom. The plaintiffs acted as agents for Hindman, the owner of the vessel and her cargo. The defendant underwrote a policy for £100. After the policy was effected the cargo was sold to Hurrell, the real plaintiff in the action. Hindman was still in Prince Edward's Island, and it would appear upon those facts that he had ceased to have any interest at all in the cargo. CLEASBY, B., who had great knowledge and experience in matters of marine insurance, made an order staying proceedings until the plaintiffs should produce an affidavit by Hindman of ship's papers and other documents in Hindman's possession. There was an appeal from that order. It is not necessary to say whether or not the court might, in its discretion, have allowed the appeal having regard to the fact that Hindman had ceased to have an interest in the cargo, and there is no evidence that the defendant was setting up that there had been any concealment on Hurrell's part; it is not necessary to consider that. But it is necessary to consider whether the decision of the court was based on grounds consistent with the practice then established or subsequently recognised. KELLY, C.B., said (2 Q.B.D. at p. 625):

"It does not appear that there has been any fraud on the part of either the nominal plaintiffs or the real plaintiff. The order stays the action until they shall have done something which it is in effect impossible for them to do. This order could not have been maintained before the Judicature Acts, and s. 21 of the Supreme Court of Judicature Act, 1875, shows that it was intended to preserve existing procedure, so far as it was not inconsistent with the new procedure."

FIELD, J., came to the same conclusion. The fact that there did not appear to be any fraud in that case at once distinguishes that case from the present where fraud is alleged. In my opinion, the statement by KELLY, C.B., that the order could not have been maintained before the Judicature Acts is not in accordance with the practice, and I do not think that this case ought to be regarded as an authority so far as the grounds upon which the order was made are concerned. I think that it is apparent from what is said in one or two other cases to which I will refer.

The next case is *West of England Bank* v. *Canton Insurance Co.* (2). That was decided in the same year by a court consisting of KELLY, C.B., who had been a member of the court in *Fraser & Co.* v. *Burrows* (1) in the preceding March, and CLEASBY, B., who had made the order then appealed against. The order in the later case was that all parties interested in addition to the parties to the action should make an affidavit. KELLY, C.B., said (2 Ex.D. at p. 474):

"I regret that the notice of motion prays for an order in this peculiar and unsatisfactory form—namely, that the action shall be stayed—not till the plaintiffs shall have satisfied the court that they have resorted to all reasonable, lawful, and practicable means in their power to produce, or cause to be produced, the ship's papers—but that the action shall be stayed till they have caused or procured affidavits to be made by a number of other persons over whom they may possess no control. I regret that the form is in those terms; but as it appears to be the form in which in actions of this kind orders have been made at chambers for a very long time, I think we shall be doing no injustice by making this order absolute."

It seems to me that the Chief Baron directly went back from what he had said in *Fraser & Co.* v. *Burrows* (1) and recognised that he had been wrong in there saying that the order could not be maintained before the Judicature Acts. He went on to point out:

"If the plaintiffs on another occasion apply to us showing that there is an absolute impossibility on their part in complying with the order, we may then consider what it is our duty to do."

In the later case of *China S.S. Co.* v. *Commercial Assurance Co.* (3), BRETT, L.J., who also had great experience in these matters, said (8 Q.B.D. at p. 145):

"Long before the Judicature Acts, the peculiarity of [marine] insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters. The practice, therefore, arose of making the order on all parties interested, without an affidavit. Then after the Judicature Acts, the question arose whether this practice had been altered, and it was held in *West of England Bank* v. *Canton Insurance Co.* (2), for the reasons there given, that it had not. As for the hardship on the plaintiffs, CLEASBY, B., who was beyond all others conversant with this head of the law, points out

in the same case that a plaintiff must show that he has used every effort to discover, and that if he has bona fide done all he can he will not be prejudiced."

I think BRETT, L.J., there, although he does not say so in terms, is expressly disapproving of what KELLY, C.B., said in *Fraser & Co.* v. *Burrows* (1).

The practice, therefore, being what it is, in my opinion, this affidavit is wholly insufficient and an order must be made for a further and better affidavit, and in that order I think the provision should be inserted that one of the parties to make an affidavit shall be the Greek owner. It will then lie upon the plaintiffs either to procure an affidavit from the Greek owner or to satisfy the court that they have used all possible means of getting him to make an affidavit and that he has refused. I think they must also in the further and better affidavit deal with those points which I have already referred to and upon which the affidavit appears to me to be quite insufficient. The appeal must be allowed, and the further affidavit ordered, and the trial must be adjourned until the order has been sufficiently complied with.

SCRUTTON, L.J.—I agree. This is an appeal against an order refusing to order a further affidavit of ship's papers to be made and refusing to postpone the trial. The subject-matter of the case, on which I express no opinion, as I have no materials for forming one, is the alleged total loss of a Greek ship, insured for between £300,000 and £400,000, by a mine some very considerable time after mines ceased to be used on the seas. The underwriters allege, whether correctly or not I do not know, that just about this time, when insured values were much above the market values of shipping, an extraordinary epidemic of disasters fell upon Greek ships, including this one, by which mines attacked them in places where fortunately no loss of life occurred to the crew and where incidentally the loss of the ship was a gain to her owner. Such a case is obviously one in which the underwriters are entitled to the fullest investigation.

One of their means of investigating is the affidavit of ship's papers, which strikes anyone not accustomed to marine insurance as an odd proceeding until its history and the reasons for it are explained. An order for ship's papers is strictly limited to marine insurance, which is a contract of the greatest good faith. When a loss occurs the underwriters know nothing about the circumstances, and the owner and persons interested may know everything. When the contract of insurance is made it is the duty of the owner to make the fullest disclosure of every material fact to the underwriters; not merely to abstain from active misrepresentation, but to tell the underwriters all the material facts he knows; and, consequently, for centuries it has been the practice in actions on policies of marine insurance to order the assured as soon as the writ is issued to make by himself, and procure other persons interested to make, an affidavit of ship's papers which should disclose not only every document in his possession, but every document in the possession of those interested, though they are not known to himself; otherwise he must show that he has made every endeavour to obtain those papers and has been unable to obtain them; and his action is stayed until he has complied with the order. It is of the greatest importance to marine insurance and to the existence of underwriters that this security of theirs should be preserved.

In this case it seems to me quite clear that the plaintiffs, against whom no charge whatever is made, and their advisers, have not understood what is meant by an order for an affidavit of ship's papers. It does not mean that the assured may wait until he is asked by the underwriters to disclose a document, which appears to be one of the untenable positions taken up by the plaintiffs in this case; it does not mean that the assured may withhold material documents merely because he thinks they are not material. He must make the fullest disclosure of documents that he has in his possession, and if the documents are in the possession of other persons interested he must do his utmost to get them and explain on affidavit, if he has not been able to get them, what he has done to get them and why he has not been able to get them; and he must account on oath for the disappearance of documents which have been, but are no longer, in the possession

of himself or persons interested. This last remark is peculiarly relevant in this case, because it is alleged that the disaster which sent this ship to the bottom sent with her all her logs and all the documents connected with her voyage. If so, the affidavit of ship's papers must deal with the matter.

The writ in this action was issued on a policy of £20,000. The plaintiffs are mortgagees. Their actual interest under their mortgage is said to be about £140,000. It appears the ship was insured for between £300,000 and £400,000, and at a very early stage, as is very proper and right in this action, a consolidation agreement was made by which the underwriters on the whole £300,000 or £400,000 were bound by the result of the action. The person interested in the balance over and above £140,000 is the owner. It is, therefore, a case in which it is essential that the owner should be concerned in the affidavit of ship's papers. I am quite satisfied that so far the plaintiffs have not complied with the order for an affidavit of ship's papers. They have not shown the efforts that they have made to obtain the papers in the possession of other persons interested, or the results of those efforts. They have not shown on oath that the documents in the possession of the persons interested have now ceased to be in the possession of those persons, and they seem to me to have completely misunderstood the materiality of the current account. It is perfectly true that there is a mortgage with a sum endorsed on it for £145,000. That sum may not be right. It may have been paid off. The current account is, therefore, a most material document, and I cannot conceive why it was not mentioned in the first affidavit of ship's papers. Therefore, there are abundant grounds for making the order for a further and better affidavit of ship's papers against the plaintiffs; but further the owner on the facts stated is interested to a very large extent, and he also should be ordered to make an affidavit of ship's papers, and the action should be stayed until that has happened.

The learned judge below, I understand, refused to make the order on the owner relying on the decision of *Fraser & Co.* v. *Burrows* (1) decided in 1877. When the Judicature Acts came into force there was for some time a question in this as well as in other matters of their effect on the preceding practice, and one of the questions was whether an order for discovery had superseded the marine insurance practice as to ship's papers. In *Fraser & Co.* v. *Burrows* (1) CLEASBY, B., to whose knowledge of marine matters I need add nothing to the testimonial given by LORD ESHER, made the ordinary order under the old form for an affidavit by the owner of ship's papers. It was objected that the Judicature Acts did not allow such an order; that the owner was out of the jurisdiction of the court, and ought not to be ordered to make such an affidavit. KELLY, C.B., and FIELD, J., relying on the procedure under the Judicature Acts, declined to make such an order. Two months later a similar case, an action by a mortgagee, came before KELLY, C.B. Again it was argued that the only order for discovery that should be made on the mortgagee was an order to produce documents in his possession. Of course, the ship's papers in his possession were practically none. On that occasion CLEASBY, B., was sitting with KELLY, C.B., and was able to inform him of the old practice. In the result the Chief Baron went back on his former decision, and adopted the old practice as explained to him by CLEASBY, B. In 1881, four years later, the matter came before the Court of Appeal, including JESSEL, M.R., who had been the chairman of the committee which drafted the Judicature Rules, and BRETT, L.J., whose familiarity with marine insurance matters needs no testimonial from me, and they adopted the view taken in the second case that the procedure in marine insurance was not affected by the provisions of the Judicature Acts. In my view, *Fraser & Co.* v. *Burrows* (1) was wrongly decided, and should no longer be followed.

The present is peculiarly a case where the plaintiffs and all persons interested should be ordered to make an affidavit of ship's papers and the order should be enforced on the owner who is largely interested in these policies. The plaintiffs must make a further affidavit; an affidavit must also be made by the owner as a person interested: documents which were, but are no longer, in the possession of the persons interested must be accounted for; the plaintiffs must show on oath

what steps they have taken to obtain documents from those interested, and the result of their efforts, and there must be a stay until the order is complied with. I am not deciding what will happen or in what circumstances that stay can be removed; it may be that if no affidavit can be obtained from the owner the plaintiffs may be allowed to go on. Speaking for myself I should require to be very thoroughly satisfied that the owner could not be induced to make the affidavit before I allowed this action to go on. A merely formal statement of request and refusal would certainly not satisfy me.

ATKIN, L.J.—I agree with both the judgments which have been delivered. I would only add my agreement with the other members of the court that *Fraser & Co.* v. *Burrows* (1) must now be taken to be overruled.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.*; *Thomas Cooper & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

CITY TAILORS, LTD. *v.* EVANS

[COURT OF APPEAL (Bankes, Scrutton and Atkin, L.JJ.), October 20, December 9, 1921]

[Reported 91 L.J.K.B. 379; 126 L.T. 439; 38 T.L.R. 230]

Insurance—Fire—Valued policy—Profits—Reduction of sums payable under policy on reduction or cessation of standing charges—Reduction by amount of profit earned at temporary premises taken after damage to insured premises.

By a Lloyd's fire policy the underwriters agreed with the assured "subject to the conditions and definitions expressed in and/or endorsed upon this policy," should the premises or property of the assured be destroyed or damaged by fire between Nov. 22, 1919, and Nov. 21, 1920, and their business be therefore interrupted or interfered with, to pay to the assured the amount of their loss of profits which were valued at £100 for each working day that work might be wholly stopped owing to fire, or, if partially stopped, then to pay a proportionate part of the amount. The expression "profits" was defined to mean "the net profit of the business added to the following charges: Interest on debentures, mortgages, loans and bank overdrafts, rent, rates, and taxes; salaries to permanent staff and wages to skilled employees; directors' fees; auditors' fees; travelling expenses; insurance premiums; advertising." Condition (1) provided: "In the event of the amount insured by this policy exceeding the total of the probable annual profits of the business to be determined by an assessor (to be mutually agreed on) after taking into consideration any extraordinary or unusual circumstances or if the standing charges shall be reduced or cease to be paid, the amount of loss hereunder shall be reduced accordingly." Condition (3) provided: "The assured shall use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the business and to avoid or diminish the loss." On April 26, 1920, a fire occurred on the assured's premises with the result that the building with the exception of the ground floor was destroyed and nine-tenths of the work was stopped. The assured took temporary premises in the neighbourhood where they proceeded to carry on their business. In an action claiming a partial loss under the policy,

Held: (i) the policy was a valued policy, and, consequently, the first part of condition 1 did not apply; (ii) (SCRUTTON, L.J., dissenting) the second part of condition 1 was separate and distinct from the first part, and, if the standing charges should be reduced or cease to be payable, the sums payable under the policy must be reduced accordingly; but (iii) while under condition (3) the assured must do his best to minimise his loss, e.g., by using every endeavour to put out the fire and by resuming business at the insured premises at the earliest possible date, that condition did not render him liable to bring into account against the payments under the policy the profits made at the temporary premises.

Notes. Referred to: *Elcock* v. *Thomson*, [1949] 2 All E.R. 381.

As to fire insurance and consequential loss insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 303 et seq., 402–404; and for cases see 29 DIGEST 305 et seq.

Cases referred to:

(1) *Blascheck* v. *Russell* (1916), 33 T.L.R. 51, 74, C.A.; 29 Digest 422, *3285*.

(2) *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333; 51 L.J.Q.B. 548; 47 L.T. 277; 31 W.R. 65; 4 Asp.M.L.C. 576, H.L.; 29 Digest 291, *2375*.

(3) *Jebsen* v. *East and West India Dock Co.* (1875), L.R. 10 C.P. 300; 44 L.J.C.P. 181; 32 L.T. 321; 23 W.R. 624; 2 Asp.M.L.C. 505; 40 Digest (Repl.) 420, *140*.

(4) *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.*, [1898] 2 Q.B. 114; 67 L.J.Q.B. 666; 78 L.T. 485; 46 W.R. 561; 14 T.L.R. 386; 8 Asp.M.L.C. 373; 3 Com. Cas. 123, C.A.; 29 Digest 196, *1562*.

Also referred to in argument:

Currie & Co. v. *Bombay Native Insurance Co.* (1869), L.R. 3 P.C. 72; 6 Moo.P.C.C.N.S. 302; 39 L.J.P.C. 1; 22 L.T. 317; 18 W.R. 296; 3 Mar.L.C. 369; 16 E.R. 740; 29 Digest 238; *1914*.

Benson v. *Chapman* (1849), 2 H.L.Cas. 696; 8 C.B. 950; 13 Jur. 969; 9 E.R. 1256, H.L.; 29 Digest 259, *2094*.

Castellain v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 310, *2562*.

Appeal by the defendants from the decision of ROCHE, J., in an action tried by him without a jury.

The plaintiffs were wholesale and retail clothiers, the factory and wholesale part of the business being carried on at 226 and 228, Old Street, in the county of London. The retail part of the business was carried on by the plaintiffs in some forty shops in various parts of London and the provinces under the name of Lockwood and Bradley. The defendant was an underwriter at Lloyd's. By a Lloyd's fire policy, dated Nov. 22, 1919, the plaintiff insured with the defendant and the other underwriters who subscribed the policy the loss of profits caused by fire as therein mentioned. The policy provided that, in consideration of the premium therein mentioned, the underwriters agreed with the assured "subject to the conditions and definitions expressed in and/or endorsed upon this policy" that if between Nov. 22, 1919, and Nov. 21, 1920, the premises or property of the assured should be destroyed or damaged by fire and the business should be therefore interrupted or interfered with the underwriters would pay to the assured the loss of profits sustained as thereinafter set forth during the period of twelve consecutive calendar months from the date of the fire in consequence of such interruption or interference. The policy further provided as follows:

> "This policy to pay £100 per working day for each working day that work may be wholly stopped owing to fire, lightning, or gas or boiler explosion, or if partially stopped then to pay a proportionate part of the amount to be based on the diminution of output as compared with the output on the same

A day in the previous year provided always that the underwriters shall not pay more than 325 working days whole or partial stoppage of work caused by any one fire or accident."

Of the "conditions" and "definitions" expressed in and endorsed on the policy the following were material:

B "Definitions.—Profits shall mean the net profit of the business added to the following charges:—Interest on debentures, mortgages, loans and bank overdrafts; rent, rates, and taxes; salaries to permanent staff and wages to skilled employees; directors' fees; auditors' fees; travelling expenses; insurance premiums; advertising.

"Condition (1)—In the event of the amount insured by this policy exceeding C the total of the probable annual profits of the business to be determined by an assessor (to be mutually agreed upon) after taking into consideration any extraordinary or unusual circumstances or if the standing charges shall be reduced or cease to be paid, the amount of loss hereunder shall be reduced accordingly.

"Condition (3)—The assured shall use due diligence and do and concur in D doing all things reasonably practicable to minimise any interruption of or interference with the business and to avoid or diminish the loss."

On April 26, 1920, a fire occurred at the premises 226 and 228, Old Street, the whole building with the exception of the ground floor of No. 228, Old Street, being destroyed, and in consequence nine-tenths of the work was stopped. In order to E preserve their goodwill the plaintiffs took temporary premises at 18 to 21, Craven Street, at a rental of £600 per annum, plus rates and taxes, and carried on business there with some of the Old Street staff. New machinery, plant, and furniture had to be purchased and various alterations made to the premises in order to comply with the requirements of the local and other authorities. By their points of claim the plaintiffs claimed:

F "1. A declaration that . . . the loss insured against is loss or diminution of output on the premises 226 and 228, Old Street . . . in so far as such loss or diminution was caused by fire thereon. 2. A declaration that for the purpose of computing such loss as aforesaid, the output from the other premises belonging to the plaintiffs is not a material factor. 3. That an account may be taken of the amount of the plaintiffs' loss so insured against as aforesaid. G 4. Payment of the amount so found to be due to the plaintiffs."

By his defence the defendant stated that, in accordance with the obligation imposed upon them by condition (3), in order to minimise the interruption of and interference with their business, and to diminish the loss which would arise therefrom, the plaintiffs had taken temporary premises at Craven Street shortly after the fire, and there proceeded to carry on their business, thereby largely H reducing the diminution of the output and the loss of profits of the said business, which they would otherwise have suffered. The defendant contended that upon the true construction of the policy the "output" which had to be regarded in order to calculate the "diminution of output" was the output of the plaintiffs' business during the relevant period both at the insured premises and at the temporary premises at Craven Street; that the insurers were entitled to have "the probable I annual profits" of the business ascertained by an assessor, and that if they were less than 32,500, the basis figure of £100 per day would be reduced accordingly; and that if the "standing charges" referred to in condition (1) were reduced or ceased to be paid it must be ascertained what the reduction per working day was and this must be deducted from the basis figure of £100. The defendant counterclaimed that upon the true construction of the policy the loss thereunder payable by the insurers to the plaintiffs must be ascertained in manner set forth above. Roche, J., held that this was an insurance against loss of output, total or partial, at the named premises, namely, 226 and 228, Old Street, and that the total output

was valued at a fixed figure which was never intended to be altered. He, therefore, held that the plaintiffs were entitled to the declarations claimed by them. The defendant appealed. A

Leslie Scott, K.C., and *Sir Albion H. Richardson* for the defendant.
George Wallace, K.C., and *St. J. G. Micklethwaite* for the plaintiffs.

Cur. adv. vult. B

Dec. 9. The following judgments were read.

BANKES, L.J.—This appeal raises a short point on the construction of a Lloyd's fire policy. The plaintiffs carried on business as manufacturing tailors at 226–228, Old Street, E.C. At these premises garments were made which were distributed to shops belonging to the plaintiffs at various places. We were told by their counsel that no separate accounts of the manufacturing business at Old Street were kept so as to enable the profits of that portion of their business to be ascertained separately. Hence no doubt the desire to value the profits. C

The plaintiffs insured the profits of the Old Street business against fire at Lloyd's. The policy is dated Nov. 22, 1919; it is on a "profits insurance" form—by which the agreement of the underwriters is expressed to be subject to the conditions and definitions expressed in and/or endorsed on the policy. In the body of the policy it is expressed to be a valued policy upon loss of profits. The profits are those of the business of tailors carried on by the plaintiffs at 226 and 228, Old Street; those profits are valued at £100 per working day, and the obligation undertaken by the underwriters is to pay that sum for each working day that work may be wholly stopped owing to fire, or a proportionate part of that sum ascertained as directed in the typewritten clause if work is partially and not wholly stopped owing to fire. The liability is limited to a period of 325 working days. A fire occurred in April, 1920, as a result of which the premises at Old Street were almost entirely destroyed and work was partially, but not entirely, stopped there for the full period covered by the policy. The plaintiffs were able to secure, and did secure, temporary premises at Craven Street in the near vicinity to their Old Street premises, and there they continued the manufacturing business, which owing to the fire they could not continue at Old Street. Disputes arose between the parties as to whether in ascertaining the amount due to the plaintiffs any account should be taken of the output from the temporary premises at Craven Street, or of any saving in the standing charges of the Old Street business. The contentions of the parties are indicated in the claims put forward in the points of claim and counterclaim. D E F G

In the counterclaim as amended two points are raised which require careful consideration. Both have reference to the construction which should be placed upon the first and third conditions of the policy. They are in the following terms:

> "Definitions: Profits shall mean the net profit of the business added to the following charges: Interest on debentures, mortgages, loans and bank overdrafts; rent, rates and taxes; salaries to permanent staff and wages to skilled employees; directors' fees; auditors' fees; travelling expenses; insurance premiums; advertising. H
>
> "Conditions: (1) In the event of the amount insured by the policy exceeding the total of the probable annual profits of the business to be determined by an assessor (to be mutually agreed upon) after taking into consideration any extraordinary or unusual circumstances, or if the standing charges shall be reduced or cease to be paid, the amount of loss hereunder shall be reduced accordingly. . . . (3) The assured shall use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the business and to avoid or diminish the loss." I

It is plain that the first branch of condition 1 need not be considered. The fact that the profits are valued excludes the possibility of this part of the condition having any application. Attention, therefore, need only be directed to the second

branch of this condition and to condition (3). I have had considerable doubt whether, having regard to the facts of this case, condition (3) ought or ought not to have any effect given to it. I do not think that the condition can be read as imposing an obligation upon the assured in the event of a fire to continue their business in fresh premises in order to reduce the underwriters' loss; on the other hand, there is room for contending that if the assured do continue their business in fresh premises they ought not as against the underwriters, and under a contract which is in its nature a contract of indemnity, to be allowed to retain both the profits of the business in the new premises and the valued loss of profits of the business in the old premises, and that a term should be implied in the contract that the former should be taken into account in diminution of the loss. I hardly think that the facts warrant such an implication, and I am, therefore, not prepared to accept the defendant's contention with regard to the effect of condition (3).

It remains to consider the effect of the second branch of condition (1). The policy is, as I have already said, a valued policy on profits. The meaning of the expression "profits" as used in the policy is defined in the definition clause as meaning the net profit of the business added to certain specified standing charges. The second branch of condition (1) provides that, if these standing charges shall be reduced or cease to be paid, the amount of the loss under the policy shall be reduced accordingly. Is there any reason, or any sufficient reason, for holding that this branch of condition (1) is to be treated as inapplicable? I do not consider that the fact that the first branch of the condition is inapplicable is a sufficient reason. It seems to me that the condition clearly contemplates two quite different sets of circumstances, and that one branch of the condition may quite well apply in any particular case, though the other branch may not do so. The really decisive question is whether the fact that in the present case the profits are valued should exclude the operation of the second branch of the condition. I do not think that it should. The bulk of the standing charges referred to in the definition are charges the amounts of which would be fixed and easily ascertainable. Some of them, no doubt, may be of varying amounts, and may, therefore, have had a value put on them by the plaintiffs in arriving at the agreed value of £100 per day but I do not think that this fact is of itself sufficient to exclude the operation of the condition. If the construction which I am putting upon the policy is correct, the parties, in arriving at the valued figure, must be assumed to have taken into account the possibility of a reduction in the standing charges being made, and the condition is clear and unambiguous in its terms, and on the face of the policy it is stated to form part of the agreement between the parties. For the above reason, I consider that the defendant is entitled to succeed. The appeal will be allowed, with costs, and the defendant is entitled to a declaration on his counterclaim, with costs.

SCRUTTON, L.J.—This appeal from a judgment of ROCHE, J., is intended to determine the true construction of a policy insuring certain profits against loss by fire. The assured had a tailoring factory at 226 and 228, Old Street, which made garments for sale at a number of retail shops belonging to the assured. There were fire insurances on the buildings and the stock, and the assured wanted, further, to insure the loss of profits caused by a fire stopping work on the premises. They arranged with the underwriters the terms of a policy, the important part of which is a typewritten clause inserted in a printed form. Obviously an inquiry into what profits of a business were loss by a fire at the central factory might involve a troublesome and difficult investigation. The typewritten clause avoids that investigation by settling two things—first, what events are to constitute a total or partial loss of profits respectively; second, what is to be the value of, or sum to be paid for, a total or partial loss respectively. This is rather more than a clause fixing the value of the subject-matter insured; it is also an agreement as to what events shall constitute a total or partial loss of the subject-matter insured. The clause, in my view, settles the two questions thus:—(i) As to the loss it

provides that for each working day on which work is wholly stopped at Old Street by fire there shall be a total loss of profits for a day, and that for each day on which the output at Old Street, though not entirely stopped, is diminished by fire, as compared with the output there on the same day in the previous year, i.e., is less than the previous year's output there is a partial loss. (ii) As to the value of the thing lost, it provides that the total loss of profits on a working day shall be valued at £100 and that the partial loss of profits shall be valued at such fraction of £100 as the actual output on any day in the year in question bears to the output on the same day in the previous year. Two things will be noticed. The measure of loss total or partial, is conventional, to avoid difficulty of assessment, and not scientifically accurate. The drop between the two outputs is not necessarily the exact measure of the effect of fire, for there may have been a boom in the first year and a slump in trade in the second year; but the difference of output is taken as proof and measure of partial loss. And secondly, as counsel for the underwriters agreed, the only output contemplated is output at Old Street. If that output is wholly stopped, there is a total loss; if that ouput is partially stopped, there is a partial loss, its extent depending on comparison of two outputs at Old Street. The fact that there is an output at some other place is not to be brought into account in seeing whether there is a total or a partial loss under the clause; to do so would be to bring into the policy the troublesome investigations which it was the object of the clause to avoid.

Some of the contentions of the underwriters may be shortly disposed of. It was argued that the clause only meant that the underwriters were not to pay more than £100 for a total loss, but that the assured must prove the actual amount of loss. This involves inserting "not more than" in the two earlier sentences of the clause, as the draftsman has expressly done in the last sentence, and as was done in *Blascheck* v. *Russell* (1), which turns partly on the words "not exceeding" and partly on the consideration that otherwise there would be no insurance on the last twenty performances when fifteen performances had lapsed. I can see no justification for this insertion. Two contentions of the underwriters in their defence involve the consideration of the question to what extent, if any, condition (1) is incorporated in the actual policy. It is common knowledge in insurance matters that the actual bargain between the parties is frequently written into a printed form, parts of which become, by reason of the matter written in, wholly inapplicable to the bargain between the parties. In the present case the printed form used is that of Lloyd's fire policy on profits. If the blanks in the first sentence were filled up and an amount inserted as the maximum amount of claim, for the purpose of the calculation of premium, there would be a complete policy. Under it, there would be an insurance of "profits" against loss by "fire." Profits are defined as the "net profit" for some period not specified plus certain specified standing charges which might be sterilised by the fire. If the amount insured by the policy, the amount on which premium is paid, exceeded what an assessor determines to be "the probable annual profits of the business after taking into consideration any extraordinary or unusual circumstances," whatever that may mean, or if the fire causes certain standing charges to be reduced or extinguished, the "loss," presumably the profits lost plus the standing charges rendered sterile, is to be reduced by the amount by which the amount insured exceeds the probable annual profits so calculated and by the standing charges saved. I hope Lloyd's underwriters understand what this means, I do not. But it obviously means a very complicated investigation. Is an investigation on these lines consistent with the typewritten clause which, in my view, records the substance of the real bargain of the parties, and contains a promise to pay, not a calculated amount of actual profits or loss, or one based on or determined by "probable profits," but an agreed and valued amount per day, if work is wholly stopped at the factory, and a proportion of that amount, if work is partially stopped, arrived at by comparing the output on any day when the fire affects output with that output on the corresponding day of the previous year? This is a valuation not of profits, but of

loss of profits by fire, with an agreement to pay the loss so passed and valued. There appears to me to be no room in this process for a calculation of "probable annual profits" and a comparison of them with the amount insured. The profits, including both profits lost and standing charges wasted, are valued at £100 a day, and that sum is to be paid for each day on which work is stopped by the fire.

The first part of condition (1) seems, therefore, wholly inapplicable and excluded by the typewritten clause. If this is so, and part of the original system of calculating profits, the first item in condition (1), is excluded by the new system, I find it difficult to believe that the second half of the sentence in condition (1) can remain. The two systems are incompatible and inconsistent. What about the second part of condition (1)? Suppose, for instance, travelling expenses or advertising expenses are, in fact, lessened by the fire until its effects are removed by reparation of the damage done. Is the actual reduction to be deducted from the valued loss? But we do not know at what amount the standing charges were valued in the valued loss, and whether that valuation did not already take into account the probable diminution in standing charges. So that to make a second deduction would credit the underwriters twice with diminution of standing charges. The parties have agreed that, say, a 50 per cent. reduction of output will diminish the loss from £100 to £50. Why is it further to be investigated what actually happens to the standing charges, if there is a 50 per cent. reduction of output as compared with the previous year? Have not the parties already included this in their valuation? In my view, both parts of condition (1) are quite inconsistent with the agreement to pay a conventionally valued loss, and this contention of the underwriters fails.

The only remaining contention of the underwriters was that the assured must give credit for or bring into account any profits made in a temporary establishment in Craven Street started after the fire. It was alternatively put that, though there was a total loss at Old Street, the assured was bound to reduce that loss, and, therefore, to carry on his business at Craven Street or elsewhere to minimise the loss. It appears to me that this argument involves a complete misunderstanding of the practice of insurance in the case of conventional losses and valued policies. For instance, if goods valued at £100 are lost by perils insured against, but owing to fall of market at the time of loss similar goods can be purchased for £50, it cannot be suggested that the underwriters could say that the assured must minimise the loss, and as he could buy similar goods for £50, he must do so, and reduce their valued loss of £100 to £50. If the insurance is on a ship "to pay a total loss if she does not arrive by Jan. 1," and the ship arrives by Jan. 15, the underwriters must pay a total loss, and cannot reduce their payment by the value of the ship, though they are entitled to the ship itself as salvage, or by subrogation. If the interest insured is totally lost, the underwriter cannot reduce the payment, because there are other elements which would reduce the loss to the assured, such as insurances, charitable contributions or contracts with others. When he has paid, and not till then, he is subrogated to any legal rights the assured had which might reduce the loss, but not to any charitable contributions, or sources of profit not depending on legal rights: *Burnand* v. *Rodocanachi* (2). As I have said, in a valued insurance on property the underwriter would not benefit by the fact that the assured could if he liked replace the insured property destroyed, by purchase at a price less than the value in the policy. What is insured is not the loss to the assured, but the loss of the property; and if that is valued at a certain figure, and there is an agreement which shall constitute its loss, it is immaterial that in consequence of the loss the assured may make profit from some other property. If one of two unique china vases is insured and destroyed, it does not avail the underwriter that by the destruction the second vase has become more unique and more valuable. If profits of a business in Old Street are insured and lost, it does not matter that the assured makes profits from a business in New Street: see *Jebsen* v. *East and West India Dock Co.* (3), where a wrongdoer was not allowed to reduce damages by the consideration that the plaintiffs had an opportunity of

making profits elsewhere by reason of his breach in the policy. The third condition appears to me to add nothing to the ordinary obligation of the assured. If fire causes the interruption, it is immaterial that the fire was caused by negligence of the assured's servants, only wilful acts of the owner prevented recovery on the policy: see *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (4). But once the fire has happened, the assured must do his best to extinguish it, and to carry on his output at Old Street. Otherwise the loss of output and profits would not be caused by the fire, but by the act of the assured. But this is limited to business and output at Old Street. If the assured cannot by reasonable exertions produce an output at Old Street, there is a total loss; to the extent to which, acting reasonably, his output at Old Street is diminished there is a partial loss. In other words, the subject-matter of insurance is limited locally; it is profits at Old Street derived from output at Old Street. The insurance is on a business carried on at Old Street, not elsewhere; and it is interruption of, or interference with, that business at Old Street by fire which causes the loss. The assured said that if output elsewhere were taken in, after considering the expenses of earning it, the underwriters would obtain no benefit. I do not know whether this is so, but I mention it to show that the underwriters' contention would bring in all the complicated investigations which, in my view, it was the intention of this valued policy of a conventional loss to avoid. It may be that the result gives the assured more than an indemnity. Valued policies often do, and the rules of English law assist the process. For instance, a valued policy on freight insures gross freight; and though, if the ship is lost early on the voyage, most of the expenses of earning the freight are saved, the assured will be entitled to recover the valued gross freight, without giving credit for the expenses saved. It may be that the same result follows here; it may be, on the other hand, that the parties, in agreeing the amount to be paid, valued all the items of probable loss or saving in a lump sum.

I entirely agree with the judgment of ROCHE, J., that this was a local insurance and a valued total loss of local profits, and that profits made elsewhere need not be brought into account. This result is entirely in accordance with insurance law as I understand it.

ATKIN, L.J.—This is a claim by the plaintiffs on a fire policy against loss of profits caused by fire at the premises of the plaintiffs at 226–228 Old Street, London. [HIS LORDSHIP stated the facts.] The first question to be determined is, what is the subject-matter of insurance? It seems necessary to discuss this, for the learned judge below repeatedly describes the insurance as an insurance on loss of output. I am not sure that I understand what such an insurance would mean; presumably it means a loss of gross earnings. But in any case it seems to me improper to go outside the terms of the written document, the policy. The insurance is to cover "loss of profits," and profits are defined in the document. It is true that under the policy there will be no loss of profits unless there is some diminution in output, but that consideration in itself is not of much assistance in solving the problem presented. Profits in the policy obviously mean gross profits as defined therein, for by the definition they include net profit added to the standing charges specified, including interest and loan capital, salaries to staff and skilled employees, rent, rates and taxes, travelling expenses, and other charges. I accept the view of the plaintiffs that in this policy the profits at risk are valued. This appears to me to be the true meaning of the words in the typewritten clause, and, taking into consideration the plaintiffs' methods of accounting, to be the way in which one would expect the business to be done. This means that "profits," i.e., net profits, plus the total of the specified standing charges are to be taken by both parties to amount to £100 a day; and, therefore, if a fire occurs on the premises which causes a total cessation of output, and, therefore, of gross earnings, the total loss of profits per day is agreed at £100, and provision is made for a conventional estimate of a partial loss on the basis of the same valuation. I may add that, in my view, in a valued policy, what is valued is the subject-matter

of the insurance, and not the amount of the loss. This, I think, is made clear in marine insurance by the Marine Insurance Act, 1906, s. 27 (2) (3). This leaves the actual total loss to be calculated on the basis of the value of the subject-matter, but subject to any agreed method of determining the proportion of the loss or to any agreed deduction, as, for instance, sums recovered on any other policy.

Having arrived at the conclusion that the profits are valued, one has to construe the policy as a whole, giving effect to every word except in so far as it appears plain that any of the provisions were not intended to apply to the particular contract. The contract is expressly made "subject to the conditions and definitions expressed in or endorsed upon the policy." The conditions endorsed are four in number. The first is:—

> "In the event of the amount insured by the policy exceeding the total of the probable annual profits of the business to be determined by an assessor (to be mutually agreed upon) after taking into consideration any extraordinary or unusual circumstances, or if the standing charges shall be reduced or cease to be paid, the amount of loss hereunder shall be reduced accordingly."

It was not, I think, contended before us, at any rate not with much emphasis, that the first part of the condition was applicable to the particular contract. In view of the difficulty of ascertaining what the net profits of the particular business at Old Street were, or what they probably would be in any future year following a fire, and in view of the fact that net profits form a material element of the "profits" insured, I think upon the whole that this part of the condition is inapplicable. But I see nothing in the second part of the condition which cannot reasonably apply to the actual contract made. "We are incurring certain standing charges and expect to earn an unknown net profit in respect of our business at the specified premises. If the premises or our stock or plant are injured by fire we shall for a time cease to produce and shall have no receipts to recoup us our standing charges or to give us our net profit. We shall, therefore, lose both of these and we agree that for the purpose of this policy the standing charges plus the net profit amount to £100 a day; and this sum you will pay us while production on the premises totally ceases. But inasmuch as we have arrived at the £100 by taking into account our standing charges, if during the period you are paying us these are reduced it is obvious that our loss is pro tanto reduced and your payment to us will be correspondingly diminished." I can see nothing unreasonable in the application of such a term to a valued policy. On the contrary, it seems to me to be reasonable and necessary to prevent the contract from being a mere wager against fire. But it is enough to say that the parties have in terms agreed to make the condition a part of the contract and that it is neither senseless nor impossible to apply. I think, therefore, that the defendant is entitled to a declaration that the loss payable by him should be ascertained on the basis put forward in the defence and counter-claim. The reduction of the standing charges I assume to relate only to a reduction as from the date of the fire, up to which date they must be taken to be valued.

The remaining three conditions it is not disputed apply to the contract, but the defendant claims that the effect of condition (3) is to entitle him to bring into account the profits made at Craven Street, inasmuch as making profits there is a diminishing of the loss. I cannot take this view of the defendant's rights. The clause clearly compels the plaintiffs to do what they can to diminish the loss at Old Street by reducing so far as possible the effect of the fire there and producing as much output there after the fire as is reasonably necessary. It may also, on the construction I have put on condition (1), involve them in taking all reasonable steps to diminish the standing charges. But I do not think that it involves them in the obligation to take any steps to carry on the business elsewhere; nor do I think that, if they did carry on the business elsewhere, it would import an obligation to account to the defendant for the profits. I can find no such obligation in the words. Whether, if the plaintiffs in fact use the same staff and skilled

employees to make profits, the defendant would on payment of the loss be entitled by subrogation to such profits is a question that does not arise, inasmuch as the defendant has not yet made any payment.

Appeal allowed.

Solicitors: *Hair & Co.*; *R. Stewart Barnes.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

SOCIÉTÉ DES HOTELS LE TOUQUET-PARIS-PLAGE *v.* CUMMINGS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), December 9, 20, 1921]

[Reported [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 38 T.L.R. 221; 66 Sol. Jo. 269]

Debt—Foreign debt—Debt due in foreign currency—Action in England to recover debt—Payment to creditor in foreign country after action brought—Discharge of debt—Accord and satisfaction.

The plaintiffs were a company incorporated in France. The defendant stayed at the plaintiffs' hotel in France between July 4 and Aug. 4, 1914, and incurred a debt to the plaintiffs of 7,260 francs for board and residence and 10,775 francs, money lent by the plaintiffs to the defendant between those dates. On Aug. 3, 1914, the defendant signed and handed to the plaintiffs' manager at Le Touquet a document in which she admitted the debt of 18,035 francs, and undertook to pay the plaintiffs at their address in cash "as soon as the European crisis permits, in any case before the end of the year." The defendant did not pay as arranged, and the plaintiffs, by a specially endorsed writ dated Nov. 1, 1919, claimed from the defendant payment of the 18,035 francs, "the equivalent of which on Dec. 31, 1914, is £715." The defendant admitted the debt, but pleaded that the equivalent in English money should be ascertained as at the date of the judgment and not as at Dec. 31, 1914. On May 9, 1920, the defendant called at the plaintiffs' hotel and paid 18,035 francs to the cashier, who knew nothing of either the debt or the action and gave her a receipt for the amount as for money received on deposit. The defendant then added to her defence in the action a plea of payment.

Held: it was immaterial whether the cashier to whom the money was paid knew what was the amount of the debt or whether or not an action had been begun to recover it, and so did not intend to receive the money in satisfaction of the debt; the debt was owed to the plaintiffs in France where it could not have been successfully pleaded that in 1920 the French franc was of less value in English currency than it was on Dec. 31, 1914; and, therefore, by paying the amount of the debt in France, the defendant discharged the debt, but the payment was not an accord and satisfaction of the action and the plaintiffs were entitled to such costs as the court thought just and (Atkin, J., dissenting) to nominal damages.

Notes. Considered: *Re British American Continental Bank, Credit General Liegeois' Claim*, [1922] All E.R.Rep. 219; *Re British American Continental Bank, Lisser and Rosenkraz's Claim*, [1923] All E.R.Rep. 52; *Madeleine Vioniet et Cie* v. *Wills*, [1939] 4 All E.R. 136; *Grayman* v. *Treitel*, [1940] 2 All E.R. 188; *Cummings* v. *London Bullion Co.*, [1952] 1 All E.R. 383. Referred to: *Pocahontas*

Fuel Co., Inc. v. *Amatielos* (1922), 27 Com. Cas. 148; *Re Chestermans Trusts. Mott* v. *Browning*, [1923] All E.R.Rep. 705; *Peyrae* v. *Wilkinson*, [1923] All E.R.Rep. 180; *The Baarn*, [1933] P. 251; *The Baarn*, [1934] P. 171.

As to the discharge of debts in foreign currency, see 27 HALSBURY'S LAWS (3rd Edn.) 5–7; and for cases see 35 DIGEST 173 et seq.

Cases referred to:

(1) *Randall* v. *Moon* (1852), 12 C.B. 261; 21 L.J.C.P. 226; 19 L.T.O.S. 92; 138 E.R. 90; 6 Digest 344, *2286.*

(2) *Goodwin* v. *Cremer* (1852), 18 Q.B. 757; 22 L.J.Q.B. 30; 17 Jur. 2; 118 E.R. 286; 6 Digest 348, *2314.*

(3) *Beaumont* v. *Greathead* (1846), 2 C.B. 494; 3 Dow. & L. 631; 15 L.J.C.P. 130; 6 L.T.O.S. 297; 135 E.R. 1039; 6 Digest 347, *2308.*

(4) *Chambers* v. *Miller* (1862), 13 C.B.N.S. 125; 1 New Rep. 95; 32 L.J.C.P. 30; 7 L.T. 856; 9 Jur.N.S. 626; 11 W.R. 236; 143 E.R. 50; 12 Digest (Repl.) 510, *3825.*

(5) *Cook* v. *Hopewell* (1856), 11 Exch. 555; 25 L.J.Ex. 71; 26 L.T.O.S. 224; 2 Jur.N.S. 66; 4 W.R. 291; 156 E.R. 951; 12 Digest (Repl.) 511, *3833.*

(6) *Day* v. *McLea* (1889), 22 Q.B.D. 610; 58 L.J.Q.B. 293; 60 L.T. 947; 53 J.P. 532; 37 W.R. 483; 5 T.L.R. 379, C.A.; 12 Digest (Repl.) 529, *3991.*

(7) *Hirachand Punamchand* v. *Temple*, [1911] 2 K.B. 330; 80 L.J.K.B. 1155; 105 L.T. 277; sub nom. *Punamchand Shrichand & Co.* v. *Temple*, 27 T.L.R. 430; 55 Sol. Jo. 519, C.A.; 6 Digest 343, *2280.*

(8) *Pilkington* v. *Liquidating Claims Comrs. on France* (1821), 2 Knapp, 7.

Also referred to in argument:

Cash v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35.*

Manners v. *Pearson & Son*, [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413, C.A.; 35 Digest 176, *57.*

Celia (Owners) v. *Volturno (Owners). The Volturno*, ante p. 110, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 37 T.L.R. 969; 15 Asp.M.L.C. 374, H.L.; 35 Digest 174, *39.*

Marburg v. *Marburg* (1866), 26 Maryland, 8.

Scott v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44.*

Di Ferdinando v. *Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 36 T.L.R. 797; 25 Com. Cas. 37, C.A.; 35 Digest 175, *52.*

Appeal by the defendant from an order of AVORY, J., in an action tried without a jury.

The plaintiffs, a company incorporated in France, claimed 18,035 francs, alleged to be due from the defendant for board and residence at the plaintiffs' hotel, the Hermitage Hotel, Le Touquet-Paris-Plage (Pas de Calais), and for money lent. The defendant, a British subject, stayed at the Hermitage Hotel between July 4 and Aug. 4, 1914, and incurred a debt to the plaintiffs, for board and lodging and money lent, amounting in all to 18,035 francs. The particulars of claim endorsed on the writ in the action, which was issued on Nov. 9, 1919, were as follows:

"To supplying board and residence to the defendant at the above hotel to Aug. 4, 1914	7,260 francs
"To money lent by the plaintiffs to the defendant	10,775 francs
Total	18,035 francs

The English equivalent of which on Dec. 31, 1914, is £715 13s. 4d."

On Aug. 3, 1914, the defendant signed and handed to the plaintiffs' manager at the Hermitage Hotel, a document of the same date in which she admitted the debt and undertook to pay the plaintiffs at their address in cash "as soon as the European crisis permits, in any case before the end of the year." Not having obtained payment in accordance with this arrangement the plaintiffs commenced an action to

recover the amount stated above. By her defence, which was delivered on Feb. 2, 1920, the defendant admitted the debt, but pleaded that her liability in sterling should be reckoned according to the rate of exchange prevailing at the date when judgment would be given in the action, and not according to the rate of exchange prevailing on Dec. 31, 1914, when the equivalent in English money of 18,035 French francs was £715. On May 17, 1920, the defendant delivered a further defence, in which she alleged that she had satisfied the claim by payment of 18,035 francs to the plaintiffs at Le Touquet on May 9, 1920. According to the evidence, the defendant, on May 9, 1920, called at the Hermitage Hotel, and paid 18,035 francs to a manager who was not acquainted with the facts. This manager gave her a receipt for that amount "as for money deposited with him." It was agreed between the parties that the rate of exchange had fluctuated from 25·05 francs per £1 sterling on July 30, 1914, to 59·30–60 francs per £1 sterling on May 9, 1920. The questions in dispute were whether the debt was payable in English money at the rate prevailing on Dec. 31, 1914, or at the rate prevailing on the date of the judgment in the action, and secondly, whether the payment made on May 9, 1920, constituted accord and satisfaction of the debt. AVORY, J., gave judgment in favour of the plaintiffs for £715, against which credit must be given for 18,035 francs calculated at the rate of exchange prevailing in May, 1920, when the payment was made by the defendant. The defendant appealed.

Schiller, *K.C.*, *Giveen*, and *Bickmore* for the defendant.
Compston, *K.C.*, and *O'Malley* (*Frampton* with them) for the plaintiffs.

Dec. 20. The following judgments were read.

BANKES, L.J.—The only material question for consideration is whether the plea of payment after action is established, and if established what the effect of it is. It is to be noticed that the plea does not set up that the payment was in settlement of the action, but that it was in settlement of the claim in the action. The plaintiffs do not sue upon the defendant's undertaking, but upon the original consideration. In these circumstances the defendant's obligation was an obligation to pay to the plaintiffs in France. The sum to be paid was the sum of 18,035 francs. The defendant paid this amount at the place at which she agreed to pay it, but long after the agreed date. It is not disputed that the person who received the money had the necessary authority to receive debts due to the plaintiffs. It is not disputed that the person to whom the money was paid knew that the defendant was paying it in discharge of a debt due to the company. The plaintiffs knew all the facts, and after the money was paid to their representative they kept it without objection or protest.

Upon the question whether upon proof of these facts the plea of payment was made out, it seems to me immaterial to consider whether the person to whom the money was paid knew what the amount of the debt was, or whether or not an action had been commenced to recover it. The only ground upon which it has been urged that the plea of payment has not been proved is that, payment not having been made within the agreed time, the claim is really one for damages, which can only be met by proof of an accord and satisfaction, which has not been proved. Apart from the difficulty of presenting such a case in face of the endorsement on the writ, I think that it cannot prevail. The technical question whether a claim to recover a debt not paid on the due date is a claim in damages which precludes any plea of payment is one which was often referred to under the old system of pleading. In BULLEN AND LEAKE ON PRECEDENTS OF PLEADING (3rd Edn.) at p. 478, the editors say:

> "In the common case of a debtor paying his creditor a debt post diem, the defence is really one of accord and satisfaction, although from the frequent recurrence of the transaction it is looked upon as a distinct defence under the name of payment."

Unless this was so a defence of payment after action could never have been

recognised. If the plea of payment is pleaded generally without limitation, it is taken as pleaded to the whole cause of action, and must show a payment in satisfaction of the damages as well as of the debt: *Randall* v. *Moon* (1). Payment after action brought is not a complete defence unless made in satisfaction of all damages and costs of the action as well as of the debt. If it is made in respect of the debt only the plaintiff is entitled to continue the action for nominal damages, and the costs of the action: *Goodwin* v. *Cremer* (2); and see BULLEN AND LEAKE ON PRECEDENTS OF PLEADING (3rd Edn.), p. 663. That payment of a debt made and accepted after the time of payment, but before action, is a complete defence, and that the creditor is not entitled to sue for nominal damages is settled by the decision in *Beaumont* v. *Greathead* (3) (2 C.B. at p. 499), where MAULE, J., says:

> "The question for consideration is whether, where a sum of money is due upon simple contract, and the creditor is entitled to claim nominal damages for its detention, the debtor is discharged by the creditor's acceptance, before action brought, of the amount of the debt, or whether the former may afterwards sue for such nominal damages. I apprehend he cannot. Nominal damages are a mere peg on which to hang costs. If a creditor were to say to his debtor, 'You owe me £50 and a nominal sum for the detention thereof'; and the latter were to produce £50 and tender it to the former, saying, 'Here is the amount of the debt I owe you, and the nominal damages you claim'; that, I conceive, would be a very good tender. Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity: and I think a man may very well pay £50 in satisfaction and discharge of a debt of £50 and of the nominal damages due for its detention."

CRESSWELL, J., said (ibid. at p. 500):

> "I am of opinion that the Lord Chief Justice was not bound to tell the jury that they must find some damages, and that the jury were not bound to give interest in the shape of damages. Payment of a smaller sum cannot be pleaded in satisfaction of a debt of larger amount: but I am not aware that the doctrine has ever been extended to the case of a claim for nominal damages after payment of the full amount of the actual debt."

As the defendant has proved that she paid the amount of the debt, at the place at which, and in the currency in which, it was payable, and as the amount she paid was accepted and retained without protest or objection, I am of opinion that the plea that after action brought she satisfied the plaintiffs' claim by payment was made out, and that judgment should have been entered for the plaintiffs for nominal damages only. Costs were in the discretion of the judge who tried the case. I do not think that the defendant can expect any indulgence having regard to the fact that the payment was made without any communication with the plaintiffs' solicitors, and I consider, therefore, that she should not have any costs of the action. The judgment will be entered for nominal damages, and the plaintiffs will have their costs down to and including the date when the defence of payment after action was pleaded, and the appeal will be allowed with costs.

SCRUTTON, L.J.—This is an appeal from a judgment of AVORY, J., raising a curious point of fact and law. The defendant, an English woman, at the outbreak of the war owed the plaintiffs, a French hotel company, a sum of 18,035 francs, payable before the end of 1914. For reasons which have nothing to do with the present appeal she declined to pay. On Nov. 1, 1919, the plaintiffs issued a writ against her in England claiming a sum in sterling equal to the value of 18,035 francs on Dec. 31, 1914. The defendant denied liability. On May 9, 1920, after defence delivered, and when the plaintiffs were represented by English solicitors, the defendant, on the advice of her solicitor, and without communicating with the legal representatives of the plaintiffs, called at the hotel in France and paid a representative of the hotel company the sum of 18,035 francs for which he gave a simple receipt acknowledging that the sum had been received. The judge below finds as

a fact that the person giving the receipt did not know the amount of the debt, and did not intend to receive the money in satisfaction. The defendant then pleaded in the English action this payment as satisfaction of the claim by payment. Whatever the legal results of this may be, I desire to express my strong disapproval of the conduct of the defendant's solicitor in sending his client to make a payment to the French plaintiffs, who knew nothing of English law, behind the backs of their English legal representatives.

The questions are: (i) Is such a payment, when retained by the plaintiffs, accord and satisfaction, so as to be a defence to the action? (ii) Were the plaintiffs, who received in France the amount of their debt in francs in 1920, entitled to claim in addition such a sum in English money as made up their receipts to the value of that number of francs in English money in 1914 when it was due? It appears clear that under the old pleading payment after the due date could not be pleaded as payment, but only as accord and satisfaction:

> "Where money is paid, not in performance of a promise, at the precise day when it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment but acceptance in satisfaction": per WILLIAMS, J., in *Chambers* v. *Miller* (4), 13 C.B.N.S. at p. 134.

The reason for this is stated in *Cook* v. *Hopewell* (5) that the claim was both for the debt and damages for non-payment, and there must be shown to be accord both as to the debt and the damages. As to accord and satisfaction, we have the authority of this court in *Day* v. *McLea* (6) that accord and satisfaction is a question of fact. There the defendant sent a smaller sum in satisfaction of a larger debt; the plaintiffs kept the smaller sum, saying that they did so on account, and sued for the balance. It was argued that keeping the payment instead of returning it amounted in law to accord and satisfaction, but CHARLES, J., and the Court of Appeal held that it was not a question of law but of fact, and in fact there had been no accord: see the judgment of BOWEN, L.J. It being a question of fact the subsequent decision of this court in *Hirachand Punamchand* v. *Temple* (7) of a question of fact does not bind us. There a third party sent a smaller sum in satisfaction of the claim; the creditor wrote back that he kept the sum on account and sued for the balance. The Court of Appeal held, reversing the judge below, that in fact there was an accord and satisfaction, and as their decision in fact does not now bind me it is not for me to question how they arrived at that decision of fact, nor how they could find, consistently with the evidence and the decision in *Day* v. *McLea* (6), that a creditor who said he kept the money on account and would and did sue for the balance had really agreed to accept in satisfaction.

I take the same view as AVORY, J., that there was here no accord and satisfaction, including in my consideration the fact to which he does not specifically refer, that the plaintiffs kept the money and did not return it, but went on with the action. But it does not necessarily follow that the plaintiffs were, therefore, entitled to the sum claimed. The day before the writ was issued, if the defendant had tendered in France to the plaintiffs 18,035 francs, could they have recovered more? They could not have recovered interest, for the law of France does not give it and the debt was a French debt. In France it could not have been successfully pleaded that the French franc was of less value in English currency than it was on Dec. 31, 1914, for the defendant was not bound to repay in English currency. But the writ was issued in England. Did this increase the damages? If the writ had been issued in Germany, could the defendant have succeeded by paying the number of marks representing 18,035 francs in 1914, though in 1921 that amount of francs represented a much larger number of marks? In *Pilkington* v. *Liquidating Claims Comrs. on France* (8) the Privy Council obiter expressed the opinion that where the French government had confiscated assignats of the English claimants worth fifty pence in English currency, and had then agreed to make reparation, they could not do so by restoring an equal number of assignats worth twenty pence, but must make good the difference between the value of the assignats at different

periods. In that case an English claimant desired compensation from English courts for a wrong done to him in France, and as personal property follows the domicil it may be that he was entitled to such an amount in English money as represented the value to him in England of the property confiscated at the time of confiscation. But in this case a domiciled Frenchman desires damages for non-payment to him on the due date of a debt payable in France in French currency. Can he increase the number of francs payable by saying that in one country French currency is worth less than it was at the agreed date for payment, though in other countries—that is, Germany—it is worth more than it was at the agreed date?

In my view, the plaintiffs who were owed 18,035 francs payable in France, must be content with 18,035 francs paid in France. In the case of an English debt they would probably recover interest, but apparently French law, which determines the incidents of a French debt, excludes liability for interest. At the time of the payment the plaintiffs were in addition entitled to costs to date of payment, and, as explained in *Cook* v. *Hopewell* (5), to nominal damages. Judgment should, therefore, in my view, be entered for them for nominal damages with costs up to the time of the plea of payment of the debt. They have failed substantially since that plea, but as the difficulty has been brought about by the irregular act of the defendant in going behind the plaintiffs' legal advisers, and the defendant did not offer to submit to nominal damages, but alleged accord and satisfaction in which she failed, there should be no costs of the action after payment in. The defendant must have the costs of this appeal.

ATKIN, L.J. (read by BANKES, L.J.).—The original debt was contracted in France, by an Englishwoman living in England, to a French company, payable in France in French currency. There is no evidence as to French law differing from English law as to the legal consequences of such an obligation. In France the plaintiffs could have sued the defendant only for 18,035 francs, and on payment of that sum the defendant would at any time have discharged the obligation. Inasmuch as the obligation to pay to the plaintiffs in France 18,035 francs was a personal obligation, the plaintiffs would also have been entitled to sue the defendant in the courts of any country where they found her, provided that the municipal law of such country recognised personal obligation contracted outside its own territory, as would be the case in most States.

The plaintiffs, therefore, have the right to sue the defendant in the English courts to recover the debt of 18,035 francs due to them in France. Judgment would only be given in the English courts expressed in English currency. At what date the exchange must be calculated is a matter of controversy that I need not deal with now. The action would be for a debt due in France just as if the debt were due in England it would be for such a debt. The legal position appears to me to be the same. If the plaintiffs had been an English company suing for an hotel bill of £1,800 it appears to me that, if before or after action brought the defendant paid and the plaintiffs received £1,800, the debt of £1,800 would be satisfied and discharged; if made after action brought a plea of such payment would be a good plea, and on being admitted or proved the plaintiffs would only be entitled to judgment for costs up to the date of the plea. No doubt, technically the action for debt is for the debt and for nominal damages for breach of the promise, expressed or implied, to pay on the due date. To satisfy the plaintiffs' right of action once vested there must be an accord and satisfaction. But nominal damages in respect of the non-payment of a debt are a vain thing fondly invented, "a mere peg on which to hang costs": per MAULE, J., in *Beaumont* v. *Greathead* (3), 2 C.B. at p. 499. If a man being owed £50 receives from his debtor after due date £50, what other inference can be drawn than that he receives it in satisfaction of the debt, and what other result can follow that the debt is discharged?

It was suggested in the present case, though with some distrust by the plaintiffs, that for the purposes of the English court once a writ was issued the debt of francs payable in France became a debt of sterling at the rate of exchange of Dec. 31,

1914, payable in England, and that such debt was not paid. Counsel disclaimed the suggestion that on Dec. 31, 1914, the defendant incurred a liability to the plaintiffs to pay them sterling in England. If such were the effect of the transaction it would follow that the defendant on Jan. 1, 1915, incurred obligations to pay to the plaintiffs sums in the manifold currencies of the many countries in the world where she might eventually be sued. It appears to me that she was sued here for a French debt, and, if you please, for nominal damages, and that by paying the debt in France she discharged the debt for which she was sued in France, and in all other countries. It is not suggested that she thereby discharged herself of the obligation to pay costs—in other words, the payment was not an accord and satisfaction of the action. It seems to me that the usual results should follow: the claim is discharged, the plaintiffs are not entitled to judgment for nominal damages any more than they would if, having a debt for £180, they had received £180 in satisfaction and discharge of the debt. The plaintiffs should have their costs up to the date of the plea of payment. As I think that the defendant should not have been advised to take the course she did without communication with the plaintiffs' legal advisers, especially in view of the fact that the plaintiffs were foreigners, I agree that the defendant should not have the costs of the action after plea.

For the purposes of this action I have not thought it necessary to decide at what date the exchange should be calculated had the plaintiffs succeeded. The same result follows, though the exchange should be calculated as at the date when payment became due. But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve.

Appeal allowed.

Solicitors: *Hutchison & Cuff*; *Cohen & Cohen.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

FRENCH AND ANOTHER v. GETHING (GETHING, CLAIMANT)

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), November 3, 4, 1921]

[Reported [1922] 1 K.B. 236; 91 L.J.K.B. 276; 126 L.T. 394; 38 T.L.R. 77; 66 Sol. Jo. 140; [1922] B. & C.R. 30]

Bill of Sale—Husband and wife—Gift by husband to wife of household furniture and effects—Chattels remaining in matrimonial home—Doubtful possession—Possession attached to wife's title—Chattels not in "apparent possession," "order and disposition," or "reputed ownership" of husband—Bills of Sale Act, 1878 (41 *& 42 Vict., c.* 31), *s.* 8—*Married Women's Property Act*, 1882 (45 *& 46 Vict., c.* 75), *s.* 10.

By a deed of gift a husband, in consideration of the love and affection he had for his wife, gave to her furniture and other effects in and about the matrimonial home for her absolute use and benefit and as her separate property. The deed was not registered under the Bills of Sale Act, 1878, and the furniture remained in the home after the execution of the deed. A judgment obtained against the husband remaining unsatisfied, the judgment creditors levied execution at the house occupied by the husband and his wife. The wife having claimed the furniture under the deed of gift, an interpleader issue was directed.

Held: (i) the goods being in the house occupied by both husband and wife, it was not possible to say which of them was in actual possession of the goods, and, therefore, possession being doubtful, it was attached to the title to the goods, which was in the wife, and the goods were not in the "apparent possession" of the husband within s. 8 of the Bills of Sale Act, 1878; (ii) the goods being the absolute property of the wife, they did not "continue to be in the order and disposition" of the husband within s. 10 of the Married Women's Property Act, 1882, nor did the fact that they were in the matrimonial home render them in the "reputed ownership" of the husband within that section; accordingly, the claimant was entitled to succeed.

Ramsay v. *Margrett* (1), [1894] 2 Q.B. 18, applied.

Per Atkin, L.J.: When s. 4 of the Bills of Sale Act, 1878, provides that "personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person," the contract is between the occupier of a house and some person outside to whom symbolic possession of the goods in the house has been given, and not between one occupant of the house and another to whom actual possession of the goods has been given.

Judgment of the Divisional Court, [1921] 3 K.B. 280, affirmed.

Notes. Considered: *Youngs* v. *Youngs*, [1940] 1 All E.R. 349; *Hislop* v. *Hislop*, [1950] W.N. 124.

As to chattels in common establishment, see 3 Halsbury's Laws (3rd Edn.) 270; and for cases see 7 Digest 110 et seq., and see also 19 Halsbury's Laws (3rd Edn.) 837 and 27 Digest (Repl.) 147 et seq.

Cases referred to:

(1) *Ramsay* v. *Margrett*, [1894] 2 Q.B. 18; 63 L.J.Q.B. 513; 70 L.T. 788; 10 T.L.R. 355; 1 Mans. 189; 9 R. 407, C.A.; 7 Digest 115, *672*.

(2) *Jones* v. *Chapman* (1849), 2 Exch. 803; 18 L.J.Ex. 456; 14 L.T.O.S. 45; 13 J.P. 730; 154 E.R. 717, Ex. Ch.; 43 Digest 406, *284*.

(3) *Charlesworth* v. *Mills*, [1892] A.C. 231; 61 L.J.Q.B. 830; 66 L.T. 690; 56 J.P. 628; 41 W.R. 129; 8 T.L.R. 484; 36 Sol. Jo. 411, H.L.; 7 Digest 5, *11.* A

(4) *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 21 W.R. 530, L.C. & L.J.; 17 Digest (Repl.) 29, *342.*

(5) *Re Lake, Ex parte Dorman* (1872), 8 Ch. App. 51; 42 L.J.Bcy. 20; 27 L.T. 528; 21 W.R. 94, L.JJ.; 5 Digest (Repl.) 820, *6918.*

(6) *Re Satterthwaite, Ex parte Trustee* (1895), 2 Mans. 52; 15 R. 242; 7 Digest 115, *673.* B

(7) *Shepherd* v. *Pulbrook* (1888), 59 L.T. 288; 4 T.L.R. 642, C.A.; 7 Digest 10, *42.*

(8) *Re Parker, Ex parte Turquand* (1885), 14 Q.B.D. 636; 54 L.J.Q.B. 242; 53 L.T. 579; 33 W.R. 437; 1 T.L.R. 284, C.A.; 7 Digest 155, *834.*

Also referred to in argument: C

Re Blenkhorn, Ex parte Jay (1874), 9 Ch. App. 697; 43 L.J.Bcy. 122; 31 L.T. 260; 38 J.P. 821; 22 W.R. 907, L.JJ.; 7 Digest 111, *654.*

Re Fowler, Ex parte Brooks (1883), 23 Ch.D. 261; 48 L.T. 453; 47 J.P. 470; 31 W.R. 833, C.A.; 5 Digest (Repl.) 813, *6876.*

Re Emery, Ex parte Chief Official Receiver (1888), 21 Q.B.D. 405; 57 L.J.Q.B. 629; 37 W.R. 21; 4 T.L.R. 701, C.A.; 7 Digest 101, *612.* D

Lingard v. *Messiter* (1823), 1 B. & C. 308; 2 Dow. & Ry.K.B. 495; 1 L.J.O.S.K.B. 121; 107 E.R. 115; 5 Digest (Repl.) 853, *7172.*

Sharman v. *Mason*, [1899] 2 Q.B. 679; 69 L.J.Q.B. 3; 81 L.T. 485; 48 W.R. 142; 16 T.L.R. 11; 44 Sol. Jo. 26; 7 Mans. 19, D.C.; 5 Digest (Repl.) 843, *7103.*

Hollinshead v. *Egan, Ltd.*, [1913] A.C. 564; 83 L.J.P.C. 74; 109 L.T. 681; 29 T.L.R. 640; 57 Sol. Jo. 661; [1913] 2 I.R. 487; 47 I.L.T. 254, H.L.; 5 Digest (Repl.) 841, **3343.* E

Appeal by the execution creditors from an order of the Divisional Court affirming the order of a master on the trial of an interpleader issue.

Schiller, K.C., Lightwood and *A. R. Thomas* for the execution creditors.

Disturnal, K.C., and *Wynn Werninck*, for the claimant, were not called on to argue. F

BANKES, L.J.—The claimant was the wife of a judgment debtor. She lived with her husband in what DAVEY, L.J., in *Ramsay* v. *Margrett* (1) ([1894] 2 Q.B. at p. 27) called the conjugal domicil. The judgment creditor put in execution on the household goods in the house. The wife claims the goods. In her affidavit she stated that a considerable part of the goods had always been her property, and had never been her husband's, but had been given to her by her father; the rest had been given to her by her husband by a deed of gift. There is no suggestion that the deed is invalid, or that it was not completed by the handing over of the last-mentioned goods. It was for all purposes a valid deed, which passed the property in the goods. But it is said that the deed was a bill of sale, and was not registered, and, therefore, the judgment creditor had a right to say that, notwithstanding the deed, he was entitled to seize the goods in execution—first, by s. 8 of the Bills of Sale Act, 1878; and secondly, by s. 10 of the Married Women's Property Act, 1882. The Divisional Court refused to accept either contention, and held rightly that the case was covered by *Ramsay* v. *Margrett* (1). G H

That was a claim by an execution creditor of a husband who was living with his wife, as the husband was in this case. There the wife had bought the goods from her husband, and that is the only difference between the cases. Counsel for the execution creditors contended that the difference between a purchase by a wife and a voluntary gift to a wife was very material. In my opinion, there is no material difference. In either case the goods become the absolute property of the wife, and absolute property in the wife is the basis of the decision in *Ramsay* v. *Margrett* (1). It is immaterial to consider how the goods became her property. That case decided two things—first, that where the husband and wife are living together in the conjugal domicil there is no presumption that the household goods I

A are in the apparent possession of the husband; and, secondly, that the doctrine laid down in LITTLETON'S TENURES, s. 701, and *Jones* v. *Chapman* (2), that possession follows title, applies to chattels as well as to land. LOPES, L.J., expressed a doubt how far it would operate to take goods out of the apparent possession of the husband; but LORD ESHER, M.R., said ([1894] 2 Q.B. at p. 25):

B "So in this case the money which the plaintiff had was her money, and the furniture was her husband's, and she had the right to buy with her money whatever she chose. When she bought these goods from her husband and paid him the price, they became her separate property. The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When C the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them."

LORD ESHER, M.R., must have held that this was enough to take them out of the apparent possession of the husband, because he continues: "This consideration D again is sufficient to oust the claim of the execution creditor." So this doctrine, which was first invoked to decide between adverse claimants to land, was applied by LORD ESHER, M.R., to a claim by an execution creditor of a husband to goods of the wife where it was doubtful whether the husband or the wife was in apparent possession of them. DAVEY, L.J., put it even more clearly. After citing *Jones* v. *Chapman* (2) and *Charlesworth* v. *Mills* (3) he says (ibid. at p. 28):

E "Here the goods were in the conjugal domicil, and were being used by the husband and the wife for the purposes of that domicil. Under the circumstances I draw the inference, and I think it is an irresistible inference, that the intention was that the goods should become the separate property of the wife out and out, in the same way as the other property which belonged to her, and was in her possession. [That intention may be effected by a gift as F well as by a sale.] In other words, the intention was that both the property in the goods and the possession of them should pass at once to the wife. . . . The fact that the goods remained in the house as before was equally consistent with their being in her possession as with their being in his possession. Therefore, they were not in the apparent possession of the husband. If there had been a formal delivery of the goods to the wife, there could have been no G question, but I do not think that such a delivery was necessary. I should, therefore, be prepared to hold that the plaintiff had a sufficient possession of the goods to take the case out of the Bills of Sale Act."

That means that the husband was not in apparent possession of the goods. In my view, therefore, *Ramsay* v. *Margrett* (1) is on all fours with this case; it binds us, H and the judgment of the Divisional Court was right upon the point arising on s. 8 of the Bills of Sale Act, 1878.

But counsel for the execution creditors has argued that a somewhat different question arises under s. 10 of the Married Women's Property Act, 1882, and that the case must be separately considered under that section. I am content to assume that. That section, after dealing with investments by a wife of her I husband's money without his consent, continues:

"nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband. . . ."

Counsel relied on the word "continue" as showing that the section refers to property which has been the husband's and has passed to the wife. In order that the section may operate the property must continue to be in the order and disposition or reputed ownership of the husband, which, I think, means in his actual

order and disposition or in his reputed ownership. There is here no question of the husband's order and disposition, because the property is the wife's, and is in her order and disposition. Was it in the reputed ownership of the husband? We have been referred to many cases, all differing in their facts from this case, of disputes between an execution creditor and a person who was indisputably in possession of the goods, where the question was whether upon a true inference from the facts he was the reputed owner also. I accept all that was said by LORD SELBORNE, L.C., in *Ex parte Watkins* (4), whose judgment tends to the opposite conclusion to that which counsel for the creditors asks us to draw. He said (8 Ch. App. at p. 528):

> "There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation. What, then, are the principles applicable to the determination of that question? Much of the argument seems to me to have proceeded on a fallacious application of the expressions 'knowledge of the world'; and 'known to the public.' The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject."

Are the goods in the present case in such a position as to convey to the minds of those who know their situation the reputation of ownership in the husband? They are household goods in the conjugal domicil. According to *Ramsay* v. *Margrett* (1) this is not enough to warrant the inference that they are in the apparent possession of the husband. How can the proper inference be that, although not in his apparent possession, they are in his reputed ownership? In my opinion, the distinction which counsel for the appellants drew between apparent possession and reputed ownership does not avail in this case. In my opinion, it requires further consideration. The appeal must be dismissed.

SCRUTTON, L.J.—In May, 1914, the execution debtor made an absolute gift by deed to his wife of certain furniture and other effects in the dwelling-house where they lived together. This is not an attempt to set aside the gift under s. 42 of the Bankruptcy Act, 1914. If it were, the grantor would have to discharge the burden of proof imposed on him by that section. It is an attempt by judgment creditors of the husband to take in execution goods belonging to the wife, and they claim to do this on two grounds: First, by virtue of s. 8 of the Bills of Sale Act, 1878. They say that the deed was an assurance of personal chattels, and, therefore, a bill of sale within s. 4 of the Act. It was admittedly unregistered. Therefore, by s. 8 it is, as against all sheriffs' officers and other persons seizing the chattels comprised in it under process of the court and against every person on whose behalf the process shall have issued, to be deemed fraudulent and void so far as regards the property in or right to possession of the chattels which at the time of executing the process and after seven days from the making or giving of the bill of sale "are in the possession or apparent possession of the person making such bill of sale." Two groups of cases have grown up about this section in which the question has been whether a document, which comes into existence at the same time as an act passing property in chattels, is or is not a bill of sale; for instance, if there is an oral agreement to sell certain goods, and at the time

of the sale a receipt for the purchase-money, or an inventory of the goods, is given, the question whether the receipt or inventory is a bill of sale within s. 4 turns on which of these groups the particular case belongs to, and that depends upon whether the act which passes the property is independent of the written document or not. If the act is independent of the document the document is not a bill of sale. The question does not arise in this case, because beyond all doubt the deed of gift was the act which passed the property, and, therefore, it was a bill of sale. But the creditors must go further and prove that the goods remained in the possession or apparent possession of the grantor, the husband. At the present day, when wives can, and often do, possess as much property as their husbands, it is impossible to say whether the husband or the wife is in possession or apparent possession of the household furniture if nothing more is known than that the parties live together in the house. But if the furniture is in the apparent possession of both, s. 8 of the Act of 1878 does not apply. That is the first answer to the creditors on this point. The second is that, if it is doubtful which of two persons is in possession of property, possession is in that one who has the right and title to possession. That person in this case was the wife. Therefore the claim under the Act of 1878 fails.

The creditors' second claim is under s. 10 of the Married Women's Property Act, 1882, which provides that

> "nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband."

I should like to point out that properly speaking the fact that goods are in the order and disposition of a person is evidence that he is the reputed owner of them; but this section seems to imply that to be in the order and disposition of the husband is not the same as to be in his reputed ownership. Be that as it may, in the present case there is no evidence that these goods remained in the order and disposition of the judgment debtor, nor that they remained in his reputed ownership; though I think in this case the one conclusion follows from the other, for if the goods, being household furniture, are not in his order and disposition, they are not in his reputed ownership. For these reasons I think the appeal must be dismissed.

ATKIN, L.J.—I agree. In my opinion, this case is covered by *Ramsay* v. *Margrett* (1). That case, like this, depended on the provisions of the Bills of Sale Act, 1878, and one of the questions was, as it is in this case, there being a bill of sale by a husband to his wife of household goods in the dwelling-house of both: Were the goods after the period of seven days mentioned in the section, in the possession or apparent possession of the grantor? *Ramsay* v. *Margrett* (1) seems to me to have decided that, where husband and wife are living together in the same house and the husband gives a bill of sale to his wife, not only are the goods in the possession of the wife and no longer in the possession of the husband, they are also in the apparent possession of the wife and no longer in the apparent possession of the husband. That must have been decided in *Ramsay* v. *Margrett* (1) because, assuming the document in that case to have been a bill of sale, if the goods had remained in the apparent possession of the grantor the bill of sale to be valid must have been registered; but both LORD ESHER, M.R., and DAVEY, L.J., held that it was enough if possession had been transferred to the wife, implying that apparent possession followed, and that the goods were neither in the possession nor in the apparent possession of the grantor. I think that case implies that "possession" and "apparent possession" mean sole possession and apparent sole possession just as "possession" and "reputed ownership" were held to mean sole possession and sole reputed ownership when it was a question whether goods were in the order and disposition clause of the Bankruptcy Act, 1869, s. 15, *Ex parte Dorman* (5).

During the argument I put this case by way of illustration. If there are three men in a boat belonging to one of them, the boat is in the possession of the owner and not in the possession of the two visitors or either of them; it is in his apparent possession and not in that of them or either of them; and if the owner sells the boat to one of the visitors intending to pass the property in it to him, then possession and apparent possession are in the purchaser and not in the former owner. That illustration sets at rest a number of difficulties. In *Charlesworth* v. *Mills* (3) LORD HERSCHELL was dealing with a case where the possession of the goods had plainly passed to a pledgee. He had only to consider the Act of 1882, and, therefore, he reserved the case where, though possession had passed to pledgees, apparent possession might remain in the pledgor. There the debtor's goods had been seized by the sheriff's officer who was in possession; then an arrangement was made between the debtor and a firm of auctioneers by which they agreed to pay the judgment debt and costs, the man in possession was thenceforth to hold possession for the auctioneers, and the auctioneers were to sell the goods and repay themselves the amount of the judgment debt and costs which they had paid to the sheriff; this arrangement was completed; the auctioneers paid the sheriff, the officer gave them a receipt, and the debtor gave the auctioneers a letter embodying the terms of the arrangement. It is clear from these facts that possession had passed to the auctioneers. That was enough to take the case out of the Act of 1882. In a later case *Re Satterthwaite* (6), VAUGHAN WILLIAMS, J., seems to have been in doubt whether there might not be apparent possession in a husband although possession was in the wife. I think it was unnecessary to embark on that question, because when the goods had passed from the husband's possession to that of the wife there was an end of his apparent possession.

I should like to add a few words upon the definition of apparent possession in s. 4 of the Bills of Sale Act, 1878:

> "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

The contrast there is between the occupier of a house and some person outside to whom symbolic possession of the goods in the house has been given; not between one occupant of the house and another occupant of the house to whom actual possession of the goods has been given. This was clear even before *Ramsay* v. *Margrett* (1) as appears from *Shepherd* v. *Pulbrook* (7). Very material upon the question of possession and apparent possession is the doubt there expressed by LINDLEY, L.J., who "wished to guard against it being taken that goods which were the separate property of the wife were in the apparent possession of the husband, when husband and wife were living together." In my opinion, the creditors fail on the point under s. 8 of the Bills of Sale Act, 1878.

Their second argument is upon s. 10 of the Married Women's Property Act, 1882. After dealing at considerable length with investments by a married woman of her husband's money without his consent, and after providing that the court may order the investment and the dividends thereof to be transferred and paid to the husband, the section, without much relation to what has gone before, proceeds to enact:

> "and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband. . . ."

I agree with BANKES, L.J., in thinking it very doubtful whether this enactment was intended to apply only where the husband and wife are living in premises where the husband is carrying on business. I wish to reserve that question,

A though I have very little doubt that the words "order and disposition" and "reputed ownership" are taken from the Bankruptcy Act, 1869, and, inasmuch as the words "being a trader" which appeared in s. 15 (5) of that Act, are altogether omitted from s. 10 of the Married Women's Property Act, 1882, I should have thought there was much force in the argument that this omission of all reference to the husband's trade or business was deliberate. However that may be, I find B no ground for saying that these goods were in the order and disposition of the husband, which must mean that the husband has the right or the permission of the true owner to dispose of them or give directions for their removal from one place to another. There is no evidence in this case that the husband has either the one or the other. As to reputed ownership when applied to household furniture, if apparent possession is negatived it is difficult to imagine how a husband C who has neither possession nor apparent possession of the furniture can be said to be the reputed owner of it. At any rate, in the present case there is no evidence that these goods are in the reputed ownership of the husband. I cannot help thinking that the Divisional Court chose an unfortunate example of the application of this section when they suggested the business of an hotel keeper carried on by the husband, because the well-recognised custom of hiring furniture for an hotel D would be enough to take the furniture out of the reputed ownership of the husband: *Ex parte Turquand* (8). But upon the main points of the case I agree with the judgments which have been delivered, and with the judgment of LUSH, J., who is well versed in this branch of the law.

Appeal dismissed.

Solicitors: *Reid, Sharman & Co.*; *Arthur Sugden.*

E [*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

F

DAVIES AND OTHERS *v.* POWELL DUFFRYN STEAM COAL CO., LTD.

G [COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), April 6, 7, 8, 1921]

[Reported 91 L.J.Ch. 40; 125 L.T. 432; 37 T.L.R. 607; 65 Sol. Jo. 567]

Judgment—Judicial decision as authority—Judgments below discharged by H *House of Lords—Permission to plaintiffs to raise new issues of fact in fresh action—Authority of discharged judgments.*

On an appeal from the Court of Appeal the House of Lords discharged the judgments previously given and directed that the plaintiffs might amend their pleadings and raise fresh issues of fact in a new action.

Held: in the new action, in any matter not affected by the fresh issues I raised, e.g., the construction of a deed, the court, though technically not bound by the discharged judgments, would feel obliged to come to the same decision as the court had arrived at in the first action.

Land—Right to support—Conveyance of surface apart from subjacent minerals—Grantee of surface deprived of right—Exceptions and reservations in conveyance.

The right to the support of the surface of land by subjacent minerals arises on the severance of the surface from the subjacent minerals. It is not an easement, but is naturally incident to the ownership of the soil, and there is

nothing in law to prevent the severance being effected on such terms that the owner of the surface shall never have any right of support. The right to let down the surface is not necessarily the subject of a re-grant, but may be severed from the ownership of the surface by means of exceptions and reservations in a conveyance of the surface.

Notes. As to judicial decisions as authorities, see 22 HALSBURY'S LAWS (3rd Edn.) 796 et seq.; and for cases see 30 DIGEST (Repl.) 211 et seq. As to the right of support of a surface owner, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 34 DIGEST 700 et seq.

Cases referred to:

(1) *Andrew* v. *Henderson and Dimmark* (1871), 9 Macph. (Ct. of Sess.) 554; reversed sub nom. *Buchanan* v. *Andrew* (1873), L.R. 2 Sc. & Div. 286; sub nom. *Henderson* v. *Andrew*, 37 J.P. 436, H.L.; 34 Digest 704, *926*.

(2) *Rowbotham* v. *Wilson* (1856), 6 E. & B. 593; 27 L.T.O.S. 199; affirmed (1857), 8 E. & B. 123; 27 L.J.Q.B. 61; 29 L.T.O.S. 357; 3 Jur.N.S. 1297; 5 W.R. 820; 120 E.R. 45, Ex. Ch.; affirmed (1860), 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642; 24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463, H.L.; 34 Digest 615, *121*.

Also referred to in argument:

London Corpn. v. *Riggs* (1880), 13 Ch.D. 798; 49 L.J.Ch. 297; 42 L.T. 580; 44 J.P. 345; 28 W.R. 610; 19 Digest 100, *627*.

Backhouse v. *Bononi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 19 Digest 163, *1140*.

Davis v. *Treharne* (1881), 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.; 34 Digest 710, *954*.

Howley Park Coal and Cannel Co. v. *London and North Western Rail. Co.*, [1913] A.C. 11; 82 L.J.Ch. 76; 107 L.T. 625; 29 T.L.R. 35; 57 Sol. Jo. 42, H.L.; 11 Digest (Repl.) 165, *379*.

Humphries v. *Brogen* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries* v. *Brogen*, 15 Jur. 124; 34 Digest 610, *85*.

Beard v. *Moira Colliery Co., Ltd.*, [1915] 1 Ch. 257; 84 L.J.Ch. 155; 112 L.T. 227; 59 Sol. Jo. 103, C.A.; 34 Digest 707, *943*.

Appeal from a decision of RUSSELL, J.

The plaintiffs were lessees of certain lands in Glamorganshire upon which buildings had been erected, and they brought an action to restrain the defendant company, who were the lessees of mines and minerals under the surface, from continuing their underground workings so as to cause the surface of the lands to subside. The writ was first issued in 1915, and an order was made that it should be decided, as a preliminary point of law, whether by virtue of the exceptions, reservations, agreements, and declarations in a partition deed of Feb. 23, 1788, the defendants had a legal right to work the mines and minerals so as to cause the subsidence complained of. On Oct. 31, 1916, the point was decided by YOUNGER, J., in favour of the defendants, and on Feb. 19, 1917, the Court of Appeal affirmed that decision: [1917] 1 Ch. 488. On appeal to the House of Lords, the plaintiffs stated that they desired to raise fresh issues of fact, and the House of Lords, without hearing the appeal, and upon the terms of the plaintiffs paying the costs to date, discharged the judgments previously given, and gave leave to the plaintiffs to amend their pleadings and to raise the issues again in a fresh action: [1918] A.C. 555. The pleadings were amended and the action again brought on.

The facts were as follows. In 1788 large estates in Glamorganshire with the minerals thereunder (including the lands and minerals the subject of the action) stood limited to the use of Edward Matthew for life, with remainder to secure a jointure for his wife Mary; with remainder to the use of his three daughters, Rebecca, wife of John Curre; Maria, wife of T. H. Gwynne; and Eleanor, wife of Hugh Lord; as tenants in common in tail, with cross-remainders between them, and remainders over. By a partition deed of Feb. 23, 1788, made between Edward

Matthew and his wife, of the first part, the three daughters with their respective husbands respectively, of the second, third, and fourth parts, and two sets of grantees to uses, of the fifth and sixth parts, all the lands in question (the mines and minerals, with full liberty for Edward Matthew during his life, and thereafter for the Curres, Gwynnes, and Lords, their heirs and assigns, to work the same to the most advantage for their mutual benefit, always excepted and reserved out of the grant and conveyance) were granted and conveyed to the grantees in three equal parts; as to two parts upon uses for Edward Matthew and his wife during their lives and thereafter upon uses in favour of the Curres and Gwynnes respectively; and as to the third part (which included the lands the subject of this action) upon uses in favour of Mr. and Mrs. Matthew, with remainder as Mr. and Mrs. Lord should appoint, or as Mr. Lord, if the survivor of them, should appoint, with remainder to Mr. and Mrs. Lord successively for life, with remainder to their issue in tail, with an ultimate remainder to Mrs. Lord in fee simple. The deed contained a covenant that a fine sur conusance de droit come ceo should be levied (which was soon after done), and the deed contained an express proviso that all the mines and minerals "already opened and unopened or at any time hereafter to be opened" were to be "expressly reserved and excepted out of the aforesaid partition" for the benefit, profit, and advantage of Edward Matthew and his assigns for life, and thereafter for the joint profit, benefit, and advantage of the Curres, Gwynnes, and Lords, their heirs and assigns, with full liberty for them to work the mines and minerals for their equal and joint benefit, profit, and advantage, or for that of every person lawfully claiming under them respectively

> "in as full and ample manner to all intents and purposes as if these presents and the partition and division of the said . . . lands had not been done and made anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

There was no provision in the deed for compensating the owner of any share of the surface which might be injured by the working of the mines. On Sept. 12, 1797, Mr. and Mrs. Lord conveyed a part of the lands taken by them under the deed of 1788, known as Cwmneol, to one Williams, the conveyance containing an exception of all the rights and interests in the mines and minerals thereunder as mentioned in the deed of 1788, and an exception and reservation of all the powers and liberties for working the same as in that deed reserved. These lands included those the subject of this action, and they were subsequently leased to the plaintiffs in 1896 by the successors in title of Williams. On Dec. 9, 1848, the persons representing the interests of the Curres, Gwynnes, and Lords in the mines and minerals leased all the seams of coal and other minerals under Cwmneol for a term of sixty years from 1848, with power "to win, work, and carry away the same." This lease became vested in the defendants, and in 1907 they surrendered it, and were granted a new lease upon similar terms for thirty-six years from 1905. In 1914 the representatives of the Lords' interests granted to the defendants in fee simple the one undivided third part formerly of Eleanor Lord of the minerals under Cwmneol. The defendants' workings about the year 1911 caused part of the surface of the lands leased to the plaintiff to subside, causing injury to buildings thereon, most of which had been erected in 1891 and 1892. The action was, therefore, brought in 1915, when Younger, J., and subsequently the Court of Appeal held that the reservations of the minerals in the deed of 1788 applied to the power of working the minerals with all natural consequences, and not merely to the power of entry on the land for the purpose of sinking shafts, &c., and, further, that the effect of the deed was, by necessary implication, to displace the plaintiffs' common law right of support for the surface.

Upon the case again coming on, after amendment of the pleadings, before Russell, J., the plaintiffs called evidence to show that in 1788 the only workings of coal known were those of shallow mines by the pillar and stall system, and that the modern system of sinking deep shafts and running deep galleries was unknown.

They contended, therefore, that the workings reserved by the deed of 1788 were only those which could then have been contemplated by the parties; further, that the right to support was, by common law, a right inherent in the freehold, which could only be taken away by express grant, and could not be conveyed away by the mere exceptions and reservations in the deed of 1788. They contended also that the fine levied was not sufficient; there should have been a re-grant, which necessitated a double fine; that the Lords' interest only enabled them to grant a right to let down the surface during their lives, and, in any case, they could only have granted such a right in conjunction with the other tenants in common; that the conveyance of 1797 impliedly gave Williams and his assigns a right of support, and that the successors of the Lords could not derogate from that grant by granting a right to let down the surface. RUSSELL, J., held that the authorities showed that the right of support was not an easement, but a legal right vested in the fee simple ownership, which the fee simple owner could convey if he chose by apt words, and that the words used in the deed of 1788 showed a clear intention to convey the surface bereft of that right. Double fines had fallen into disuse since the Statute of Uses, and in 1788 were not necessary, particularly as the deed of 1788 operated as a bargain and sale. In his Lordship's view, it was unnecessary to consider whether one of the tenants in common could deal with the minerals apart from the other tenants. The plaintiffs appealed.

Romer, K.C., and *MacSwinney* for the plaintiffs.
Upjohn, K.C., *Clauson, K.C.*, and *J. S. Wood* for the defendant company.

LORD STERNDALE, M.R., stated the facts as to the earlier litigation, and continued.—Technically, the orders made under the judgments of YOUNGER, J., and the Court of Appeal having been discharged, those judgments as to the effect of the deed of 1788 are not binding upon us, but it was recognised by counsel for the plaintiffs that it was extremely unlikely that we should not consider ourselves in fact bound by the judgment given by the Court of Appeal. The point determined by YOUNGER, J., and the Court of Appeal was that on the construction of this deed of 1788 the defendants were entitled to work so as to let down the surface of the plaintiff's land, and counsel for the plaintiffs recognised that it would be extremely unlikely that we should differ from that, whether we were technically bound by it or not. Therefore, that question has not been seriously argued before us, though it remains open to the plaintiff in the House of Lords, just as it was before. I think that we certainly ought, whether the previous judgment of the Court of Appeal is technically binding upon us or not, to give our judgment in accordance with it. But that leaves other difficult questions which have been argued before us and which, in my opinion, are not covered by that decision. There are expressions both in the judgment of YOUNGER, J., and in the Court of Appeal which seem to cover, at any rate to a certain extent, some of the questions that have been argued before us, but I have the advantage here of sitting with YOUNGER, L.J., who heard the case in the first instance, and WARRINGTON, L.J., who delivered the judgment of the Court of Appeal before, and they assure me that any expressions they used were used without their having the questions which have been argued before us present in their minds. Therefore, I do not think that those expressions have any effect upon the questions which we have to decide, apart from the one I have mentioned.

The first point that is taken, and I do not say that it is an easy point at all, is this. It is said that by this deed, assuming the previous decision of the Court of Appeal to be right, there was a re-grant of the right to let down the surface to some persons—who they were I will deal with later—and that such a power must be given by a re-grant and cannot be given either by way of reservation or exception; and, that being so, that in 1788, at the date when this deed was executed, it was necessary that that re-grant should have been completed by a peculiar kind of fine, what was called a double fine, which had not been done, and, therefore, the grant was not effective. The name "double fine" is a curious name; it is picturesque

A and rugged, like the names of many of the other fines. But in 1819, the date of the third edition of PRESTON ON CONVEYANCING, it is stated on p. 213 of that book that "as this fine has fallen into disuse, the learning on the subject has become rather a matter of curiosity than utility." I do not intend to go into the matter because I do not think it is necessary, because, assuming that this was necessarily a re-grant, such a fine would not probably be necessary, and no such fine ever was B levied. But if the right, power, or privilege, whatever it may be called, of letting down the surface is not necessarily the subject of a re-grant, then the double fine was unnecessary, and the absence of it was immaterial. It was contended, and authorities—not with regard to the question of a right to let down the surface, but with regard to what was called the analogous rights of way, of sporting, of shooting, of fishing, and so on—have been cited to show that such a privilege or right must C come by re-grant, and cannot come by any reservation or exception. That may be and I dare say is correct, assuming that the land in respect of which the right was claimed was granted in the first instance with that right attached to it. The question upon this point with regard to this matter is whether that was so in the present case.

The deed of 1788 was entered into by a number of persons who were entitled at D that time in this way. There was a gentleman called Matthew who was tenant for life of the whole property, surface, minerals, and everything else; there were his daughters who were also entitled as tenants in tail in common in remainder to the whole property. This deed of 1788 was a deed of partition. It was decided a very long time ago in a Court of Appeal case, in a judgment delivered by LORD DENMAN, that the result of such a deed was to divide the surface in severalty between the E three persons, including the heir-at-law, subject to their father's life interest, but not to interfere with the ownership of the minerals, and that seems to me pretty clearly to be the effect of the deed. The deed, as I have said, has been interpreted by a decision which we think it is right to follow to give to certain persons the right to work the mine so as to let down the surface if necessary, and the question that arises is whether upon this deed the surface, with all the rights attached to it, F including the right of support, was granted in severalty to these ladies, or whether it was granted without the right of support, although with the other rights which would attach to it. RUSSELL, J., has held that the right of support was never granted to the owners in severalty of the surface, and, if he be right in that, then the question of the necessity for the double fine does not arise. I think he is right. The question is a difficult one I agree, but I think that the case that was cited G before him of *Buchanan* v. *Andrew* (1) shows that he was right. There are certain strong observations to that effect in the judgment of Lord Justice-Clerk MONCRIEFF in the Court of Session. His judgment was a dissenting judgment, and the House of Lords reversed the decision of the Court of Session and decided in accordance with the dissenting judgment of Lord Justice-Clerk MONCRIEFF. It is quite true that they did not expressly affirm or express their agreement with the particular H observations which were made, and were cited in the judgment of RUSSELL, J., to which I do not intend to refer in detail, but they certainly had those expressions before them, and there is no expression of dissent from them. It is quite true that Lord Justice-Clerk MONCRIEFF was speaking of Scottish law, and it may possibly be that these technicalities of conveyancing relating to double fines and so on do not apply to Scottish law. I do not know. But, considering that RUSSELL, J., based I his judgment very much upon the expressions of Lord Justice-Clerk MONCRIEFF, I think, if there had been any difference in effect between the law of the two countries, we should have had our attention called to it. In *Buchanan* v. *Andrew* (1) LORD SELBORNE, L.C., seems to me to be speaking in accordance with the opinion expressed by Lord Justice-Clerk MONCRIEFF, and in accordance with the judgment now given by RUSSELL, J. After saying that, as a general rule, the grant of land carries with it the right of support to the land, not as an easement at all, but as a natural right, LORD SELBORNE goes on to say (L.R. 2 Sc. & Div. at p. 288):

"But, on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public law) as they may think fit, and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so. . . . The person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon."

That is, it seems to me, in accordance with what was said by Lord Justice-Clerk MONCRIEFF in this passage (9 Macph. (Ct. of Sess.) at p. 572):

"In this feu contract, accordingly, Buchanan conveys the surface to Porteous, but he does not convey the minerals; and he does not convey the right to claim damages for any injury which the working of the minerals may occasion. On the contrary, he reserves the minerals and the right to work and win them free of any such claim of damage. It is thus clear that Buchanan retained something more, and Porteous acquired something less, than at common law the ownership of the minerals and the surface respectively would have conferred upon them . . . the result in law is that Buchanan retained the right to disturb the surface to this extent, and that Porteous to this extent did not acquire and did not pay for the right to support."

The argument of counsel for the plaintiffs and his comment is that in that case Lord Justice-Clerk MONCRIEFF and the House of Lords were merely stating the result of the conveyance, and were not stating the method by which that result had been obtained. I do not think that is so. I think that the expressions in the judgment go beyond that, and that they go to this, that you can have a conveyance of the surface of the land without passing by that conveyance the natural right to support which in the ordinary case would be passed by it. I think the judgment must go to that extent, and we have to follow the decision of the House of Lords, whether the Scottish case is technically binding upon us or not. As I have said, no distinction between the Scottish law has been pointed out to us.

If that be so, I am rather glad to say that a great many other difficult questions do not arise. It was said, and quite correctly said, that in 1797, by virtue of a power contained in the deed of 1788, the Lords, that is to say, Mr. and Mrs. Lord, the owners of a portion of the land, conveyed the surface of the land direct to the plaintiffs' predecessors in title, and, therefore, they could not now derogate from their grant by themselves working so as to let down the surface and destroy the surface which they had appointed to the plaintiffs' predecessors in title. The next necessary step in the argument was that, as they could not do it, the Curre owners and the Gwynne owners, under whom as well as under the Lord owners the defendants claim, could not do so without their consent, because there was a joint power given to them to let down, and it could not be done by two of the three who had the joint power if the third had got rid of his right to do it. It could only be done by the three, except in the case of estoppel, and this is not a case of estoppel, and if one had by his act prevented himself from exercising his power the other two could not do it without him. I think myself that there are several answers to those contentions. I have very grave doubts whether this was a joint power in the sense that has been argued at all, but it is enough to say that the point does not arise if, as a matter of fact, the Lord owners, when they had the surface conveyed to them in severalty under the deed of 1788, got that surface only without the right of support, because, if that were all that they had, that was all that they could appoint to the plaintiffs' predecessors in title, and, therefore, the appointment of that to the plaintiffs' predecessors in title was not a grant from which they could derogate by working so as to destroy the right of support to the surface which they had not got, and which they could not give to the plaintiffs' predecessors in title. Therefore, it seems to me that the decision upon the question whether this right to

A let down could only be done by re-grant really disposes of all the questions in the case before us. I think that RUSSELL, J.'s judgment was right, and that the appeal should be dismissed with costs.

WARRINGTON, L.J., stated the facts as to the previous litigation, and continued.—So far as the construction of the deed is concerned, although the order of B YOUNGER, J., and the order of this court have been set aside, and, therefore, cannot be treated as res judicata, yet the opinions expressed by YOUNGER, J., and this court remain as an authority on the construction of this deed. I think it has been recognised by counsel for the plaintiffs that this court would not depart from its previous decision on the question, and with that I unhesitatingly agree. I see no reason whatever for departing from what this court said previously—that on the C true construction of this deed the true intent of the parties was that the owners of the minerals should be entitled so to work as they could have worked when they were also the owners of the surface, and, therefore, could so work, if they pleased, as to let down the surface.

But then it is said, assuming that to be so, that there are other difficulties in the way of the present owners of the minerals so working. The first of these difficulties D arises on a consideration of the technical mode in which the result is arrived at: that the owners of the surface cannot prevent the owners of the minerals from letting the surface down. On the one hand, it is said that, on the true construction and effect of this deed, the right of the surface owners to protection from the working of the subjacent minerals never arose at all, and, on the other hand, it is said that the power of the owners of the minerals to damage the surface by their work- E ing is a special right, or power, or easement, or whatever you like to call it—probably "easement" is the correct term—and that it is necessary to show that the deed we have to deal with granted that easement to the owners of the minerals. It becomes important, because, having regard to the title of the persons concerned at the date when the deed of severance was executed, it was necessary that that conveyance should be perfected by a fine, and if a re-grant of the right to let down F the surface were essential, then it was contended that there should have been a double fine—first the fine which conveyed the fee simple of the land to the surface owners with the right of support, and then another which conveyed the easement or right to let down the surface.

Which of those two contentions is the correct one? I look at it, first, quite independently of authority, in order to see what is the kind of question we are G dealing with. While the lands remain unsevered, that is to say, while the subjacent strata remain in the hands of the owner of the surface, the question of the right of support from the subjacent strata never arises at all. The right which the surface owner then has to protect his surface is a right to prevent anybody taking the minerals at all—they belong to him—and he has no right to support as against himself. The right he has is to prevent those minerals from being removed, H whether they endanger the surface and let it down or not. I start with this, then, that this particular right is one which arises on the severance, and not until the severance. When it does arise it is, I think it is now quite settled, a natural incident (it is not an easement) of the ownership of the soil. What is there, I ask myself, in principle to prevent the owner both of the soil and the minerals, if he grants the soil to one person reserving to himself the minerals, to prevent him I from so granting that surface that the right of support shall never arise at all? In other words, what is there in law that would prevent the severance being effected on such terms that the surface owner shall never have that right of support? I can see nothing. It seems to me that the authorities, so far as they go on that subject, strongly support the view that there is nothing.

I want to refer to a passage in LORD CAMPBELL'S judgment in *Rowbotham* v. *Wilson* (2). I think the point arose rather neatly then. That case was a case of an award under a private Act of Parliament for the inclosure of certain common grounds. By the award in that case certain surface was allotted to one Pears, and

the minerals under it were allotted to one Howlette. On the face of the award there was a stipulation that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. It will be observed that the stipulations which were contained in the award negatived the right of the allottee of the surface to claim compensation for disturbance to the surface. It did not profess to convey any right to the owner of the mines. The award was executed by the surface allottee as a deed. The mineral allottee did not execute it as a deed, but he accepted the allotment, and was held by the court to be bound by the stipulations contained in the award. LORD CAMPBELL, who was delivering the judgment of the Court of Queen's Bench, said (6 E. & B. at p. 602):

> "In the present case we are of opinion that there is evidence to show that upon the severance of the surface and the minerals the owner of the surface took as a separate tenement without that continuing and unqualified right to support from the subjacent strata to which the owner of the surface would be primâ facie entitled."

The judges were LORD CAMPBELL, COLERIDGE, J., ERLE, J., and CROMPTON, J. I see that CROMPTON, J., left the court before the conclusion of the argument, so we may take it that this is the judgment of LORD CAMPBELL, COLERIDGE, J., and ERLE, J.

In accordance with the view thus expressed is the statement of Lord Justice-Clerk MONCRIEFF, who deals with the law of Scotland in *Andrew* v. *Henderson and Dimmark* (1). That statement has already been read. [HIS LORDSHIP read the passage read by the Master of the Rolls, and continued:] The view of that learned judge was adopted in the House of Lords, who reversed the decision of the Court of Session. LORD SELBORNE, L.C., in giving judgment in the House of Lords said (L.R. 2 Sc. & Div. at p. 288):

> "But, on the other hand, I apprehend it is the clear law of England and also of Scotland that when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public law) as they may think fit; and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon."

It is said that those two judgments, and I suppose it would be said, too, that the judgment of LORD CAMPBELL in *Rowbotham* v. *Wilson* (2), only express the result of the transaction, and do not express the technical mode by which it is being carried out. That may be so, but after carefully considering the arguments which have been addressed to us, and the authorities which have been cited to us upon this point, I still cannot see why on the severance of the surface from the minerals there should not be an exception or a qualification—I do not care what you call it—of that which is conveyed to the surface owner, and if that exception or qualification prevents the surface owner from enforcing, as against the owner of the minerals, his right to support, then the owner of the minerals acquires, without any grant to him, but by reason of the fact that the right to prevent the letting down has not been conveyed to the surface owner, the right to work those minerals so as to let down the surface of the land.

If that view be correct, and if under this deed of 1788 the surface owner never acquired the right to support at all, then the other questions which have been argued before us do not arise. There is only one of them to which I think it right to allude, and that is the contention that inasmuch as the present owners of the minerals derived their title through the Lords, or perhaps it would be more correct to say through Mr. Lord in particular, by virtue of a conveyance executed in 1797, the Lords are precluded from, and therefore those who claim under them are also precluded from, derogating from the grant made by that deed, and destroying the

subject-matter of that grant by letting down the surface. If I am right in what I have said as to the true construction and effect of the deed of 1788, this question does not arise. By the deed of 1788, in that part of the deed which deals with the limitation of the surface, a portion of the surface was limited to such uses as the two Lords should by deed jointly appoint, and in default of appointment to certain uses which it is unnecessary now to mention. The conveyance of 1797 was an appointment in pursuance of that power, and if I am right in saying that the right to support did not pass under the conveyance of the surface in the deed of 1788, then the power of appointment extended to no more than that which was comprised in the original conveyance. Accordingly, those who took by virtue of that appointment never acquired the right of support. The interference with the support would be no derogation from the grant, and the suggestion that those who claim through the Lords are, by virtue of the doctrine against derogating from the grant, prevented from doing what they are doing fails to have any effect. For those reasons I think the judgment of RUSSELL, J., was correct, and this appeal, therefore, must be dismissed.

YOUNGER, L.J.—I am of the same opinion, and, agreeing as I do with the judgments which have been delivered by my Lord and the lord justice, I do not think it is necessary that I should add any observations of my own in support of them. I would only say that if it does turn out elsewhere that the grounds upon which these judgments proceed are well founded, I can well conceive that the result will be to strengthen, and it may be materially to strengthen, the position of the plaintiffs on the main question which is involved in the litigation between them and the defendants, which main question is, I agree with my Lord and the lord justice, concluded, so far as this court is concerned, both by authorities which are not binding on the House of Lords, and also by a decision of this court itself on this very deed of 1788, when it was brought before it on the last occasion.

Solicitors: *Peacock & Goddard*, for *D. W. Jones & Co.*, Merthyr Tydfil; *Bell, Brodrick & Gray*, for *C.* and *W. Kenshole & Prosser*, Aberdare.

[*Reported by* G. T. WHITFIELD HAYES, ESQ., *Barrister-at-Law.*]

R. *v.* POPLAR BOROUGH COUNCIL. Ex parte LONDON COUNTY COUNCIL (No. 1)
SAME *v.* SAME. Ex parte METROPOLITAN ASYLUMS BOARD (No. 1)

[COURT OF APPEAL (Bankes, Warrington and Scrutton, L.JJ.), July 22, 27, 1921]

[Reported [1922] 1 K.B. 72; 91 L.J.K.B. 163; 126 L.T. 189; 85 J.P. 273; 37 T.L.R. 963; 66 Sol. Jo. (W.R.) 2; 19 L.G.R. 675; 2 B.R.A. 810]

Mandamus—Statutory right—Enforcement—Inadequate remedy provided by statute for failure to perform statutory obligation—Refusal by borough council to obey precept for rates—Statutory remedy of distress on property of council and/or members.

Where a statute confers a right and either that statute or some other Act provides a remedy for the breach of that right the enforcement of the right will, as a general rule, be limited to an exercise of the statutory remedy, but where the enforcement of the right will not be ensured by the statutory remedy the court may grant an order of mandamus.

Where, therefore, the London County Council and the Metropolitan Asylums Board, acting under the London Government Act, 1899, s. 11 (2), and the Metropolitan Poor Act, 1867, s. 56, respectively, had issued precepts to a borough council which the council refused to obey, and the remedy open to the county council and the board under the County Rates Act, 1852, s. 28, and the Poor Rate Act, 1839, s. 1, respectively, was to distrain on the goods of the borough council and/or those of its members,

Held: in both cases this remedy was rather a personal punishment of individuals who did not perform their duty under the statutes than a method of enforcing the performance of that duty, and was utterly inadequate to produce the sums for which the precepts were issued, and, therefore, mandamus would issue directing the borough council to obey the precepts.

Notes. Considered: *R.* v. *Woolwich Borough Council, Ex parte Woolwich Union Guardians* (1922), 20 L.G.R. 820. Referred to: *Stepney Borough Council* v. *John Walker & Sons, Ltd.*, [1934] A.C. 365.

As to mandamus where there is no other legal remedy, see 11 Halsbury's Laws (3rd Edn.) 107–109; and for cases see 16 Digest 291–303.

Cases referred to:

(1) *R.* v. *Archbishop of Canterbury and Bishop of London* (1812), 15 East, 117; 104 E.R. 789; 16 Digest 276, *892*.

(2) *Doe d. Murray, Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, *1737*.

(3) *Peebles* v. *Oswaldtwistle U.D.C.*, [1897] 1 Q.B. 625; 66 L.J.Q.B. 392; 76 L.T. 315; 61 J.P. 308; 13 T.L.R. 297, C.A.; affirmed sub nom. *Pasmore* v. *Oswaldtwistle U.D.C.*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368, H.L.; 16 Digest 302, *1150*.

(4) *Barwick* v. *South Eastern and Chatham Rail. Cos.*, [1921] 1 K.B. 187; 90 L.J.K.B. 377; 124 L.T. 71; 85 J.P. 65; 37 T.L.R. 4; 18 L.G.R. 757; 2 B.R.A. 779, C.A.; 44 Digest 70, *509*.

(5) *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616; 90 L.J.K.B. 609; 124 L.T. 557; 85 J.P. 109; 37 T.L.R. 165, C.A.; 34 Digest 730, *1104*.

(6) *R.* v. *Bermondsey Borough Council, Ex parte Bermondsey Guardians* (1908), 99 L.T. 14; 72 J.P. 330; 6 L.G.R. 852, D.C.; 16 Digest 301, *1147*.

(7) *R.* v. *Leicester Union*, [1899] 2 Q.B. 632; 68 L.J.Q.B. 945; 81 L.T. 559; 15 T.L.R. 511; 43 Sol. Jo. 691, D.C.; 16 Digest 278, *901*.

(8) *R.* v. *Victoria Park Co.* (1841), 1 Q.B. 288; 4 Per. & Dav. 639; 113 E.R. 1142; 16 Digest 298, *1108*.

(9) *R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646; 106 E.R. 501; 16 Digest 299, *1119*.

(10) *R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q.B. 47; 2 Ry. & Can. Cas. 694; 1 Gal. & Dav. 324; 10 L.J.Q.B. 322; 6 Jur. 146; 114 E.R. 21; 38 Digest 279, *177*.

Also referred to in argument:

Robinson v. *Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 45 W.R. 453; 13 T.L.R. 148, C.A.; 42 Digest 752, *1757*.

R. v. *Governors of Christ's Hospital, Ex parte Dunn*, [1917] 1 K.B. 19; 85 L.J.K.B. 1494; 115 L.T. 545; 80 J.P. 423; 32 T.L.R. 594; 14 L.G.R. 975, D.C.; 16 Digest 292, *1052*.

Appeal by the Poplar Borough Council against orders of a Divisional Court directing writs of mandamus to issue against them.

Slesser for the borough council.

Macmorran, K.C., and *E. H. Tindal Atkinson* for the London County Council.

Macmorran, K.C., and *C. Herbert Smith* for the Metropolitan Asylums Board.

Cur. adv. vult.

July 27. The following judgments were read.

BANKES, L.J.—The Poplar Borough Council appeal against two orders of the Divisional Court directing two peremptory writs of mandamus to issue, the one commanding the borough council pay to the London County Council the sum of £33,944 10s. 6d., the first instalment due under a precept of the London County Council dated May 10, 1921, and the other to pay to the managers of the Metropolitan Asylums Board two sums of £7,035, each due from them under and by virtue of a precept of the said managers to the guardians of the poor of the parish of Poplar, dated April 9, 1921, and in each case if necessary to make and levy a rate for the purpose of those payments. The orders were made by the Divisional Court in consequence of a refusal by the borough council to honour the precept, or to attempt to raise or pay any portion of the money required. The borough council made no objection to the validity of the precepts, and did not dispute their statutory obligation to raise the moneys, but in an affidavit sworn by the mayor and some other members of the borough council complaint is made that the borough of Poplar is in an unfortunate position as compared with other metropolitan boroughs, and the deponents submit that in the financial circumstances in which the council finds itself the council is unable to discharge its liabilities and ought not to be called on to undertake further liabilities which it cannot possibly meet. I call attention to this submission merely for the purpose of pointing out that upon an application such as the present these are matters with which a court of law has no concern.

Parliament has laid the statutory duty upon the Poplar Borough Council of obeying the precepts and paying the money. They refuse to do so. The only concern of the court in these circumstances is to interpret the will of Parliament and to see that the appropriate remedy is applied. If the existing law press too hardly upon the borough of Poplar it is Parliament alone that can reduce the pressure. If those who control the expenditure of the borough lay a greater burden upon the ratepayers than they can bear the ratepayers have the remedy in their own hands. That, primâ facie, mandamus is the appropriate remedy where there is a clear breach of duty by a public body the performance of which would be to the benefit of the person or body complaining is clear. In cases where the statute creating the duty has prescribed a form of remedy for a breach of that duty, other than mandamus, then as a general rule the court will not allow any other remedy to be pursued. There may also be cases where the party complaining may have some alternative remedy as convenient, beneficial and effectual as mandamus and if so, in its discretion, the court will not grant a writ of mandamus. In the Divisional Court the contention for the borough council proceeded apparently upon the assumption that the county council and the managers each had an alternative remedy and that the court ought, in the exercise of its discretion, to refuse to grant a mandamus. If the argument had been confined to this point in this court I should not have considered it necessary to add anything to what was said by SANKEY, J., in his judgment as I entirely agree with the grounds of his decision. In this court, however, the argument was put a great deal higher. It was contended that an exclusive remedy was provided by statute for both of the breaches of duty complained of, and that the court had no power to make an order granting the writs.

The rule which has guided the courts in reference to this last contention is to be found in many cases. I will only refer to *R.* v. *Archbishop of Canterbury and Bishop of London* (1), where LORD ELLENBOROUGH points out (15 East, at p. 136):

> "There have been many dicta of judges cited, from none of which am I prepared to differ, or to deny to any of them their proper weight and authority; the result of them is in effect this, that this court, in the exercise of its authority to grant the writ of mandamus will render it as far as it can the supplementary means of substantial justice in every case where there is no other specific legal remedy for a legal right, and will provide as effectually as

it can that others exercise their duty wherever the subject-matter is properly within its control. The right of the court to apply these means for the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted."

In *Doe d. Murray, Bishop of Rochester* v. *Bridges* (2), LORD TENTERDEN says (1 B. & Ad. at p. 859):

"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

In *Pasmore* v. *Oswaldtwistle U.D.C.* (3) ([1898] A.C. at p. 397), LORD HALSBURY says that he decided the case upon the ground that the statute provided the only remedy for a new obligation created by the statute itself.

In my opinion, the argument in the case of the London County Council fails on the face of the statute which creates the obligation. The material section is s. 11 (2) of the London Government Act, 1899, which is in these terms:

"After the appointed day every precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough [other than a precept sent to guardians by the Local Government Board or by a body containing representatives elected by the guardians] shall be sent to the council at their offices, addressed to the council or to the town clerk. Any such precept, if so sent and addressed, shall be deemed to be personally served on the council, and shall be executed by them. 'Precept' in this section includes any order, certificate, warrant, or other document of a like character, and the Local Government Board may settle the form of any precept as so defined."

[The words in square brackets were repealed by the Local Government Act, 1929.] The Act of 1899, though it creates the obligation for the first time, is entirely silent on the question of any remedy as against the council. The fact that the council are overseers of every parish within the borough under s. 11 (1) of the statute, and may be proceeded against as such for breaches of duty created by other statutes, appears to me to be quite irrelevant.

The case of the managers of the Metropolitan Asylums Board stands in a somewhat different position. The precept issued by that body is excepted from s. 11 (2) of the London Government Act, 1899. The Metropolitan Poor Act, 1867 [repealed], is the Act which provides for the contributions of unions and parishes to the requirements of the managers. Section 56 authorises the managers to call upon the guardians for such contributions as the managers consider requisite for their purposes. It was under this section that the managers served the guardians with the formal precept dated April 9, 1921. The guardians, in their turn, acting under their general powers, caused an order for contribution to be served upon the council of the borough of Poplar as the overseers of the parishes within the borough, requiring them to pay to the treasurer of the guardians on certain named dates during the periods ending June 30, 1921, and Sept. 30, 1921, respectively, and out of the general rate, sums amounting altogether to over £253,000, which sums included the amount specified in the managers' precept to the guardians. The borough council refuse to include this last amount in their estimates or to levy any rate which will include it. This is the default complained of by the managers in respect of which they apply for a mandamus. The Metropolitan Poor Act, 1867, s. 58, provides machinery by which the managers may, if the guardians make default in paying the contributions demanded of them, proceed against the overseers in like manner as the guardians may proceed against them for recovery of contributions of parishes. In the present case the managers are not complaining of any default on the part of the guardians. The contribution, it is true, has not

A been paid, but that is not through any actual default of the guardians. The obligation to pay is laid by the statute upon the guardians. If the managers had sought to obtain a mandamus against the guardians it might have been open to them to contend that the statute pointed out the appropriate remedy for the managers to take by proceedings against the overseers directly. Whether such a contention would avail them I will consider later, but I cannot see that the overseers can B successfully claim to stand in the shoes of the guardians for the purpose of taking any advantage of the provisions in the statute. The statutory obligation upon the borough council to obey the precept of the guardians is not contained in the Metropolitan Poor Act, 1867, at all. What remedy the guardians may have against the overseers for failing to comply with the precept seems to me for the present purpose to be immaterial. There is no statute which, in my opinion, provides the managers C with an exclusive remedy for the breach of duty of which they complain. Assuming for the purpose of the argument that the borough council can take the point that for the present purpose they can claim the benefit of the provisions of s. 58 of the Metropolitan Poor Act, 1867, I am of opinion that it is no answer to the present application for a mandamus. In the first place, as pointed out by LORD MACNAGHTEN in *Pasmore* v. *Oswaldtwistle U.D.C.* (3) ([1898] at p. 397), the D general rule to which I have already referred admits of exceptions, which must depend on the scope and language of the Act which creates the obligation, and on considerations of policy and convenience. If ever an exception to the rule should be admitted, it should be in the present case. The suggested remedy is so ludicrously inadequate that it seems to be a misuse of language to call it a remedy at all. *Barwick* v. *South Eastern and Chatham Rail. Cos.* (4) and *Simmonds* v. E *Newport Abercarn Black Vein Steam Coal Co.* (5) are both cases in this court in which it was held that a statutory remedy was so inappropriate that it must not be regarded as exclusive. In the second place, in spite of the decision in *R.* v. *Bermondsey Borough Council, Ex parte Bermondsey Guardians* (6), I venture to doubt whether the statutes which give power to levy distress upon the goods of individual overseers apply to the goods of a borough council merely because the F statute of 1899 directs that the council of each borough shall be the overseers of every parish within their borough. For these reasons I think that both appeals fail and must be dismissed with costs.

WARRINGTON, L.J.—These are two appeals by the council of the metropolitan borough of Poplar (which I will hereinafter refer to as the Poplar Borough Council) G against two orders of the King's Bench Division, ordering the issue of a peremptory writ of mandamus directed to the Poplar Borough Council commanding them to pay in the one case to the London County Council a sum of money due under a precept dated May 10, 1921, and in the other to the managers of the Metropolitan Asylums District two sums due by virtue of a precept of the said managers to the guardians of the poor of Poplar dated April 9, 1921, and in each case if necessary H to make and levy a rate for that purpose.

I will deal first with the case in which the writ was issued on the application of the London County Council. The sum mentioned in the order is a sum of money duly apportioned to the borough of Poplar as their proportion of the county rate. It is not disputed that the precept for the sum mentioned in the order was duly sent to the Poplar Borough Council as the overseers: see London Government Act, I 1899, s. 11 (1); for that the council as such overseers were by virtue of the same provision (and of sub-s. (2) of the same section) bound to execute the precept by paying the amount thereof to the London County Council. But it was contended (i) that as by the Act imposing the duty to pay a remedy was provided for recovering the money that remedy and that alone can be resorted to, and (ii) that, even if this is not so, then, inasmuch as the issue of the writ is in the discretion of the court the existence of that other remedy is sufficient reason for refusing to direct the writ to issue. As to the first point, the borough council rely on the principle "that where an Act creates an obligation and enforces the performance in a specified

manner," it is "a general rule that performance cannot be enforced in any other manner": see *Doe d. Murray, Bishop of Rochester* v. *Bridges* (2) (1 B. & Ad. at p. 859); and they cite the judgment of LORD HALSBURY in *Pasmore* v. *Oswaldtwistle U.D.C.* (3). The remedy alleged in the present case is that of personal distress upon the goods of the overseer making default, who is described in the statute as "the offender": see County Rates Act, 1852, s. 28; and is punitive. I cannot think that distress upon the goods of an overseer who might well be possessed of goods of trifling value could have been intended to be the only remedy for recovery of the portion due from a parish of the county rate. LORD MACNAGHTEN in the case above cited says ([1898] A.C. at p. 397):

> "Whether the general rule is to prevail or whether an exception to the general rule is to be admitted must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience."

I am clearly of opinion that the present case does not fall within the general rule. There is a further answer which is, in my opinion, fatal—namely, that the Act of 1899, which imposes the duty on the council, does not give the remedy. This is given by another Act—namely, the County Rates Act, 1852 [repealed].

In my opinion, the first ground of appeal fails. As to the second, the issue of the writ is no doubt discretionary, and it has been laid down that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted (*R.* v. *Leicester Union* (7)). But for the reasons given by the learned judge in the court below, it seems to me that the alternative remedy by distress on the goods of the Poplar Borough Council is certainly not equally convenient, beneficial or effectual with the writ of mandamus. This second ground of appeal also fails. In the case of the managers of the Metropolitan Asylums District, the liability arises under the Metropolitan Poor Act, 1867 [repealed], and it is admitted in this case also that the precept was duly issued and that the borough council, as overseers, are liable to pay under s. 58 of that Act. The alternative remedy suggested in this case is again a right to distrain conferred by s. 1 of the Poor Rate Act, 1839. Assuming that such an alternative remedy is operative, the observations I have made in the previous case as to the alternative remedy there relied on apply to the alternative remedy in the present case and need not be repeated. In my opinion, both appeals fail and must be dismissed.

SCRUTTON, L.J.—The Poplar Borough Council appeal against an order of the Divisional Court that a peremptory mandamus should issue directing them to pay to the London County Council and the Metropolitan Asylums Board certain sums of money due under precepts from the proper authorities respectively, and, if necessary, to make and levy a rate for that purpose. I do not understand counsel for the borough council to dispute that the borough council are bound in law to pay the money and make the necessary rates for that purpose, and that they are guilty of a breach of their legal duty in not doing so. The attitude of the borough council is that to levy a rate to meet the precepts of the county council and asylums board would impose too great a burden upon the poorer classes of their ratepayers, and, therefore, they do not propose even to try to collect the money. They take the same attitude with regard to the precepts for the Metropolitan Police and Metropolitan Water Board. I notice that though they do not propose to pay for the services rendered by these four bodies, they have not discontinued availing themselves of these services, and they would probably be very indignant if their borough were deprived of the services for which they object to pay. But the question is not as to any moral justification of their attitude; it is admitted to be a breach of their legal duty. Their defence to this application is that mandamus is not the legal remedy, first, because there is another equally appropriate and efficient remedy, to distrain on the goods of the council; secondly (though I do not think this point was clearly and prominently put forward in the court below) because the Act creating the duty also gives the remedy, which is, therefore, the only remedy available whether efficient or not.

A The cases of the two respondents vary slightly, and I take first the case of the London County Council. The duty of the borough council to obey the precept of the county council for the levying and payment of county rates rests on the London Government Act, 1899. By s. 11 any precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough shall be sent to the borough council at their office, and "shall be B executed by them." It is this duty which the borough council have failed to observe in regard to a precept issued by the London County Council, and the duty is created by this statute. I do not find any remedy for the breach of this duty created by this statute, and for this reason I think the objection based on statutory remedies fails in the case of the London County Council. I understand the argument of the borough council to be that, as the Act of 1899 creates the borough C council overseers, it, therefore, renders them liable for breach of the new duty created by the Act of 1899, to the penalty to which overseers would have been liable for the breach of the old and different duty, imposed on overseers by the County Rates Act, 1852, to pay warrants issued by justices in default of payment of precepts by guardians. The Act of 1899 does not say so, and I think counsel for the county council is right in arguing that this remedy is not attached to the new duty, D in which case the borough council's point about limitation to prescribed statutory remedies fails, for there is no prescribed statutory remedy. Should, however, the borough council's view be right, that the old remedy is attached to the new statutory duty, the position becomes similar to that of the Metropolitan Asylums Board, to which I now turn.

The Act of 1899, by s. 11, exempts from its operation precepts sent to guardians E by a body containing representatives elected by the guardians. This covers the Metropolitan Asylums Board. We are then sent to the Metropolitan Poor Act, 1867, s. 58 [repealed], which gives to such a body the same remedies against overseers as are given by s. 28 of the County Rates Act, 1852 [repealed], against overseers who fail to obey the warrants of justices to pay precepts. One thing is clear, that such a remedy is ludicrously inapplicable to the present default. To F seize the personal goods of the borough council, whether this means goods owned by the council as such, such as water carts, or the personal goods of the members of the council, would be quite insufficient to produce even the first instalment of the precept; it would have to be repeated monthly for four months. Either the council would buy the goods back again on the first distress, to have them seized again on the second distress, or, if the council submitted to being deprived of the G goods on the first distress, there would be no goods to seize on the second distress, and the council would be deprived of the means to carry on essential services. In these circumstances the suggested alternative remedy is quite inefficient to produce the result aimed at, the performance of the statutory public duty, and is indeed obviously in its origin a person punishment of the individuals who do not perform it rather than a means of getting the duty performed..

H This court has twice in the last year declined to limit applicants to a statutory remedy when that remedy would not secure the result which the statute intended to effect. In *Barwick* v. *South Eastern and Chatham Rail. Cos.* (4) it was argued that the liability to rates should be ascertained before magistrates in the way provided by the Act. The court pointed out why such proceedings would not attain the desired result, and declined to limit the applicants to the statutory remedy. I Again in *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.* (5) the court declined to limit the applicant under the Coal Mines Act, 1911, to the remedy for penalties by proceedings before magistrates given in the Act, because it would not secure the performance of the duty owed to the applicant. This is a view taken in many early cases, where the punishment of the defaulter does not secure the performance of the statutory duty. For instance, in *R.* v. *Victoria Park Co.* (8) LORD DENMAN said (1 Q.B. at p. 291):

"It was argued that we have issued the writ, even where there was a legal

remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not in its nature so complete, without reference to any circumstances peculiar to the case in which it was to be used as in *R.* v. *Severn and Wye Rail. Co.* (9) where a mandamus was granted to compel a corporation to reinstate and lay down a railway, although an indictment would have lain for the non-repair; for the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought and were entitled to."

In that case the court refused to grant a mandamus to pay money and make calls to raise it, where it was proved that the company had no money, no officials who could make calls, and that the last calls made had not been paid. But it would be otherwise where, as in *R.* v. *Birmingham and Gloucester Rail. Co.* (10) (2 Q.B. at pp. 61–62), the company had not used their statutory powers at a time when they could have used them. In the present case it is clear that some of the ratepayers could pay a rate if made; it is not clear that a rate would not raise the money sufficient to pay the precepts, and it is not clear that the money difficulty of the council does not arise from their expenditure in other directions without regard to existing legal obligations.

As pointed out by Lord Macnaghten in the *Oswaldtwistle Case* (3) ([1898] A.C. at p. 397), the application of the rule of limitation of enforcement of a statutory right to the statutory remedy must depend on the scope of the Act and the obligation, and on policy and convenience, by which I understand to be meant that where the performance of the statutory obligation will not be ensured by the statutory remedy, the importance from a view of policy of securing the performance of the statutory obligation may lead the court to grant other remedies than the statutory one. Mandamus is the regular remedy where it is desired to compel a public body to fulfil a public duty which they without legal excuse decline to perform, and, in my opinion, it is the only suitable and convenient course in this case.

I am, therefore, of opinion that the respondents are not limited to the statutory remedy—in the case of the London County Council, because none is prescribed; in the case of the Metropolitan Asylums Board, because the statutory remedy is by way of punishment, and in this case will not ensure performance. I am further of opinion that mandamus is by far the most convenient and effective remedy for the admitted breach of their legal duty committed by the borough council. The appeal, therefore, should be dismissed with costs. I hope I appreciate the consideration of the borough council for the poorer ratepayers of a poor borough, but if the burdens of the expenses of administration of London press unequally on various parts of that vast area, the remedy is not "direct" or illegal action, but bringing the matter before the attention of Parliament. If every public body which thinks its constituency over-rated is to be allowed to decline to pay its legal debts, the whole machinery of administration must speedily break down. The Poplar Borough Council will not be able to govern their area unless they can rely on their legal demands being obeyed even by those who disapprove of them, and they should, in my opinion, consider very carefully the great responsibility they incur when they set to other and more ignorant people an example of disobedience to law.

Appeal dismissed.

Solicitors: *Scott Duckers & Thompson*; *D. P. Andrews*; *Williams & James.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

R. v. POPLAR BOROUGH COUNCIL. Ex parte LONDON COUNTY COUNCIL (No. 2)
R. v. SAME. Ex parte MANAGERS OF METROPOLITAN ASYLUMS BOARD (No. 2)

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), August 4, 1921]

[Reported [1922] 1 K.B. 95; 91 L.J.K.B. 174; 126 L.T. 138; 85 J.P. 259; 38 T.L.R. 5; 19 L.G.R. 731]

Contempt of Court—Corporation—Attachment—Borough council—Liability of members—Defective notice of motion—Waiver of irregularity.

A corporate body, such as a borough council, cannot be attached for failing to obey a writ of mandamus addressed to it, but the persons who govern the corporation and are responsible for its acts are liable to be attached for their disobedience. Notice of motion to attach should be served on all the members of the corporation, together with a copy of an affidavit specifying the nature of the contempt with which each one is charged. But where the notice of motion (or, under the old practice, the rule nisi) is defective in form—e.g., in that it does not convey sufficiently definite information to the members intended to be affected thereby that they would have to appear and show cause against the attachment being issued—the irregularity can be waived by, e.g., the members swearing affidavits in which they attempt to justify their disobedience to, and state that they do not intend to obey, the writ of mandamus, and appearing and addressing the court on the hearing of the motion (or rule nisi).

Notes. Under s. 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (5 Halsbury's Statutes (2nd Edn.) 1121; ibid., vol. 6, p. 101), writs of mandamus were abolished and orders of mandamus are now issued in their place.

Referred to: *Re Carroll*, [1931] 1 K.B. 317.

As to contempt of court by corporations and members thereof, see 8 Halsbury's Laws (3rd Edn.) 26, 27, 29, 35, and ibid., vol. 9, p. 96. For cases see 13 Digest (Repl.) 327–331, 16 Digest 46 et seq.

Cases referred to:

(1) *R.* v. *Ledgard* (1841), 1 Q.B. 616; 113 E.R. 1268; sub nom. *R.* v. *Poole Corpn.*, 1 Gal. & Dav. 728; 10 L.J.Q.B. 198; 13 Digest (Repl.) 347, *1550*.

(2) *McKeown* v. *Joint Stock Institute, Ltd.*, [1899] 1 Ch. 671; 68 L.J.Ch. 390; 80 L.T. 641; 6 Mans. 338; 13 Digest (Repl.) 346, *1547*.

Appeals by the Poplar Borough Council and certain individual members thereof from orders of the Divisional Court (Lord Trevethin, C.J., Bray and Sankey, JJ.) affirming orders against them for attachment for neglect to comply with writs of mandamus directing them to levy rates to meet the precepts of the respondents the London County Council and the Metropolitan Asylums Board.

Disturnal, *K.C.*, and *Slesser* for the appellants.

Macmorran, *K.C.*, and *Tindal Atkinson* for the London County Council.

Macmorran, *K.C.*, and *Herbert Smith* for the Metropolitan Asylums Board.

LORD STERNDALE, M.R.—These are two appeals from an order of the Divisional Court issuing writs of attachment against the council of the metropolitan borough of Poplar, and also against certain individual members of that council. In one sense, there is no point of substance in it at all, in another sense there is considerable substance. The reason why I say that in one sense there is no substance in it, is that there is no question whatever that the individuals against whom the writ of attachment has issued have not obeyed and have no intention of obeying the order of the court. The learned Lord Chief Justice has said that they have taken up the position which they take up from conscientious motives. I have no

wish to differ from that statement at all, but I think it necessary to point out that it is quite immaterial, unless and until the time comes when the law of this country is that a person may disobey the law as much as he likes, if he does it conscientiously. That is not the law. The question of motive is immaterial. There have been instances in which, by statute, conscientious motives have been stated to be, and have been constituted, sufficient reason for not obeying the law. This is not one of those cases that come within any of these exceptional statutes, and the fact that such exceptional statutes were necessary to make conscientious motives justification for disobeying the law shows that the general law is not to that effect. Therefore, in my opinion, the question whether the appellants here acted conscientiously, or not, has nothing to do with the matter.

From another point of view, however, there is considerable substance, and that is this. By this order undoubtedly the liberty of the subject is affected, and it is extremely important that the liberty of the subject should not be affected except in the strictest form of law. That is a matter of great public importance. What has happened is this. The Poplar Borough Council received precepts from the London County Council and the Metropolitan Asylums Board, in accordance with the statute regulating the issue of such precepts. On receipt of those precepts it was the duty of the council to levy a rate to raise the money which was required by the precepts. They declined to do so on the ground that Poplar is a poor borough, its account is already overdrawn, its rating is at present extremely high and will be abnormally and extraordinarily high if the rate be levied to pay the money mentioned in the precepts. The members of the council were of opinion that these precepts should not be issued to individual boroughs, but that there should be an equalisation of rates over the whole of the metropolis, and that these precepts should be issued to the whole, so that the burden that falls upon the poor districts should be very much lightened. As the Lord Chief Justice said, that is a political matter of great difficulty. We all know that the burden of the rates, as well as of taxes, at the present moment is crushing, and there are persons who think (possibly rightly, I do not know) that until some of those burdens are in some way lightened the country will not be as prosperous as it ought to be. That is a matter with which I have nothing to do. But it is quite clear that the state of the country will not be improved if every subject of the country takes it upon himself to decide whether he will obey the law or not. That would produce, as the Lord Chief Justice said, a state of anarchy. Therefore, the law has to be enforced, as far as it can be.

When the Poplar Borough Council failed to levy the rate, the two bodies who issued the precepts applied for a mandamus, and a writ of mandamus issued commanding

> "the said council and every of them, firmly enjoining you that you do pay or cause to be paid, to the treasurer of the county of London, the said instalment of £33,944 10s. 6d., and if necessary do make and levy a rate for that purpose lest by your default the same complaint should be repeated to us and how you have executed this our writ made known to us,"

and so on. That is a mandamus to the council, and it is agreed that the council is a corporate body constituted under the London Government Act, 1899, and that the council mentioned there—the Poplar Borough Council—is not a mere name for a collection of individuals, but is a corporate body to whom the mandamus was addressed. That mandamus was not obeyed, and it is quite clear, according to the practice of the courts and the cases which have been cited to us, that where a writ of mandamus of that kind is addressed to a corporation, which can only act by the persons who govern it, if it be not obeyed, those persons are liable to be attached for not obeying it. They cannot say: "This is addressed to a corporate body. We are only individuals, and, therefore, the mandamus does not impose any obligation upon us." If it be not obeyed, the persons who have the power of making the corporation obey it or of setting the corporation in motion—the individuals who

A have control of it—are liable to be attached for their disobedience. The Crown Office practice, with regard to this, follows the well-established rule, because it provides, by r. 55, that

> "unless the court or a judge otherwise directs when a writ of mandamus is directed to corporations service shall be made upon such and so many persons as are competent to do the act required to be done,"

B recognising the fact that a corporation can only act by the individuals who control it. I think, from a remark after judgment had been delivered in the Divisional Court, made by Mr. Lansbury [a member of the borough council], that he was contending that individuals who have the control of a corporation cannot be attached because that corporation has not obeyed the mandamus. If he meant to C contend that, in my opinion he was wrong, and all the authorities and all the practice show that he was wrong.

Therefore, the question is this. How is that obligation to be enforced against the individual members who have control of the corporation? I think that there is quite sufficient to show that the normal and ordinary and regular way of doing that is by getting a rule nisi for attachment against the individuals, naming them D in the rule nisi and serving them with the same and the evidence which it is proposed to adduce against them as individuals. That seems to me the regular and proper course of procedure. That was not adopted in this case. I have not been able to see any reason at present why it was not. It might have been that in the circumstances of this case it would have been necessary to name the whole of the members of the council—I do not know. If it were, then it should have E been done. But what was done was this. A rule nisi was obtained in this form:

> "It is directed that Friday, the 29th day of July inst., be peremptorily given to the defendant council to show cause why a writ or writs of attachment should not issue against them or every of them for their contempt in not obeying the peremptory writ of mandamus directed to them commanding them to pay to the London County Council, the sum named the first instalment . . . F and if necessary to make and levy a rate for that purpose."

That was the rule, which was obtained, and it will be noticed that it gives a day to the defendant council "to show cause why a writ or writs of attachment should not issue against them or every of them." The words "or every of them" are extraordinarily difficult words to which to attach any meaning, because the day is given to the defendant council, and, in my opinion, the regular course should have G been followed of putting in the names of the individuals whom it was proposed to attach under this rule.

The rule nisi and the evidence proposed to be adduced in support of it was served upon, I think, some thirty-one members, at any rate, a considerable number of members, but not upon all. The evidence was this. There was an affidavit of Mr. Andrews, the solicitor to the London County Council, and I have no doubt H there was another one with regard to the Metropolitan Asylums Board, but I have not troubled about that. Mr. Andrews says: "The writ of mandamus was handed to Edgar John Tiffen, a law clerk in my department, with instructions to serve the same upon the town clerk and the mayor, aldermen and councillors of the said metropolitan borough of Poplar." He goes on to say that he has received a printed list of the names and addresses of the said mayor, aldermen and councillors. "The I said council of the metropolitan borough of Poplar have not paid the instalment of £33,000 odd as they were peremptorily commanded to do by the said writ of mandamus. I have made due inquiry of the Crown Office of this honourable court, and I am informed that the said council of the metropolitan borough of Poplar have not returned the same writ of mandamus to this honourable court setting out the manner in which they, the said council of the metropolitan borough of Poplar, had executed the same as they were peremptorily ordered to do."

If all the members of the council had been named in the rule, and the rule and the affidavit had been served upon all of them, I think that, according to the

authorities, there would have been a primâ facie case of disobedience by all of them, and they would have had then to show, each of them, that they were not personally guilty of the disobedience to the mandamus. But the rule and affidavit were not served upon all. They were only served upon a certain number, and none of them was named in the rule. But for matters which I shall have to mention directly, I should have been of opinion that there was nothing—or at any rate not sufficient—to call upon those members upon whom the rule and the affidavit were served, to show cause why the writ of attachment should not issue, because the primâ facie disobedience which is shown by that affidavit does not necessarily attach to those persons upon whom it was served, any more than those upon whom it was not served, and there was nothing pointed to them individually. Nevertheless, it is quite clear that, however difficult and obscure the words in the rul nisi are to understand, and however irregular the form of the rule nisi was, as I think it was, the words were clearly understood by the persons upon whom the rule and the affidavit were served as being applicable to them and intending to call upon them for their defence, and charge them with disobedience to the rule, because twenty-six in the one case and twenty-two in the other filed a joint affidavit explaining why they had acted as they had done in not levying the rate and taking no steps to get the rate levied, and also pointing out that the result of the issue of the writ of attachment and the imprisonment of the members of the council would confer no benefit upon any of the parties. It was, therefore, clearly understood by the deponents to that affidavit that this procedure was intended, and the words, however difficult, did apply to them individually.

The reason why the individual names should be given and the individual evidence should be served is stated by Lord Denman in *R.* v. *Ledgard* (1) to which we were referred:

> "It is common justice that when individuals are to be charged with contempt and threatened with attachment they should have the opportunity of exculpating themselves."

However irregular, therefore, this rule and these proceedings may have been, it is perfectly clear that those twenty-six deponents did understand that they were being attacked and attachment was sought against them, and they did take advantage of the opportunity given them of exculpating themselves—or rather did not attempt to exculpate themselves. They said: "We did it, that is why we did it, and we think we were right." In addition to that, a considerable number of members of the borough council attended at the hearing of the argument of the rule, and some ten or eleven, at any rate, of them made speeches and addressed the court. Counsel were only instructed on behalf of the council, and the judgment of the Divisional Court does not in any way deal with the point—the only real point—that was argued before us, namely, the irregularity of the proceedings for attachment, and I think for this reason it only applied to the individual members. Counsel were not instructed on their behalf, and those who appeared, with the exception of one whom I will mention directly, seemed to have directed their attention almost entirely, not to the legal point at all, but to justifying to the court or to the public the motives and the reasons of their actions. Therefore, the matter was not very much discussed. Mr. Lansbury, it is true, in his address to the court did say that without his being served by name and the service of the evidence upon him, he ought not to be put away. As a matter of fact he was one of the deponents to the affidavit I have mentioned, and he, therefore, also knew, although he was not mentioned by name, that attachment was being sought against him. He then went on to state directly to the court that he did not intend to obey the order of the court, and that the order for attachment, if it was made, must inevitably result in imprisonment, because he—and although he was only appearing for himself he said he was speaking for others in court—he and others did not intend to levy this rate.

The question is whether this writ of attachment is bad, because of the irregu-

A larities that I have pointed out in the rule nisi, and because the evidence would not have been sufficient against the individuals although it might have been sufficient against the whole of the council if all the council had been named. As I said, I do not think that the affidavit was sufficient against the individuals by itself; but when the evidence of that affidavit is supplemented by the fact that an affidavit was filed by twenty-six of the persons who were served, and when also a number B of them appear in court and address the court in a way which certainly that court understood as being an avowal of an intention still to disobey the mandamus, then, in my opinion, there was sufficient evidence. The effect of those speeches that were made was for the court itself and not for us. The effect of the affidavit we have before us and we can judge. In my opinion, this was an irregularity, but it was an irregularity which could be waived and I think it was waived when the C individuals, understanding quite well, however difficult the language, that they were being attacked, chose to file an affidavit showing that they did not intend to obey the order, and also addressed the court to the same effect. I think that, by appearing and taking that course, they did waive the irregularity. Therefore, with regard to those individuals I think that this appeal fails.

With regard to the writ of attachment against the council, the respondents do D not seek to support the order, and, indeed, it cannot be supported from any point of view. If this be a corporate body, one cannot attach a notional body of this kind, a corporate body, and put it in prison, and even if it were not, if it were merely a collective name for a number of individuals, the writ of attachment would be equally wrong, because it would put all the members of the council into prison under the writ of attachment, whether they had done their best to get the rate E levied or whether they had not. That cannot in any view be supported, and, therefore, this appeal must be allowed as to that, and with that allowance of the appeal goes the discharge of the order that was made on the borough council to pay the costs, because if they cannot be attached, they ought not to pay the costs of somebody trying to attach them. No order was made as to the costs of the individuals, and considering the appeal has succeeded to a certain extent and considering the F difficulties caused by the irregularities of the procedure, in my opinion, the appeal should be allowed as to the attachment against the borough council and dismissed as to the attachment against the individuals, but that there should be no costs of the proceedings either here or below.

G **WARRINGTON, L.J.**—I am of the same opinion. These are two appeals from two separate orders of attachment against the council of the metropolitan borough of Poplar, and certain individual members of that council for disobedience to two writs of peremptory mandamus, one obtained by the London County Council and the other obtained by the managers of the Metropolitan Asylums Board. The council was constituted under the London Government Act, 1899. It is incorporated by an Order in Council issued under that Act; and under the Act it H consists of a mayor, aldermen, and councillors. Its actions are not controlled by a separate governing body, but are under the control of the whole of what I may call the corporators of the council, the members of the council. Against that body and the individual members of it there has been issued these two writs of mandamus. I propose to refer to only one of them, that which was obtained on the prosecution of the London County Council. That is a peremptory writ whereby I the King commands the

> "council and every of them, firmly enjoining you that you do pay or cause to be paid to the treasurer of the county of London [certain sum of £33,000 odd] and if necessary do make and levy a rate for that purpose."

In my judgment, it is settled by authority for many years that a writ of mandamus of that nature addressed to a corporation such as this, which has no separate governing body, is a command addressed to every individual member of the council. Sufficient authority for that, I think, is found in the statement in Buller's Treatise on Nisi Prius (7th Edn.), pp. 201, 202. What he says is this:

"If no return is made [to a prerogative writ of mandamus] the court will grant an attachment against the persons to whom the mandamus was directed, with this difference, however, that where a mandamus is directed to a corporation to do a corporate act and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus."

Although that statement is put in the form in which I have read it, it is clear that it assumes that the members of the corporation, who control its actions, are all of them under obligation to obey the commands given by the writ and that those who do not obey, by proper proceedings, can be proceeded against for attachment.

In *R.* v. *Ledgard* (1) in 1841 LORD DENMAN said:

"Where no return is made, a peremptory mandamus issues against those persons to whom the mandamus is directed, but it should seem that an attachment ought to be granted only against those particular persons who refuse to pay obedience."

That again assumes that it would be granted against those who do refuse to pay obedience. He says:

"Here the attachment is moved for against the whole body whereas the governing body is only the town council."

The defect in that particular case does not exist in the present case, because in the present the governing body of the corporation is the whole body of corporators, that is to say, the whole body of the council, and I think from that judgment of LORD DENMAN and from the statement which is made in BULLER'S TREATISE ON NISI PRIUS, an ancient book of considerable authority, it is quite plain that the mandamus directed to such a body as that with which we have to deal is a command addressed to every member of that body. That command has, in the present case, not been obeyed and proceedings have been taken for attachment which have resulted in the orders from which the present appeals are brought. The objection taken by the appellants is to the regularity of the proceedings by which the writs of attachment were obtained; and I accordingly proceed to consider how, if at all, those proceedings were irregular.

For the purpose of proceeding in attachment, certain conditions unquestionably founded on the requirements of natural justice, where it is sought to interfere with the liberty of any person, have to be complied with. The first of those conditions is that the order for disobedience to which it is sought to attach anybody must be shown to have been brought to the knowledge of that person. That was done in the present case, for there was evidence that the writ of peremptory mandamus had been personally served on every one of the persons against whom the writ of attachment has issued. The next condition which has to be fulfilled is, I think, that if any individual is going to be treated as responsible for disobedience to the order, the fact that he is going to be so treated must be brought home to him, and the proper method of bringing home to that individual the fact that it is proposed to proceed against him is to name him either in the notice of motion—if that is the appropriate form of proceeding—or in the rule nisi, if that be the proper form of proceeding. In the present case that step was not taken, and the effect of that on the circumstances of the particular case I will consider presently. But I think that there was in the form of the rule nisi in the present case the defect that it did not name the members of the council against whom it was proposed to proceed. I can see no excuse. I cannot see why, if the prosecutors were uncertain which of the members had disobeyed the order so as to be liable to attachment, they should not have specified in the rule nisi every member of the corporation, leaving it then to each individual member to show cause against the order being made against himself. However, that was not done, and as I have said, there was, I think, the defect in that procedure.

The next step that has to be taken is that the rule nisi or the notice of motion, whatever may be the appropriate proceeding, must be served personally upon those whom it is sought to attach. That was done in the present case. No members of

the council have been attached excepting those upon whom both the writ of mandamus and the rule nisi were served. Another point that has to be observed in all such cases is that notice must be given to the person against whom the proceedings are taken and the nature of the contempt for which it is proposed to attach him. That is provided for by the rule which requires that copies of the affidavits which it is proposed to use upon the hearing of the application for attachment shall be served upon the person to be attached. That condition was complied with in the present case. Copies of all the affidavits proposed to be used were served. The sufficiency of those affidavits I will deal with presently. The third direction is that to which I have alluded, namely, that the evidence of disobedience of the command must be sufficient to establish that disobedience. In the present case the position stands in this way. The rule nisi was, as I have said, not served upon every individual member of the council and one effect of that is certainly that it renders defective the affidavit of Mr. Andrews filed in support of the order absolute, and for this reason. Whereas, if every member of the council had been named in the rule nisi, the affidavit which states that the council had not done what was commanded to be done would be sufficient primâ facie evidence against all the members of the council. But when the rule nisi is served upon only some of the members of the council, and none of them is specified in the order itself, then the affidavit does not afford evidence that any particular individual member was guilty of disobedience to the order.

If matters then had stood there the order for attachment would, in my opinion, have been obtained irregularly, and it would have had to be discharged. But the matter did not stand there. The order nisi may have been embarrassing in its form and not have conveyed sufficiently definite information to the several members affected or intended to be affected thereby that they would have to appear and show cause against the attachment being issued. But all those persons against whom the writ has been issued have made it plain that they, at all events, were not embarrassed by the form of the rule nisi. They have all sworn an affidavit in which they either avow their contempt and attempt to justify it, and state in effect that they do not intend to obey the writ of mandamus, and that, if they are attached, their imprisonment will not obtain compliance with the writ, and it will be, as they say, of no benefit to anybody. If there are any who have been attached who did not join in that affidavit, they appeared in court and there made statements which were accepted by the court as amounting to the same effect as the statements made in the affidavit, that is to say, an avowed disobedience to the order and an intention not to obey it. Having taken that course, it seems to me that it is no longer open to them to object that they were not named in the rule nisi. They have shown by the steps which they have taken that they knew the rule nisi was directed to them. They have admitted their contempt, and have remained in contempt; and the effect of what they have done is twofold. It not only removes the objection to the form of the rule nisi, but it supplies the necessary evidence against them as individuals which, as I have pointed out, might not have been contained in the affidavit of Mr. Andrews taken by itself.

It seems to me, therefore, that assuming that all the individuals named in the writ of attachment either joined in the joint affidavit or addressed the court when the order was made, the order absolute was rightly made against those persons. If there are any persons named in the order who did not either join in the affidavit or address the court, then I think their names ought to be omitted; and for the reason stated by my lord, the name of the council itself ought certainly to be removed. I agree with the order proposed as to costs.

YOUNGER, L.J.—This appeal concerns the liberty of the subject, and it deals with a matter in which compliance with principles—the observance of which are designed for the protection of the subject sought to be attached—must be complete. The books are full of cases in which, in deference to this cardinal rule, applications for attachment or committal have been refused where the omission has apparently

been of a relatively trivial character. I concur in the view that this appeal should be dismissed only because it has been made plain to my mind that the appellants here individually have suffered nothing by any irregularity in procedure. They have had the opportunity, and they have taken advantage of it, of showing that their personal attitude with regard to the order of the court has been deliberate, and that with full appreciation of the consequences of their disobedience they have resolved to disobey it. It is only because that attitude on the part of the appellants has been made plain to my mind that I concur in the view that this appeal should be dismissed.

Here the original duty to levy a rate was imposed by the London Government Act, 1899, upon the borough council as a council, and it is made quite plain, I think, by s. 11 (2) of that statute, that the service and intimation of the precepting authority served upon the town clerk is sufficient notice to the council concerned. I think that that is sufficient to show that the obligation, in the first instance, was nothing but a corporate obligation on the part of the borough council, and moreover the duty so thrown upon the borough council is a purely ministerial duty for the creation of which they are neither in a corporate capacity nor individually in any sense responsible. I cannot help thinking that, if this had been properly present to the minds of the persons concerned, much of the difficulty would have been avoided. That precept was served upon the borough council and it was not complied with; accordingly proceedings for mandamus were instituted. Those proceedings were instituted against the council only. The arguments which were addressed to the court then, and subsequently addressed to the Court of Appeal, were directed to what I may call the corporate responsibility of the council and nothing else. With reference to the point made by junior counsel for the London County Council that this is a corporation with a difference, I do not feel the difficulty that he suggested. It is a corporation in the fullest sense of the word. But it appears to me that it has this peculiarity which may substantially affect the individual responsibility of the corporators. It is composed entirely of what I may call the governing body. But, nevertheless, a corporation so composed is a corporation for every purpose, and its responsibility is a corporate responsibility; and up to this point it was only the corporate responsibility of the council which was sought to be enforced either by the precept or by the proceedings to enforce the rate. That is plainly shown by the order absolute. But when we come to the writ which followed upon the order absolute, the validity of which is not now in debate, so that one only looks at the writ for the purpose of seeing what it says, we find that there are introduced into the writ for the first time these words: "The said council and every one of them." That certainly does not appear to me to have any warrant or explanation, so far as the use of those words is concerned, in any of the previous proceedings. If I had thought that the words "and every of them" affected in any way the validity of this rule, I should have had more hesitation in expressing the opinion that I am about to express. But, in my view, these words, while they do not help the prosecutors, do not in fact hurt them, provided that the prosecutors do, with these words or without these words in the writ, take the proper proceedings for making the individual corporators responsible for a breach of the order of the court.

I desire to say quite definitely that the use of such words as these, or any vague words of that kind, in an order of that sort are not sufficient of themselves to justify or lay foundation for subsequent punitive proceedings against individuals. Something very much more direct in the interest of individuals is required before such a result can be secured. Leading counsel for the respondents said that, although he was unable to find any authority in support of the proposition that proceedings in attachment against individuals had followed a writ in which the reference to individuals was such as is to be found in the present writ, yet in the absence of authority the view that he would present to the court was that in this case these words were sufficient to, if I may use the expression, "regularise" the subsequent proceedings. I beg leave to differ from him in that statement. We

have no authority, as it seems to me, justifying, in matters of this kind, and in procedure of this kind, what would be so direct a divergence from all the analogous protection that is thrown round the subject in proceedings which may not be in the King's Bench Division, but which are proceedings like those in which we are concerned. To my mind, if it is to be laid down that the procedure with reference to attachment and committal following upon disobedience to a rule of this kind is to be different from that which applies in cognate cases, I think that that should be established and proved. It has not been established, nor has it been proved.

In analogous proceedings there would be no possibility of argument on the point. If you take an ordinary case of committal following upon an order which had been made by the court that certain publications, let us say, shall not be made, and it is desired subsequently to commit for breach of that order a party who was not present when it was made, or was not technically a party to it, it is incumbent upon the person who seeks to proceed by way of committal to do one of two things —possibly to do two things. In the application he makes to commit he must add the name of the new respondent to the proceedings. But if he does not add the name of the new respondent to the proceedings, which may not in all cases be required, it is essential that in the body of the application for committal the name of the respondent should be stated, and the justification for his committal should be set forth. If committal differs from attachment, as I agree it does in many respects, we nevertheless can find analogy in attachment properly so called which bears out the view which I am now expressing. In *McKeown* v. *Joint Stock Institute, Ltd.* (2), in which it was sought to attach directors of a company for breach of an order which had been made against the company alone, it will be seen from the notice of motion which was given what was required there as being necessary to bring it to the notice of the respondent that proceedings were being taken against him. So, it seems to me, if there is going to be any departure from these well-recognised principles, which are all of them laid down for the protection of the liberty of the subject in connection with this special matter, that ought to be made plain. If there be no authority showing that there is any such departure, I myself should be prepared to hold that the proceedings applicable to committal or attachment in relation to questions of this kind did not differ from those on which authority is to be found, and all to the same effect.

If we now turn to the procedure with which we have to deal here it is quite obvious that apart from these very vague and general words in the writ itself there is no reference to individuals at all. When we come to the order nisi for the attachment, the terms of which have been referred to by my lord, that order nisi for attachment is even, from this point of view, more unfortunate. For on the construction of that order, while it peremptorily gives an opportunity to the defendant council properly so called to show cause, it does not, in terms, give any opportunity to the every of them to show cause at all. That is the form of the order nisi for attachment construed, as I construe it, in such a way as to indicate that the only persons who would be heard or the only council who would be heard on this occasion would be counsel for the defendant council, and none other. In these circumstances, if there had been no appearance on the writ of any of the individual respondents now attached by the order made by the King's Bench Division on the hearing of that application to show cause, and if no affidavit had been made by any of the persons who had been in fact attached on the order of the King's Bench Division, my opinion would have been that it would have been impossible to attach any of them at all, and that the proceedings up to that point would have been characterised by such an irregularity as that order would have had to be refused. It would not be a good order, as we all now agree, as against the council. It would not have been available as against the individual respondents, service or no service, if they had not appeared. Accordingly, the proceedings, as it seems to me, would properly have fallen to the ground. And I seize this opportunity of saying that now because I do hope that what has happened in the present case will not be repeated in future cases, and that there will be greater care that

if proceedings are going to be instituted to attach individuals to let those people know that proceedings are being taken against them for contempt. It is said, however, that if this rule which I have ventured to enunciate is to be of universal application, persons in the position of the prosecutors here will be placed in a position of great difficulty. I do not, myself, think so. It appears to me that the difficulties vanish so soon as they are grappled with, and I think the solution of them may be based on the observation made by LORD DENMAN in *R.* v. *Ledgard* (1), in which he said this:

> "If the town council have decided not to obey the writ that might be primâ facie evidence on a motion against all of them."

That, to my mind, is the basis of the whole matter. There has been an order made against this borough council that is primâ facie evidence against every member of the borough council that he is party to the disobedience. If he is proceeded against individually it is unnecessary for the prosecutor to show that the particular respondent has been guilty of disobedience. It is enough for him to state the case that the corporation have disobeyed, to name the respondent who is made a respondent, and to give him the opportunity of exculpating himself by direct evidence. If he fails to exculpate himself by direct evidence he then becomes, and is held by the court to be, guilty of the contempt which has already been proved against the corporation. In that event the respondents must be, and ought to be, all the members, because it appears to me that when the prosecutor is intending to proceed individually against the members of a corporation such as this, but is not proposing to make any definite charge against any one of them over and above another, it is obligatory upon him to proceed against all. Otherwise it would give to a prosecutor an opportunity of picking and choosing, which in another case might probably be productive, to my mind, of grave abuse. But if the prosecutor does not desire to proceed upon the primâ facie responsibility of any member of the defendant council, and does desire to make an individual case against a particular member, then it is incumbent upon him, naming those particular members only as responsible, to make against them the special and particular case which he desires to set forth. In that way, then, you have the whole matter properly put forward. In the first instance, you proceed against all and leave each of them to exculpate himself. In the other, you proceed against the individuals, making against each and any of them a special case. But in both cases you give the respondent the fullest notice that as against him an application for committal or attachment is going to be made.

In the present case we on this application can take no account at all of any political movement which has agitated Poplar. No other question, as it seems to me, can be dealt with by us or can be properly raised here than whether the appellants have been proceeded against with such regularity that they ought not to be heard to say that they have suffered from any irregularity. On a survey of all the facts of the case, while I am of opinion for the reasons which I have given that the proceedings are characterised by substantial irregularity, I have arrived at the conclusion that none of these appellants can now be heard to say that that irregularity has in any way injured him; and it is for that reason that I think that this appeal should be dismissed. The contempt which is set up against the appellants, regarded as we alone must regard it, taking no account of outside considerations at all, is very glaring and flagrant contempt. It is a reasoned and a deliberate disobedience to the court's order. That is to say, it is a disobedience to the established law of the land declared by the King's courts that are set up to declare it. Moreover, it is a disobedience by persons holding a position of public trust, and notwithstanding their public duty, faithfully to execute that trust. There is no discretion of theirs in the duty which they are required to perform. The responsibility for levying this rate that they are directed to levy is not theirs. One of the rates in question is that directed to be levied by the county council, a body which is itself composed, I suppose, of the proper number of Poplar representatives as well as representatives of all London. If a rate is excessive in its incidence on

Poplar that is a justification for an alteration of the law. But it is no justification by a subordinate public body for disobedience to the law before and until it is altered. If the appellants are unwilling to carry out the trust which they have undertaken by membership of this subordinate body, it is their duty to make way for others that will. But deliberate disobedience to an order of this kind, in my judgment, cannot be overlooked. And it is because the appellants and each of them, either in the addresses they gave to the court of King's Bench or in the affidavit they have made, have rendered quite plain, although they give their reasons, that they do not propose to obey this order that it appears to me that they have prevented themselves from saying that they have in any way been prejudicially affected by any irregularity in the proceedings. I myself hope, if it is not too late, that the respondents may see that in the attitude that they take up as members of this body in relation to this writ they have fallen into an error. It is no great thing that is asked of them under the order. It is not that they shall pay anything, or do anything impossible. It is merely that they shall make a rate. I cannot help thinking that the reluctance which they feel—and I am quite willing to allow conscientiously feel—in making this rate is because, temporarily, they have magnified their subordinate office. In a sphere in which it is their duty to obey they have arrogated to themselves the right to rule. I most sincerely hope—for I do not doubt the soundness of their heart, although I have more doubt as to the soundness of their judgment—that they will be brought to realise that it is not only by disobedience to duly constituted authority that they, as members of this public body, will impress their views on a sufficient number of their fellow subjects to attain the end—by an alteration of the law—that they have in view. I, therefore, think that the appellants are not able, in the present case, to rely upon the irregularities that I have pointed out; that, in fact, they have waived them; and that, accordingly, this appeal should be dismissed.

Solicitors: *Scott Duckers & Thompson*; *D. P. Andrews*; *Williams & James.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* GAUNT

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Finlay, Viscount Cave, Lord Atkinson and Lord Sumner), February 11, 17, April 18, 1921]

[Reported [1921] 2 A.C. 41; 90 L.J.K.B. 801; 125 L.T. 491; 37 T.L.R. 632; 65 Sol. Jo. 551; 15 Asp.M.L.C. 305; 26 Com. Cas. 247]

Insurance—Marine insurance—Risks insured against—"All risk"—Need to prove damage due to fortuitous circumstance, accident, or casualty—Damage arising from circumstances not expected to occur in normal transit.

In a policy of marine insurance against "all risk" those words cannot be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and ordinary depreciation during transit, or is due to inherent vice, an act of the assured, or a risk which it is not lawful to cover, is not within the policy. To be covered by such a policy damage must be due to some fortuitous circumstance, accident, or casualty. In a claim under the policy the assured discharges the onus which is on him by proving that the damage arose from any of the insurable risks or accidental circumstances which were incidental to the journey, and was not such as would be expected to occur in the course of a normal transit, as, for instance, where wool insured from the

sheep's back in South America to its destination in England was found on arrival to have been damaged by rain, there being no specific evidence to show how or where the wetting took place.

Insurance—Marine insurance—Deck cargo—Live animal—Need to insure specifically—"Specifically"—"In absence of usage to contrary"—"Usage"—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *Sched.* 1, *r.* 17.

By r. 17 of Sched. 1 to the Marine Insurance Act, 1906: "In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods." The "usage" referred to in the rule is a usage of the carrying trade to do a certain thing, and is not a usage of the business of insurance to attach a special meaning to a particular term, or to recognise a special liability in certain circumstances though only general terms are used. "Specifically" means "as such." In the case of deck cargo there must be an intimation that the goods are to be carried on deck by inserting "for carriage on deck" or other similar words, and in the case of animals the description must intimate that the animals are alive and not mere carcases.

Insurance—Marine insurance—Duty of assured to avert or minimise loss—Effect of s. 78 (4) *of Marine Insurance Act*, 1906.

Per LORD SUMNER: Section 78 (4) of the Marine Insurance Act, 1906, which provides: "It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss," obviously refers to suing and labouring, and cannot be read as meaning that, if the agents of the assured are not reasonably careful throughout the transit, he cannot recover for anything to which their want of care contributes.

Decision of Court of Appeal, [1920] 1 K.B. 903, affirmed.

Notes. Considered: *London and Provincial Leather Processes, Ltd.* v. *Hudson*, [1939] 3 All E.R. 857; *F. W. Berk & Co.* v. *Style*, [1955] 3 All E.R. 625. Referred to: *Lind* v. *Mitchell*, [1928] All E.R.Rep. 447; *Wadsworth Lighterage and Coaling Co.* v. *Sea Insurance Co.* (1929), 35 Com. Cas. 1.

As to the meaning of "goods" and losses for which insurers are liable under an all risks policy, see 22 HALSBURY'S LAWS (3rd Edn.) 53, 54, 73, 74, 89, 92, 130. For cases see 29 DIGEST 95, 96, 125 et seq., 155 et seq., 167, 168, 225, 226. For Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

(1) *Schloss Bros.* v. *Stevens*, [1906] 2 K.B. 665; 75 L.J.K.B. 927; 96 L.T. 205; 22 T.L.R. 774; 10 Asp.M.L.C. 331; 11 Com. Cas. 270, C.A.; 29 Digest 226, *1832*.

(2) *Nigel Gold Mining Co.* v. *Hoade*, [1901] 2 K.B. 849; 70 L.J.K.B. 1006; 85 L.T. 482; 50 W.R. 108; 17 T.L.R. 711; 6 Com. Cas. 268.

(3) *Jacob* v. *Gaviller* (1902), 87 L.T. 26; 50 W.R. 428; 18 T.L.R. 402; 7 Com. Cas. 116; 29 Digest 225, *1831*.

(4) *Dudgeon* v. *Pembroke* (1874), L.R. 9 Q.B. 581; 43 L.J.Q.B. 220; 31 L.T. 31; 22 W.R. 914; 2 Asp.M.L.C. 323; on appeal (1875), 1 Q.B.D. 96, Ex. Ch.; (1877), 2 App. Cas. 284, H.L.; 29 Digest 201, *1603*.

(5) *Rohl* v. *Parr* (1796), 1 Esp. 445, N.P.; 29 Digest 243, *1971*.

(6) *Hunter* v. *Potts* (1815), 4 Camp. 203, N.P.; 29 Digest 203, *1623*.

(7) *Merchants Trading Co.* v. *Universal Marine Co.* (1870), cited in L.R. 9 Q.B. at p. 596; 2 Asp.M.L.C. 431, n., C.A.; 29 Digest 201, *1605*.

(8) *Ross* v. *Thwaite* (1776), 1 Park's Marine Insurances (8th Edn.), p. 23; 29 Digest 95, *525*.

(9) *Backhouse* v. *Ripley* (1802), cited in Park's Marine Insurances (7th Edn.), p. 26; 29 Digest 95, *524*.

(10) *Da Costa* v. *Edmunds* (1815), 4 Camp. 142; 29 Digest 168, *1248*.

(11) *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244; 2 Tyr. 266; 1 L.J.Ex. 101; 149 E.R. 106; 29 Digest 40, *23*.

(12) *Myers* v. *Sarl* (1860), 3 E. & E. 306; 30 L.J.Q.B. 9; 7 Jur.N.S. 97; 9 W.R. 96; 121 E.R. 457; 17 Digest (Repl.) 42, *508*.

(13) *Miller* v. *Tetherington* (1861), 6 H. & N. 278; 30 L.J.Ex. 217; 3 L.T. 893; 7 Jur.N.S. 214; 9 W.R. 437; 1 Mar.L.C. 39; 158 E.R. 114; affirmed (1862), 7 H. & N. 954; 31 L.J.Ex. 363; 9 L.T. 231; 8 Jur.N.S. 1039; 10 W.R. 356; 1 Mar.L.C. 388; 158 E.R. 758, Ex. Ch.; 29 Digest 73, *322*.

(14) *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K.B. 252; 73 L.J.K.B. 62; 89 L.T. 670; 52 W.R. 174; 20 T.L.R. 79; 9 Asp.M.L.C. 526; 9 Com. Cas. 91; 29 Digest 95, *526*.

Appeal by the defendants in the action from an order of the Court of Appeal, [1920] 1 K.B. 903, reversing a judgment of Rowlatt, J.

R. A. Wright, *K.C.*, and *Le Quesne* for the appellants.
Sir John Simon, *K.C.*, *Mackinnon*, *K.C.*, and *R. I. Simey* for the respondent.

The House took time for consideration.
April 18. The following opinions were read.

LORD BIRKENHEAD, L.C. (read by Viscount Finlay).—This is an appeal from an order of the Court of Appeal reversing a judgment of Rowlatt, J., in favour of the appellants in an action brought against them by the respondent in respect of a partial loss to wool insured with the appellants.

The wool in question was produced in Patagonia by the Sociedad Explotadora del Tierra del Fuego. The respondent, by direct and sub-purchases, had acquired part of the 1916–17 clip under four contracts, all of which were on the terms f.o.b. Punta Arenas. The insurance up to delivery on ocean steamer at that port was effected by the Explotadora company and after such delivery by the purchaser, but no question now arises as to the insurance of the risks of ocean transit. The policies sued upon were taken out by the Explotadora company and by them assigned to the respondent after the wool had reached his mills at Bradford and a few days before the writ was issued. These polices have been modified so as to carry out the terms of a general cover note dated Mar. 15, 1916, and must, therefore, be read as containing a clause to this effect:

> "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water, and all risk from the sheep's back and/or station, while awaiting shipment and/or forwarding and until safely delivered . . . with liberties as per bill of lading."

The wool reached Bradford in a damaged condition. The evidence did not establish with any certainty when or how the damage was done, but made it clear (and Rowlatt, J., so held) that it occurred at some period between the shearing of the sheep and shipment at Punta Arenas—that is to say, during the period covered by the policies issued by the appellants. The general manager of the Explotadora company gave evidence that he could not recall a serious claim in respect of damage to wool occurring during the transit to Punta Arenas, and that the statements in the manifests of the local steamers showed that something abnormal had occurred. The mates' receipts and bills of lading issued by the ocean steamers contain notes that a number of bales were wet; and the oral evidence was to the effect that the wool was damaged before it was taken on board the ocean steamers. There was no evidence as to any particular bale or bales, or as to the exact circumstances or cause of the damage.

In construing these policies it is important to bear in mind that they cover "all risk." These words cannot, of course, be held to cover all damage, however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of Walton, J., in *Schloss Bros.* v. *Stevens* (1), on a policy in similar terms, states the law accurately enough. He said ([1906] 2 K.B. at p. 673) that the words

"all risks by land and water [as used in the policy then in question] were intended to cover all losses by any accidental cause of any kind occurring during the transit. There must be a casualty."

Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty. ROWLATT, J., accepted this view, but was of opinion that the evidence proved a state of facts which was consistent with the damage having occurred

"without the intervention of anything fortuitous, of anything accidental, or of anything which could be called a casualty within the meaning of an insurance contract."

I agree with the criticism of the Master of the Rolls upon this finding. The damage proved was such as did not occur, and could not be expected to occur, in the course of a normal transit. The inference remains that it was due to some abnormal circumstance, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. In this case the respondent established that the loss must have been due to some casualty, and consequently the judgment of the Court of Appeal upon this point is right.

A further point arises, namely, whether the policies insure such part of the wool as was carried on deck, the appellants urging that some at least of the bales were damaged while being so carried. There is, it is true, evidence suggesting that some of the damage occurred in the case of bales carried on deck, and the appellants rely on the seventeenth rule of construction in the first schedule to the Marine Insurance Act, 1906, which applies to this policy by virtue of s. 30 (2) of that Act. The latter part of the rule reads:

"In the absence of any usage to the contrary deck cargo and living animals must be insured specifically and not under the general denomination of goods."

It was proved that the Explotadora company were aware of a practice of carrying bales on deck and, in fact, had complained, but, the owners meeting this protest with an assertion of right, it was not persisted in. There was certainly a usage in the trade to carry on deck. Nor, in my view, did the rule under consideration make any change in the law as it existed when the Act was passed. Deck cargo and living animals must be insured as such, the policy containing words which inform all interested parties that the goods insured are to be carried on deck or are living animals, as the case may be, unless there is a "usage to the contrary." It was contended for the appellants that the "usage" contemplated by the rule was a usage in the insurance business as to the description for the purposes of insurance. This cannot be so. In the first place this construction would involve such a departure from the principles of law existing when the Act was passed that we ought not so to construe the words unless such an alteration was most plainly intended; secondly, inasmuch as an insurer is bound to know the usages of trade, if a usage exists in the trade to carry goods of a particular kind on deck, he knows that such goods are likely to be so carried, and there is little reason for requiring a specific statement that such a method of carriage will or may be employed. The "usage," therefore, must be a trade usage, and it was abundantly established in the case which your Lordships are considering. There was, therefore, no need to insure the wool specifically as deck cargo, and the omission to do so does not afford any defence to the appellants. For these reasons I am of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY.—This appeal relates to the question of the liability of the appellants upon policies covering wool from various stations in Tierra del Fuego

and on the mainland of Patagonia to Punta Arenas, the port of embarkation for Europe. The wool arrived in this country in a damaged condition. An action was brought upon policies covering the wool on the ocean voyage from Punta Arenas, and in that action it was held that the underwriters were not liable for the damage upon the ocean policies, and there is no appeal from that decision.

The present appeal relates to policies of insurance from the sheep's backs at several stations to the ocean steamers at Punto Arenas. ROWLATT, J., held that the plaintiff in the action, the present respondent, failed to establish any right to recover on these policies. The damage was by wet, and the learned judge was of opinion that there was no evidence of any casualty causing the wetting so as to make the policy attach. The Court of Appeal, on the other hand, held that the circumstances showed that the loss was covered by the terms of the policy as resulting from some casualty, and gave judgment for the plaintiff, the amount to be assessed by a referee. The amount has been assessed at £19,125 13s. 11d. The insurance company on this appeal ask that the judgment of ROWLATT, J., in their favour should be restored.

The wool had to be conveyed from a number of sheep stations to Punta Arenas, partly by land and partly by water, in coasting vessels. The insurances are to be read as containing the following clause:

> "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding and until safely delivered into warehouse in Europe, with liberties as per bills of lading."

I take this clause from the letter of cover of Mar. 15, 1916, it being admitted that the policies are to be read as containing a clause to this effect. The bales of wool, on arrival at Bradford, were found to be seriously damaged by water, and the action was brought. A commission was issued to Punta Arenas, and the evidence taken on commission and at the trial left no doubt in the minds of the court of first instance and of the Court of Appeal that the wetting took place after shearing and before the bales were put on board of the ocean steamer at Punta Arenas. There was no specific evidence to show how the wetting had taken place. ROWLATT, J., held that the whole of the evidence was consistent with the goods having been injured

> "without the intervention of anything fortuitous, of anything accidental, or of anything which could be called a casualty within the meaning of an insurance contract."

He repeated the ratio decidendi of his judgment in another sentence near the end:

> "It seems to me that the policy insures the assured only against risks, and any evidence which does not show that the damage was due to something fortuitous does not support the case when the underwriters are sued."

The evidence showed that the wool was made up into bales at the stations and that these bales were carried down to the place of embarkation on the small coasting steamers by which they were carried to Punta Arenas, where they were stored in hulks until embarkation could be made upon the ocean steamers. No details were available as to the transit of particular bales, but the Master of the Rolls in his judgment in the Court of Appeal thus summarises the evidence ([1920] 1 K.B. at pp. 907, 908):

> "It was, however, proved that the logs of the small steamers showed bad weather and rain at times, and that some bales shipped on them about this time were wet, and also that some of these bales received on board the ocean steamers were stated in the mates' receipts and bills of lading to be wet and damaged. It was also proved that sometimes there was not room in the sheds for all the wool accumulated for shipment on the river steamers, and that some had to be piled outside the sheds, where tarpaulins were provided but not always effec-

tively used. Evidence was also given that bales sometimes got wetted with salt water by an unexpectedly high tide while piled on the beach, and also by spray coming over them when carried on the deck of the river steamers. Evidence was given that part of the wool was always carried on deck. Great congestion prevailed at this time because of the difficulty in obtaining transport, with the result that the storage places were overcrowded and some of the wool had to be stored outside. Mr. Burbury, the manager of the Explotadora, stated that in his experience of the carriage of wool, extending over many years, he could not remember any case of a serious claim in respect of damage arising during the transit from the stations to Punta Arenas, and that the statements in the logs and mates' receipts indicated that something abnormal had happened. The chief officer of one of the ocean steamers also gave evidence that the part of these bales which he received was the worst cargo he had ever seen."

The Master of the Rolls proceeded to state the risks insured against, and referred to the decision of WALTON, J., in *Schloss Bros.* v. *Stevens* (1). That was the case of a policy somewhat similar to that in the present case, and WALTON, J., said ([1906] 2 K.B. at p. 673):

> "I think they [the words of the clause] were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered, in fact, come within that category? Was the damage from some accidental cause? There must be a casualty."

The Master of the Rolls said that in the present case there was exceptional damage such as did not arise under the normal conditions of such a transit, and that, in his opinion, it might be inferred that it proceeded from a casualty or something accidental. With reference to the judgment of ROWLATT, J., he remarked ([1920] 1 K.B. at p. 910):

> "I think he treated the policy too much as one against specific perils in which it is necessary to prove specifically that the loss came within one of them and did not give sufficient attention to the fact that this was a policy of an unusual kind against all risks, and that it was sufficient to show that the loss was occasioned by a casualty or something accidental without proving further in what the exact nature of that casualty consisted."

I agree with the Master of the Rolls in thinking that there was sufficient evidence to justify the inference that this loss was due to something accidental. Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. But I can find no justification for the contention which the appellants put forward at the Bar of your Lordships' House that in order to recover upon such a policy for damage resulting in the goods getting wet by rain it would be necessary to establish that there was an extraordinary or unusually heavy fall of rain. It would be quite enough if, owing to some accidental circumstances, the goods were left uncovered when rain was falling. This might happen by some want of care on the part of the men whose duty it was to keep the goods covered with the tarpaulins which were provided for the purpose. If, from any of the accidental circumstances which are incident to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied. There is nothing in the present case to show that the damage was due to any wilful misconduct on the part of the assured. As ATKIN, L.J., put it in his judgment, the facts show that the wetting might probably be caused by some fortuitous accident or casualty. I agree with this finding.

This disposes of the main question on this appeal. There is, however, another point to be dealt with. The appellants allege that some part of the bales were damaged while being carried as deck cargo on board the coasting steamers, and

A that the policy does not cover deck cargo. They rely for this purpose on the Marine Insurance Act, 1906, s. 30, and r. 17 of the rules of construction in the schedule. Section 30 is as follows:

> "(1) A policy may be in form in the first schedule to this Act. (2) Subject to the provisions of this Act, and unless the context of the policy otherwise
B requires, the terms and expressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them."

Rule 17 of the rules for construction is as follows:

> "The term 'goods' means goods in the nature of merchandise, and does not
C include personal effects or provisions and stores for use on board. In the absence of any usage to the contrary deck cargo and living animals must be insured specifically, and not under the general denomination of goods."

The construction of this rule has given rise to a great deal of controversy, and it is now necessary that we should endeavour to settle this vexed question of construction. Rule 17 is very oddly worded, but it appears to me that on its true reading
D it leaves the law as to insurance of deck cargo very much as it was before the Marine Insurance Act passed. The rule prescribes that deck cargo and living animals must be insured specifically in the absence of any usage to the contrary. What is the meaning of the provision that deck cargo and living animals "must be insured specifically"? I think "specifically" in this connection means "as such." In the case of deck cargo there must, in addition to the ordinary description of the
E goods, be an intimation in the policy that the goods are to be carried on deck, by inserting "for carriage on deck," or other similar words. In the case of "living animals" the description must convey an intimation that the animals are alive and not mere carcases, that is, if there is any ambiguity in the description there must be added to it the word "live," or some equivalent expression.

There are, of course, special risks attaching to deck cargo and to live animals,
F and the rule is, I think, intended to secure that the underwriter must have express information of the existence of such risks "in the absence of any usage to the contrary." What is the meaning of these words as to usage which are prefixed to the second part of r. 17? In the case of deck cargo, I think that the words would be satisfied by proof of a usage in a particular trade, or generally, to carry on deck goods of a particular kind. The underwriter is bound to know of the existence of
G such usages, and the description of particular goods as of the class to which such a usage applies gives him the information that the goods will or may be carried on deck. If there is such a usage there is no reason for requiring a statement that goods which fall within it are, in fact, to be carried on deck, as the mere description of the goods gives the necessary intimation. Such a usage may be fairly described as "a usage to the contrary." I cannot adopt the appellants' contention
H that the usage must be a usage, not in the carrying trade with regard to such goods, but in the insurance world with reference to the manner in which they are to be described for insurance purposes. Such a usage as to insurance may, of course, grow up in any trade in which deck carriage of certain articles prevails, and if such a usage in the business of insurance has grown up it will be a usage to the contrary. But, in my opinion, no such usage in the business of insurance is
I necessary to dispense with the specific description of deck cargo as such. Any such construction of r. 17 would bring it into acute conflict with the law as to insurance of deck cargo as it existed up to 1906, and is not, in my opinion, warranted by the wording of the rule. In the case of "living animals" the words "in the absence of any usage to the contrary" may have been introduced to guard against the conceivable case that in a particular trade in which the goods carried were almost exclusively live cattle or sheep there might be a usage that such live-stock should be merely described as "goods." The contingency is not a very probable one, but Parliament, if it considered the wording of this rule, may have

thought that to provide against any possible usage to the contrary could do no harm and might conceivably be useful. The concluding words of the paragraph that deck cargo and livestock are not to be insured simply as goods appear to be quite unnecessary, but do not militate against the construction of the paragraph which I am disposed to adopt. As both the Master of the Rolls and ATKIN, L.J., point out, there was abundant evidence of a usage that in this trade bales of wool should be carried on deck. The "usage to the contrary" was, therefore, established, and there was no necessity to ensure the bales specifically as for carriage on deck. Upon the whole, I think that the appeal should be dismissed with costs.

VISCOUNT CAVE.—I agree.

LORD ATKINSON.—I concur.

LORD SUMNER.—With one exception mentioned later on I concur in the conclusions drawn from the evidence by the Court of Appeal. The damage was fresh-water damage; it occurred after the winter rains had begun. There is some evidence that bales are exposed to rain at Puerto Prat when the sheds are full, and on the decks of the coasters, where it is proved to be the usage to carry such cargo as this, and on the hulks at Punta Arenas. It is proved that tarpaulins are provided by the shippers at their sheds and that their men sometimes neglect to use them. On coasters and hulks tarpaulins ought to be at hand and used, and it is not shown that either were unseaworthy for want of them. Proper tarpaulins properly used would protect the wool from damage by rain. Evidently a substantial amount of the damage was done while the goods were on deck and would have been prevented if proper care had been used.

The perils insured against in the printed form of policy are enlarged by those in the cover notes

> "including all risk of craft, fire, coasters, hulks, transhipment, and inland carriage by land and/or water, and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding. . . ."

Both clauses, therefore, the additional clause as well as that in the regular form, describe risks or perils intended to be insured against: *Nigel Gold Mining Co.* v. *Hoade* (2); *Jacob* v. *Gaviller* (3). The words closely resemble those in *Schloss Bros.* v. *Stevens* (1), where WALTON, J., refused to read "all risks by land and by water" as limited to the risks peculiarly incidental to carriage in a ship, in boats or in craft, and held that it must be "read literally as meaning all risks whatever." There is nothing abnormal in this; in fact, "against all risks whatsoever, anything printed or written herein to the contrary notwithstanding" was a clause known in practice over thirty years ago, and a great variety of clauses in policies on cattle, employing the word "all risks," "all risks of mortality," and "all risks of mortality . . . from any cause whatsoever" may be found by the curious in SIR DOUGLAS OWEN'S MARINE INSURANCE CLAUSES. "There must be a casualty," added WALTON, J.; the words were "intended to cover all losses by any accidental cause of any kind occurring during transit." The appellants argue that getting wet, when not under cover, is a thing that will happen to bales whenever it rains, and the injured bales started on their journey after the rainy season had begun; in a word, they say the loss arose from "no unusual cause": *Dudgeon* v. *Pembroke* (4) (L.R. 9 Q.B. at p. 594). It is, however, to be remembered that discussions about wear and tear and leakage and breakage generally arise when the issue is whether the loss is or is not a loss by perils of the sea, e.g., in *Rohl* v. *Parr* (5), *Hunter* v. *Potts* (6), and *Merchants Trading Co.* v. *Universal Marine Co.* (7) (2 Asp.M.L.C. at p. 432), where LUSH, J., observes, "the silent natural action of the water on a floating body is not a peril of the sea, but it is wear and tear." The more widely the category of perils insured against is extended, the more nearly is it true to say that not only perils of the sea but perils on the sea are insured. "All risks" has the same effect as if all insurable risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins

to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of the loss by wetting. It appears to be what happened. For wool to get wet in the rain is a casualty, though not a grave one; it is not a thing intended, but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to "all risks." They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances in which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally, the description "all risks" does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils. I think, however, that the quasi-universality of the description does affect the onus of proof in one way. The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he avers loss by some risk coming within "all risks," as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused. If he did so, he would not bring it any the more within the policy. These considerations answer the appellants' complaint that the plaintiffs were meagre with their proof. So they were, but it was enough for them to prove some casualty insured against. ROWLATT, J., as I venture to think, attached too much importance to the absence of any kind of marine disaster. If the casualty was fortuitous, it needed not to be a calamity.

As a good deal of the damaged cargo was on deck, there arises for decision a point upon the Marine Insurance Act, 1906, which was strongly pressed upon your Lordships. The first schedule sets out a Lloyd's form of policy and a series of rules for its construction "where the context does not otherwise require," and, out of seventeen following rules, in all but one the meaning of some particular term is expounded. The schedule in fact contains a typical document with an elaborate interpretation clause. I can conceive no subject on which the legislature is less likely to have wished to make a change or to declare that what people have hitherto meant in business shall be their meaning no longer. Theretofore all concerned, when they said "goods" simply, meant goods under deck or goods in and over all according as the usage of the trade in which the goods were to be carried did not or did include a usage to carry on deck. Why should a Codification Act abolish that habitual meaning and make the word mean the one or the other according as there is or is not a drafting usage among those who prepare and those who sign policies? No one has suggested any reason for such a change.

Even if the schedule has changed the law, does it affect this case? Section 30 (2) is an interpretation section. It says: ". . . the terms and expressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them." Now this policy, as expanded by the covers, does not contain any term or expression mentioned in r. 17 of sched. 1; it says "wool," "wool clips," or "bales of wool," not deck cargo or cargo or goods. Next, the rule does not apply, "except where the context does not otherwise require." The form is for a voyage in a named ship, "beginning the adventure upon the said goods, from the loading thereof aboard ship," but the context consists of additional words, which make the adventure begin from the sheep's back and continue by land and/or water in coasters and hulks and while awaiting transhipment. I greatly question, if this context does not require something different from the mere insurance of deck cargo specifically. In any case, if this rule of interpretation is

new, the appellants find considerable difficulty in making it apply to this policy on any strict construction, and unless the construction is to be very strict, there is no ground for questioning that the rule is not new, but only embodies the existing law. This cargo is insured specifically, for it is described as wool "clips" and "bales of wool." To say that it is not insured specifically, though it is described specifically, unless it is insured as on deck however described, conflicts with the rest of the sentence. Clearly living animals have to be insured specifically as living animals, and not under the general denomination of goods. From the specific description the underwriter must take notice of the place of stowage, where a usage as to the place of stowage of such goods is, or is deemed to be, known to him. Then there are the words "in the absence of any usage to the contrary." Rule 17 is a direction as to the apt mode of drawing up a policy, that is, primarily as to the use of words. The rule in construing, and, therefore, in drawing, contracts is that the words must be understood with reference to the circumstances in the light of which the parties contract. When there is a usage to carry all or any goods on deck, which both parties know or are deemed to know, their words may be selected and will be construed with reference to it. In such circumstances even a general word, "goods," will derive its meaning from the usages of the carrying trade known to the contracting parties, just as much as from any usage known to both as to the meanings of terms in the general vocabulary of commerce. The word "usage" is not expressly limited, and a usage to carry on deck is a usage like another; only the context, therefore, can restrict it to a usage of drafting policies. What is that context? Goods on deck are still "goods," and "goods" are specifically described for insurance, when the policy says what they are specifically. It is not a specific description to say where they are. So much for mere language. What makes "goods" insufficiently specific for an insurance on deck cargo is not any usage of underwriters to use words in a technical sense, but the usage of carriers to stow goods under deck, as being the safest place. A usage to carry on deck is a usage to the contrary to that, and, therefore, where it exists, its presence prevents any misdescription from arising. If in all carrying trades cargo was carried in and over indiscriminately, no one would ever have distinguished between one position and the other any more than between one hold and another. No doubt, if ever a usage arises among those who draw and sign and accept policies to mean by "goods" any kind of goods, stowed anywhere, that also might be proved as a "usage to the contrary," but the respondent's point here is not that the "usage to the contrary" can never be such a usage as the appellants say it must be, but that it is not exclusively so, for a usage to carry on deck is also a usage to the contrary. For my part, I think them right.

Perhaps I might venture to say that in this rule the legislature has used language to express its thoughts with less than its accustomed felicity, but I think that there are special reasons to explain this. It may easily happen to anyone who endeavours to crystallise in a sentence the language of a century's decisions to draw the line somewhat uncertainly between the usual mode of carrying particular goods and the usual meaning of or description of those goods in a policy. In Lord Mansfield's time goods on deck were said not to be covered by a policy "on goods," because, in the language of insurance, goods only meant goods which were merchantable and a part of the cargo. Hence a captain's effects and goods lashed on deck were not covered. Apparently (though not quite certainly) the objection that the goods lashed on deck were not covered by the description "goods" rested on the fact that they were on deck and so not part of the cargo, which normally would be under deck, and not on the fact that they were not merchandise, but were the master's own effects: *Ross* v. *Thwaite* (8). In 1802 the opinion was clearly expressed that goods on deck were not within the description of goods in the policy: *Backhouse* v. *Ripley* (9). Lord Ellenborough held in 1815 that underwriters were bound to take notice of a usage to carry carboys of vitriol on deck "without any communication," and so a policy on carboys of vitriol covered them on deck: *Da Costa* v. *Edmunds* (10). In the general usage of the carrying trade, goods were only

properly stowed when stowed under deck, but when, by a particular usage of a particular trade, or referring to particular goods, they were properly stowed though stowed on deck, the underwriter must be taken to know it as part of his business equipment, and to contract to insure goods in that trade or of that description with reference to the usage. Subsequent authorities develop this view. Evidence of a usage of underwriters not to pay for boats when slung on the quarter, though the policy was on "ship, boat and other furniture," was held inadmissible as contradicting the express language of the policy: *Blackett* v. *Royal Exchange Assurance Co.* (11) (2 Cr. & J. at p. 249), and *Ross* v. *Thwaite* (8) was explained by LORD LYNDHURST, C.B., upon the view that by an implied term of the policy the underwriter is liable for goods insured only when so carried as to be exposed to ordinary and not to extraordinary and uncommunicated perils. Hence "an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy." In commenting on this case in *Myers* v. *Sarl* (12) (30 L.J.Ex. at p. 13), COCKBURN, C.J., says that it goes to the verge of permissible exclusion of evidence, and that *Ross* v. *Thwaite* (8) and *Backhouse* v. *Ripley* (9), cases which had never been questioned, showed that by usage the general terms in the policy had received a limited signification. In the same case BLACKBURN, J., considered that LORD LYNDHURST meant that, taking the language of the whole contract, it evinced upon the face of it an intention not to use the phrase in question in the particular sense sought to be put on it. In substance this was the view adopted in *Miller* v. *Tetherington* (13), briefly affirmed in the Exchequer Chamber, where on demurrer a plea of a custom of Liverpool underwriters not to pay for general average on timber jettisoned from deck was sustained on a declaration on a Liverpool policy upon ship. It was pleaded as a custom in the North Atlantic timber trade that underwriters were not liable in such circumstances, as both assured and underwriter well knew when they entered into the contract, and MARTIN, B., assigns as the reason for this decision that *Blackett's Case* (11) is really an illustration of the rule first recorded in *Ross* v. *Thwaite* (8), and that in such cases words are used in particular trades in a particular sense, which the parties may prove by evidence.

So far as I know, questions relating to insurance on deck cargo in actions on a policy for loss of the cargo by perils insured against did not come up for any considerable amount of further discussion in this country till 1903, the propositions laid down in ARNOULD ON MARINE INSURANCE (2nd Edn.), i. 263, being generally accepted, namely,

> "goods carried on deck, as they are exposed to a greater hazard than goods carried in the ordinary way, are not covered by a general insurance in the common form of goods and merchandise; if, indeed, they are so carried by virtue of any general and well-known custom of the particular course of trade, on which the insurance is effected, the underwriter is presumed to be acquainted with such usage without having notice, and therefore may fairly be supposed to undertake the risk of their being so carried on deck."

In 1903 WALTON, J., reviewed the subject in a remarkable judgment, *Apollinaris Co.* v. *Nord Deutsche Insurance Co.* (14), and stated these conclusions ([1904] 1 K.B. at pp. 258, 260):

> "Where from the description of the goods or the voyage, or both, it is apparent that in accordance with a well-known practice or usage of trade, the goods will or even probably may be carried on deck, then even in the case of voyages by sea, where goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk and will be liable for any loss of deck cargo by perils insured against. . . . the rule against carrying goods on deck is usually involved in and depends on a larger

and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit."

The result would appear to be as follows. (i) In the absence of proof of a special meaning attaching to the word used, and of contracting with reference to that meaning, anything coming under the description of the subject-matter of insurance which is expressed in the policy is covered; but (ii) there is an implied exception from the liability of the underwriter, that he does not cover losses where they are caused by exposure of the subject-matter by those in charge of the adventure to extraordinary perils, of which the risk of deck carriage is one. (iii) If the underwriter knows by the special description employed or otherwise, or if he is deemed to know it without notification because of the existence of a usage in the carrying trade to which the insurance refers that the goods may be carried on deck, his contract is taken to assent to that mode of stowage, and then either he agrees to cover such extraordinary perils or they cease to be extraordinary and so are covered. The important thing to notice is that the usage in question is a usage of the carrying trade to do a certain thing, and is not a usage of the business of insurance to attach a special meaning to a particular term, or to recognise a special liability in certain circumstances though only general terms are used. Such, I think, was the law before it was codified by the Act of 1906, and such, in my opinion, it remains. The particular wording of r. 17 obviously is not that which would have been adopted if totally new legislation was being framed. It takes its colour from the decisions, and reference to those decisions shows how the article came to be framed as it was. I think that it makes no change in the law.

The fact which I am not able to find established in the evidence as the Court of Appeal found it is the existence of a custom of underwriters to insure wool on deck during this transit under general terms not specifying that it may be stowed on deck. There was no evidence of actual knowledge that wool was ever carried on deck so far as the defendants were concerned, and their underwriter denied it. There was none of general knowledge of the practice and there was evidence to the contrary. True the cover was many years old and had been annually renewed, but no claims were proved to have been made and paid on the footing of the wool being carried on deck. A man may know that in some instances his cargo is being put on deck without this being evidence against him of a usage to carry on deck, for he may be relying on his right to claim damages for improper stowage if any harm is done. So these underwriters may have renewed the cover annually, relying on their not being on the risk except for under-deck cargo. If so, the renewal of the insurance does not show that they used general terms to cover the cargo whether on deck or not. To make them liable there must be proved, in fact, a usage to carry on deck, which they are deemed to know, and then a liability arises in such circumstances in respect of deck cargo, though unspecified.

There remains an argument based on the reading of s. 78 (4) of the Act which is very novel. It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that, if the agents of the assured are not reasonably careful throughout the transit, he cannot recover for anything to which their want of care contributes. The point, therefore, fails. I think the appeal should be dismissed.

Solicitors: *Waltons*; *Ballantyne, Clifford & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

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NIBLETT, LTD. *v.* CONFECTIONERS' MATERIALS CO., LTD.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), April 15, 19, 1921]
[Reported [1921] 3 K.B. 387; 90 L.J.K.B. 984; 125 L.T. 552; 37 T.L.R. 653]

B *Sale of Goods—Right of seller to sell—Merchantable quality—Quiet possession of goods—Implied conditions—Breach—Sale of goods with labels constituting infringement of patent—Sale of Goods Act*, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 12 (1) (2), *s.* 14 (2).

By s. 12 of the Sale of Goods Act, 1893: "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there C is—(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass: (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods." By s. 14: "Subject to the provisions of this Act and of any D statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows . . . (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality . . ."

E The defendant sellers, who dealt in goods of that description, agreed to sell to buyers condensed milk in tins. When the goods were delivered it was found that some of the tins bore labels which infringed the registered trade mark of third persons, and the buyers were obliged to remove the labels from the tins and sell them without any label, as a result of which they suffered loss.

Held, by all the members of the court: there being no circumstances of F the contract showing a different intention, the sellers were in breach of the implied condition in s. 12 (1) of the Sale of Goods Act, 1893, that they had a right to sell the goods, and, therefore, the buyers were entitled to succeed in an action for damages for such breach.

Held, further: by Bankes, L.J., and Atkin, L.J.: the sellers were also in breach of the condition in s. 14 (2) of the Act that the goods should be of G merchantable quality; and by Atkin, L.J.: the sellers were in breach of the implied warranty in s. 12 (2) that the buyers should have and enjoy quiet possession of the goods.

Monforts v. *Marsden* (1) (1895), 12 R.P.C. 266, overruled.

Per Scrutton, L.J.: If I had to express my present opinion, it is that the condition in s. 14 (2) of the Act does not touch the title to the goods or the H right to sell them.

Notes. Explained and distinguished: *Sumner, Permain & Co.* v. *Webb & Co.*, [1922] 1 K.B. 55. Referred to: *Wilson* v. *Rickett, Cockerell & Co.*, [1954] 1 All E.R. 868.

As to conditions and warranties in a contract for the sale of goods, see 29 Halsbury's Laws (2nd Edn.) 52 et seq.; and for cases see 39 Digest 414 et seq. I For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Monforts* v. *Marsden* (1895), 12 R.P.C. 266; 39 Digest 431, *609*.

(2) *Bristol Tramways, etc., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest 418, *512*.

(3) *Laing* v. *Fidgeon* (1815), 4 Camp. 169; 6 Taunt. 108; 128 E.R. 974; 39 Digest 449, *765*.

(4) *Gardiner* v. *Gray* (1815), 4 Camp. 144; 171 E.R. 46; 39 Digest 451, *790*.

(5) *Jones* v. *Consolidated Anthracite Collieries, Ltd., and Lord Dynevor*, [1916] 1 K.B. 123; 85 L.J.K.B. 465; 114 L.T. 288; 34 Digest 706, *941*. A

(6) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54, H.L.; 39 Digest 420, *526*.

Appeal by the buyers (plaintiffs in the action) from a judgment of BAILHACHE, J., in a non-jury action.

In August, 1919, the parties entered into a contract for the sale of 3,000 cases of B condensed milk. The contract was originally made at an interview, but it was subsequently confirmed by writing in the form of a sold note dated Aug. 18 sent by the sellers to the buyers with a request that they would sign a counterpart, that is to say, a bought note, in the same terms, which the buyers did. The contract appeared to be wholly embodied in the writing, but both parties seemed to have treated the contract as partly oral and partly in writing, and to have adduced C parol evidence as to its terms. Counsel for the sellers contended that it was agreed that one or more of three brands of condensed milk, including the "Nissly" brand, might be delivered in fulfilment of the contract. Two thousand cases were delivered, and gave rise to no question. One thousand arrived bearing labels with the word "Nissly" upon them. It came to the knowledge of the Nestlé and Anglo-Swiss Condensed Milk Co. that parcels of condensed milk were being im- D ported with this label upon them; they took up the position that these 1,000 cases infringed their registered trade mark, and objected to the goods being dealt with in any way. The justice of their objection was admitted by the sellers who gave an undertaking not to sell, offer for sale, or dispose of any condensed milk under the title of "Nissly." The buyers did their best to sell, exchange, or export the goods, but found that the only possible way of dealing with them was to strip them of E their labels and sell them without marks or labels, as a result of which they suffered loss. Accordingly, they sued the sellers for breaches of condition and warranty, and BAILHACHE, J., on the authority of *Monforts* v. *Marsden* (1), gave judgment for the sellers. The buyers appealed.

Stuart Bevan, K.C., and *J. Dickinson* for the buyers.
Kerly, K.C., and *E. F. Spence* for the sellers. F

BANKES, L.J.—The buyers seek to recover damages from the sellers on the ground that the goods delivered were not in accordance with the contract of sale. The case as presented to us rests on one or another of three enactments. It is said that the buyers had a right of action under s. 12 or under s. 14 of the Sale of Goods Act, 1893, or under s. 17 of the Merchandise Marks Act, 1887. Upon this G last I need say nothing. No reference was made to it at the trial. If it had been insisted on, it would have required evidence which the sellers had no opportunity of giving in the court below, and the buyers ought not to be allowed to make that point now. I, therefore, confine myself to the claims under s. 12 and s. 14 of the Sale of Goods Act, 1893, although it does not appear that s. 14 was much relied on by counsel or considered by the judge at the trial. H

BAILHACHE, J., came clearly to the conclusion that, if s. 12 of the Sale of Goods Act, 1893, is to be construed literally, the sellers had no right to sell the goods as they were, and that the buyers were not enjoying, and never had enjoyed, quiet possession of the goods—that they could never get them from the Commissioners of Customs, and that, if they had got them, they were never in a position to deal with them, because of the Nestlé Co.'s threat. But he felt himself bound, by the I judgment of LORD RUSSELL, C.J., in *Monforts* v. *Marsden* (1), to give to s. 12 a meaning and effect which he would not have otherwise attributed to it. With the greatest respect to LORD RUSSELL, C.J., I think the doubts of BAILHACHE, J., upon that decision are justified. The case was heard and decided by LORD RUSSELL, C.J., on circuit. He took the view that s. 12 was to be read with qualifications like those which limit the implied covenant for quiet enjoyment in a conveyance of real property by a grantor who conveys as beneficial owner under s. 7 of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, Sched. 2, Part I],

A and he imposed upon the implied obligations in s. 12 of the Sale of Goods Act, 1893, a restriction limiting their operation to acts and omissions of the vendor and those acting by his authority. I cannot agree with the view thus expressed by LORD RUSSELL. I think s. 12 has a much wider effect, and that the language does not warrant the limitation imposed by LORD RUSSELL. I express no opinion as to what "circumstances" of a contract are "such as to show a different intention," to use the earlier words of s. 12. Counsel for the sellers contended that these circumstances are not confined to matters relating to the making of the contract, but would include the fact that at the time of making a written contract for the sale of goods it was understood that the goods would be of one or another brand. He argued that this was a circumstance which would show an intention to exclude the warranties otherwise implied. But, assuming that goods of one or more of three brands might be delivered under the contract, that circumstance does not show any intention that, if two of those brands are free from objection, and the third is an infringement of trade mark rights, the vendor may tender goods of the third brand in fulfilment of his contract. The goods tendered must still be goods which the vendor has a right to sell. Therefore, in my opinion, the buyers have established a right of action under s. 12 (1) of the Act.

It is not necessary to consider whether there is also a good cause of action under s. 12 (2), and I say nothing upon that point. I think there is also a cause of action under s. 14 (2), because these goods were not "of merchantable quality." Quality includes the state or condition of the goods. The state of this condensed milk was that it was packed in tins bearing labels. The labels were as much part of the state or condition of the goods as the tins were. The state of the packing affected the merchantable quality of the goods. In *Bristol Tramways, etc., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.* (2) ([1910] 2 K.B. at p. 840) FARWELL, L.J., said:

> "The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both; the definition of 'goods' in s. 62 makes that word include 'all chattels personal other than things in action and money,' and 'quality of goods' includes their state or condition. And this is in accordance with older cases, e.g., *Laing* v. *Fidgeon* (3), where it was held that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. In *Gardiner* v. *Gray* (4) LORD ELLENBOROUGH says:
>
> > 'The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them; the purchaser cannot be supposed to buy goods to lay them on the dunghill.'
>
> The phrase in s. 14 (2), is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again."

If the warranty that the goods shall be of merchantable quality applies to a complicated machine, it applies equally to the packing in which the goods are presented, which may, and does in this case, form a most important feature of the goods as delivered. The defendants contended that there was no evidence that the goods were bought from a seller who dealt in goods of that description. I cannot agree. In my view, there was ample evidence which called for an answer. Therefore, if it were necessary to decide this point, I should hold that the buyers had a cause of action under s. 14 (2). The appeal must be allowed.

SCRUTTON, L.J.—Several difficult questions have been raised, and if it were necessary to decide them all I should desire further time to consider them. Upon some of the points raised I am not sure that I should agree with my learned brothers; but I agree in the result for the following reasons.

This was an English contract in writing whereby the buyers bought 3,000 cases of sweetened full cream condensed 1919 season's milk of a quality equal to federal standard. The milk came from the United States. The price was 42s. a case c.i.f. London nett cash against documents. The documents which were tendered under this contract had reference to certain cases which had on them labels with the words "Nissly Brand." The Nestlé and Anglo-Swiss Condensed Milk Co. thought that the word "Nissly" was an infringement of their registered trade mark, and that they could stop the sale of these goods. They attacked the sellers, and the sellers, not wishing to contest the matter, admitted that the cases were an infringement of the Nestlé Co.'s trade mark, and undertook not to sell condensed milk under the title of "Nissly." Neither were the buyers prepared to fight the Nestlé Co.; and after an unsuccessful attempt to export these cases, they were driven to remove the labels and sell the goods as condensed milk unlabelled. They then sued the sellers, and BAILHACHE, J., although he felt bound to enter judgment for the sellers, has assessed the buyers' damages at £400. In this court the buyers attempted to make out a case under s. 17 of the Merchandise Marks Act, 1887; indeed, the sellers seemed to think this the most formidable line of attack against them. But that case was not made in the court below. To enable us to decide it we should want to know more about the word "Nissly," who put the labels on the tins, and what marks, if any, they had on them originally. A point which required evidence for its decision ought not to be taken for the first time in the Court of Appeal. Therefore, I exclude the claim under the Merchandise Marks Act, 1887.

The second point arose on s. 12 (1) of the Sale of Goods Act, 1893, which provides that there is an implied condition on the part of the seller that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass. The property was to pass when the documents were tendered for the cases containing the goods. The sellers impliedly warranted that they had then a right to sell them. In fact, they could have been restrained by injunction from selling them, because they were infringing the rights of third persons. If a vendor can be stopped by process of law from selling, he has not the right to sell. Therefore, the purchasers so far have made out a cause of action for breach of s. 12 (1). This subsection is to apply unless the circumstances of the contract are such as to show a different intention. Here we are in a difficulty, because the matter is uncertain. The sellers say that the contract was oral, and that the goods might be of one or more of three named brands. In my view, in a contract to sell goods of specified brands there might be circumstances showing an intention that the seller should not warrant his right to sell. If, for example, this contract had been to sell 1,000 cases of the "Nissly" brand, would the sellers then have warranted that they had a right to sell? I desire to reserve my opinion on that question. But assuming that the sellers establish that they had an option to deliver goods of the "Tuscan," "Freedom," or "Nissly" brands, they could have fulfilled their contract lawfully in two ways; if they had chosen the third way, they could have been stopped. I cannot infer from these circumstances an intention that they should not warrant their title to sell.

Upon the question whether there was an implied condition that the buyers should have and enjoy quiet possession of the goods, I wish to give no decision. In *Jones* v. *Consolidated Anthracite Collieries, Ltd.* (5), I was able to avoid defining the limits of a covenant for quiet enjoyment; fortunately, because, as I said, the conflicting authorities made the covenant difficult to construe. I say no more now. I have not been able to trace the origin or history of the condition that goods shall be of merchantable quality. If I had to express my present opinion, it is that the condition does not touch the title to the goods or the right to sell

them. I base my decision upon the implied condition in s. 12 (1), that the sellers had a right to sell the goods, that there were no circumstances in the contract to show a different intention, and that they failed to perform that condition.

It remains to consider *Monforts* v. *Marsden* (1). LORD RUSSELL, C.J., was among the great lawyers who have sat upon the English Bench, and I look upon any decision of his with great respect. He observed that s. 12 (1), although it provides for an implied condition that the vendor has a right to sell, makes no mention of any condition or warranty that the purchaser shall be able legally to use the thing sold. He further drew attention to the uncertain validity of letters patent upon which each appellate court may differ from the court below. These considerations enabled him to arrive at the decision that the vendor of a patented machine for preparing cloth did not warrant that the patent was valid, or that the purchaser should be legally entitled to work the machine. He assumed that the vendor had the right to sell the machine, and did not consider whether he might have been stopped from selling it. If he had considered that point, he must have seen the difficulty in the way of holding that a vendor has a right to sell goods which he may be restrained from selling. There is much to be said for the view of BAILHACHE, J., that the circumstances of the contract in *Monforts* v. *Marsden* (1) were such as to negative the implied condition that the vendor had a right to sell the machine, but, in so far as it decides that the vendor had fulfilled the condition, I think the decision is erroneous and should be overruled.

ATKIN, L.J.—This was an action for breach of warranty on the sale of goods. The first question is: What was the contract between the parties? In my opinion, it was contained in the two documents dated Aug. 18, 1919. Every essential term of the contract is recorded in those documents. The buyers, however, suggest that, although the documents speak of 3,000 cases, there was a term not expressed in writing that the milk to be supplied should be milk of three named brands, and that the vendors might at their option deliver milk of the "Tuscan," "Freedom," or "Nissly" brand. In my view, this suggestion is inadmissible, because the parties intended to embody the whole contract in writing, and this suggested term is inconsistent with the writing; or, if it is sought to introduce it as a collateral term, I should like to refer to the words of LORD MOULTON in *Heilbut, Symons & Co.* v. *Buckleton* (6), the last and most authoritative statement on this matter of collateral contracts ([1913] A.C. at p. 47):

> "It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you £100,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

To one who bears those words in mind it is evident that a suggestion made while the parties were discussing the terms of this contract that the milk supplied

would be of three brands is not to be regarded as a collateral term of the contract. A

Therefore, I approach this case with the view that the contract was simply and solely as contained in the documents. The goods were delivered in two instalments; 2,000 cases of the "Freedom" brand, which give rise to no difficulty; and 1,000 of the "Nissly" brand. Of these it is enough to say that they were an infringement of the Nestlé Co.'s trade mark. The infringement was admitted. The sellers gave an undertaking not to sell any condensed milk under the title of B "Nissly," and there is no doubt that if the buyers had sold these goods as delivered they would have been liable to an injunction in the terms of the undertaking given by the sellers. Before this undertaking was given, the sellers wrote to the buyers saying that the Nestlé Co. were objecting to this brand, and asking the buyers not to offer the milk for sale for the moment. In the end the buyers were obliged to remove the labels before they were able to sell the goods they had bought from C the sellers. That was the state or condition of the goods delivered under this contract.

In a contract for the sale of goods there is an implied condition that the seller has a right to sell the goods "unless the circumstances of the contract are such as to show a different intention." I think those words were inserted in s. 12 of the Sale of Goods Act, 1893, to exclude sales by a sheriff under an execution and D other cases where, by implication or by express terms, there is no warranty of title. In the present case I see no circumstances "such as to show a different intention," and, therefore, I think there was an implied condition that the sellers had a right to sell the goods within s. 12 (1). The sellers had not the right to sell these goods. They gave an undertaking not to sell them, and, having admitted that they were an infringement of the Nestlé Co.'s trade mark, they E were liable to an injunction restraining the sale. Therefore, they had no right to sell these goods at the time when the property was to pass. It may be that the implied condition is not broken if the seller is able to pass to the purchaser a right to sell, notwithstanding his own inability; but that is not so here, for the Nestlé Co. had the same rights against the buyers as they had against the sellers. In my opinion, there was a breach of this condition. F

The only doubt in my mind is raised by the judgment of Lord Russell, C.J., in *Monforts* v. *Marsden* (1). That was not a decision expressly under s. 12 of the Sale of Goods Act, 1893, because the sale took place before that Act was passed, but the Lord Chief Justice treated the Act as declaring the law at the date of sale. He said:

> "I think that all that the first implied condition as to title meant was that the man had a right to sell the thing as it was in the sense of being able to pass the property in the thing to the vendee, and in the sense that nobody had a title superior to that of the vendor, so that the possession of the vendee might be disturbed. . . ." G

The Lord Chief Justice is using the right to sell in two different senses. The right H to pass the property is one thing—and no doubt the sellers in the present case could have passed the property in the milk but for the intervention of the Nestlé Co.—but the existence of a title superior to that of the vendor, so that the possession of the vendee may be disturbed, is another thing, and there was a title superior to that of the vendor, so that the possession of the vendee could be disturbed, unless title means no more than ability to pass the property, in which I case it does not exhaust all the contingencies whereby the possession of the vendee can be disturbed. The owners of the patent had no right or ability to pass the property, but they had a right to disturb the possession of the defendant in that case. The Lord Chief Justice continued:

> "In other words, it is a warranty of good title to the thing; it is not a covenant as to the quality of the thing, as to the workability of the thing, or that the machine shall be delivered under circumstances in which the vendee should be entitled to work it."

With all respect, this is to apply to a code a wrong canon of construction. The true canon is to give full effect to the words enacted, not to read those words by the light of existing decisions, and infer from the absence of authority an intention not to amend the law. Whatever the law may have been before the passing of the Sale of Goods Act, 1893, there is, since that Act, an implied condition that the sellers shall have a right to sell the goods at the time when the property is to pass. As they had not that right, there was a breach of this condition.

I think there was also a breach of the implied warranty in s. 12 (2), that the buyer shall have and enjoy quiet possession of the goods. It may be that possession would not be disturbed if the only cause of complaint was that the buyer could not dispose of the goods, and that the warranty is confined to disturbance of possession of the goods delivered under the contract of sale. The warranty so interpreted was broken. The buyers were never allowed to have a quiet possession. They had to strip off the labels before they could take possession of the goods. Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations, and only purports to protect the purchaser against lawful acts of third persons, and against breaches of the contract of sale and tortious acts of the vendor himself. But it is unnecessary to define its scope. There was a clear breach in the present case. In considering the implied warranty in s. 14 (2), the first question is whether the sellers were sellers who deal in goods of the description of the goods bought. Upon this, the facts do not admit of a doubt. The sellers describe themselves as the Confectioners' Materials Co., Ltd. The correspondence shows that they have entered into contracts with other purchasers for similar goods. Beyond all doubt they deal in goods of this description. Then were the goods of merchantable quality? Applying the passage read by BANKES, L.J., from *Bristol Tramways, etc., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.* (2), it seems to me that these goods were in such a state or condition that no reasonable man would in the circumstances accept them in performance of an offer to buy sweetened full cream condensed milk. If he knew the real facts, he would refuse the goods on the ground that they were in such a state or condition as to expose him to an injunction. No one who knew the facts would be willing to buy them in that state or condition; in other words the goods were unsaleable and unmerchantable.

The judgment must be set aside, and judgment must be entered for the buyers. In coming to this conclusion, we are deciding as BAILHACHE, J., would have decided if he had not felt himself bound by *Monforts* v. *Marsden* (1). I agree that the argument upon s. 17 of the Merchandise Marks Act, 1887, is not open to the appellants.

Appeal allowed.

Solicitors: *William A. Crump & Son*; *Maxwell & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

Re MOORE & CO., LTD. AND LANDAUER & CO.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), March 2, 1921]
[Reported [1921] 2 K.B. 519; 90 L.J.K.B. 731; 125 L.T. 372; 37 T.L.R. 452; 26 Com. Cas. 267]

B

Sale of Goods—Description—Packing of goods not of contract description—Breach of implied condition—Waiver by buyer of condition—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 13; *s.* 30 (3).

By s. 13 of the Sale of Goods Act, 1893: "Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description . . ." By s. 30 (3): "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

C

Sellers contracted to sell to buyers tins of canned fruits in cases containing thirty tins each. The sellers tendered all the tins ordered, but about one-half of the cases contained twenty-four tins to the case only, instead of thirty. There was no difference in the market value of the goods whether packed twenty-four or thirty tins to the case.

D

Held: the contract was for the sale of goods by description, and under s. 13 there was an implied condition that the goods should correspond with the description; it was part of the description that the goods should be packed thirty tins to a case, and so the sellers were in breach of the implied condition; they had also delivered to the buyers goods which they had contracted to sell mixed with goods of a wrong description within s. 30 (3); and, therefore, the sellers were entitled to reject the whole of the goods tendered and not merely the goods which were not of the contract description.

E

Decision of Rowlatt, J., [1921] 1 K.B. 73, affirmed.

Semble: a buyer may waive the implied condition as to description, even (per Atkin, L.J.) before he has had examination of the goods.

F

Notes. Referred to: *Ballantine & Co.* v. *Cramp and Bosman*, [1923] All E.R.Rep 579; *Barker (Junior) & Co., Ltd.* v. *Ed. T. Agius, Ltd.* (1927), 43 T.L.R. 751.

As to sales by description, see 29 Halsbury's Laws (2nd Edn.) 59–62; and for cases see 39 Digest 432–438. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

G

Cases referred to:

(1) *Panoutsos* v. *Raymond Hadley Corpn. of New York*, [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330; 33 T.L.R. 436; 61 Sol. Jo. 590; 22 Com. Cas. 308, C.A.; 39 Digest 467, *924*.

H

(2) *Makin* v. *London Rice Mill Co., Ltd.* (1869), 20 L.T. 705; 17 W.R. 768; 39 Digest 438, *673*.

(3) *Manbre Saccharine Co.* v. *Corn Products Co.*, [1919] 1 K.B. 198; 120 L.T. 113; sub nom. *Mambre Saccharine Co.* v. *Corn Products Co.*, 88 L.J.K.B. 402; 35 T.L.R. 94; 24 Com. Cas. 89; 39 Digest 576, *1807*.

I

Appeal by the sellers from the judgment of Rowlatt, J., on an award in the form of a Special Case.

By a contract of June 14, 1919, the sellers, Moore & Co., Ltd., sold to the buyers, Landauer & Co.,

"about 3,100 cases Australian canned fruits consisting of about 2,500 dozen 30/2½ nominal tins Vickar pears at 27s. 6d. per dozen, 240 dozen 30/2½ nominal tins apricots at 27s. 6d. per dozen, 2,358 dozen 30/2½ nominal tins plums at 27s. 6d. per dozen, 964 dozen 30/2½ nominal tins Bartlett pears at 27s. 6d. per

dozen, 1,745 dozen 30/2½ nominal tins apples at 23s. per dozen, shipped per steamship *Toromeo*."

In the above contract "30/2½ nominal tins" meant thirty tins in a case, each tin being of the nominal weight of 2½ lb. The goods were shipped on board the *Toromeo* at Hobart in May, 1919. As to about one-half of the cases, each case contained twenty-four tins only; the remainder of the cases contained thirty tins each. On the goods being tendered the buyers refused to take delivery on certain grounds, the one material to this report being that they were entitled to reject the whole consignment because half of the cases contained only twenty-four tins each instead of thirty. The dispute was referred to arbitration, and the umpire made his award in favour of the sellers, subject to the opinion of the court on the question (so far as material), "whether in law under the contract of June 14, 1919, the buyers are bound to accept any goods packed twenty-four tins in a case, and if not whether, the apricots, plums, and Bartlett pears having been tendered so packed, the buyers can reject the whole tender, or must accept that part of it which comprises the Vickar pears and the apples packed in cases of thirty tins." He found that there was no difference in the market value of the goods whether they were packed twenty-four tins or thirty tins in a case, and that the goods tendered were in this respect a good delivery. ROWLATT, J., held that on the construction of the contract the buyers were entitled to say: "We must have the goods packed in the way we have contracted for." A buyer might have good reasons for preferring to have goods packed in a particular way, and he (his Lordship) could not see on what grounds it could be said that he was bound to take them if packed in another way. The fact that in this particular case their value on the market, so packed, was unaffected made no difference. On the further point whether the buyers were entitled to reject the whole consignment, or were bound to take those cases which were packed in accordance with the contract, they were not bound to accept the latter. By s. 30 (3) of the Sale of Goods Act, 1893, if the goods delivered were mixed with other goods the buyer was entitled to reject all or accept all or part. The words "mixed with" could not refer to physical confusion, but were equivalent to "accompanied by." The sellers appealed.

Sir John Simon, K.C., *Stuart Bevan, K.C.*, and *H. H. Joy* for the sellers.
Montgomery, K.C., and *Costello*, for the buyers, were not called on to argue.

BANKES, L.J.—This is an appeal from a decision of ROWLATT, J., on a Special Case. The dispute between the parties arose in these circumstances. The buyers entered into a contract for the purchase of a quantity of canned fruits afloat. The contract described the goods as being 3,100 cases Australian canned fruits consisting of a certain number of dozens of pears, a certain number of dozens of apricots and plums and Bartlett pears and apples. All the dozens were described as being thirty tins to a case.

The first question which arises is in reference to the construction of that contract. In my opinion, it is a contract for the sale of goods by description, and it is part of the description of the goods that they are packed thirty tins to the case. The goods were delayed for an inordinate length of time owing, apparently, to labour troubles at the places at which the vessel called. They did not arrive in London at St. Katherine's Dock until some time in January, 1920. The discharge commenced on Feb. 6. On Feb. 10 an invoice was sent, which is dated back to the date of the contract, in which it appears that anybody who looked at the invoice carefully would find that a substantial part of these purchases were packed, not thirty tins to the case, but twenty-four tins to the case. The buyers made no reference to that fact at the time, but on the day after the receipt of the invoice they made a request for the examination of the goods, to which they were entitled. The examination was arranged for and took place. It was completed on or before Feb. 25. On that date the sellers requested the buyers to take up the delivery order. After a lapse of some days the buyers refused to take delivery of

the goods, on the ground that they were not in accordance with the contract. They did not at that time specifically mention the objection that the goods were to a large extent packed not thirty tins to a case. As far as the evidence goes as disclosed by the Special Case, the buyers kept this objection to themselves until the arbitration proceedings were commenced. The buyers raised two questions. One had reference to what was said to be the unreasonable delay that had occurred between the date of the contract and the date when the goods were tendered. I need not say anything with reference to that. The second point was stated in these words: "Whether in law, under the contract of June 14, 1919, the buyers are bound to accept any goods packed twenty-four tins in a case, and, if not, whether, the apricots, plums and Bartlett pears having been tendered so packed, the buyers can reject the whole tender, or must accept that part of it which comprises the Vickar pears and apples packed in cases of thirty tins."

That question of law, in my opinion, admits of a very simple answer. If it is true to say, as I think it is, that this is a sale of goods by description, and the statement in the contract that the goods were packed thirty tins to a case is part of the description, then there is by operation of law an implied condition that the goods should correspond to that description. That is the effect of s. 13 of the Sale of Goods Act, 1893. It follows, therefore, that these goods did not correspond with the description. One has to look at s. 30 (3) to see what is the effect of that. That subsection provides that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods in accordance with the contract and reject the rest, or he may reject the whole. That is his position as defined by the Sale of Goods Act. Therefore, the question of law, as stated by the arbitrator, as it seems to me, admits of only one answer.

Our attention has been called to two cases. One is *Panoutsos* v. *Raymond Hadley Corpn. of New York* (1). That was a case where there was a contract for the sale and shipment of a very large number of tons of flour providing that each shipment should be deemed a separate contract and that payment should be confirmed by bankers' credits. It appears that a number of shipments had been made, and that the seller had not insisted upon the performance of that part of the contract which related to the method of payment and a number of shipments had been made in respect of which the seller had obviously waived that condition which was a condition in his favour. Then came a time when he in reference to one shipment insisted upon his rights. The question which the court had to decide there was what was the position of the parties, having regard to the fact that the seller had admittedly waived the condition in reference to all previous shipments. The contention for the buyers was that, having once waived the condition, he had waived it for the whole period of the contract. On the other hand, it was said that the waiver had reference only to those particular shipments in respect of which there had been a waiver. The court held that, if the seller had by his conduct in reference to the shipments that had been made led the buyer to believe that he was going to adopt that course in reference to all shipments, then, if he changed his mind, he must give notice. That point does not affect this case at all, because in that case the waiver had been found by the learned judge. Here there is no finding of a waiver. The other case was *Makin* v. *London Rice Mill Co., Ltd.* (2). Our attention was called to what the learned judges said in that particular case, where the contract was for the sale of rice in double bags. All that appears from the judgment there was that in that case the judges wished to know what had taken place at the trial in reference to any evidence which had been given either one way or the other as to the importance from the trade point of view of rice being packed in this kind of bag. It may be that it was very important in those days to ascertain that fact, but here, it appears to me, it is plain upon the facts of the contract in the present case that the packing of these goods was part of the description of the goods. In those circumstances it is not a case in which it is necessary to inquire whether in the trade it was considered a

matter of vital importance, or whether it really affected the market value. If I am right in saying that on the face of the contract it appears to be part of the description of the goods, then any inquiry such as was made in the case to which attention was called becomes immaterial. For these reasons I think this appeal must be dismissed with costs.

SCRUTTON, L.J.—In this case sellers sold to buyers about "3,100 cases of Australian canned fruits consisting of about" and then follow five items, of which the first is 2,500 dozen 30/2½ nominal tins Vickar pears at 27s. 6d. per dozen. We are informed that 30/2½ means thirty tins in a case, each tin being of a nominal weight of 2½ lb. When the goods arrived, the sellers tendered 698 cases, thirty tins to the case, and 781 cases twenty-four tins to the case, making in all a tender of 1,479 cases. The buyers, who rejected without giving a reason, at the arbitration gave as one of their reasons that they were not bound to accept such part of the tender as was thirty tins in a case. In view of the provisions of s. 30 of the Sale of Goods Act, I should have thought that the buyers were clearly right. One may adopt as one's own the language in which McCARDIE, J., dealt with a point of this sort in *Mambre Saccharine Co.* v. *Corn Products Co.* (3), where the contract was for the sale of starch in 280 lb. bags, price so much per hundredweight, and the seller tendered 220 lb. bags and 140 lb. bags. McCARDIE, J., said:

> "In my opinion it is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods. The size of the bags may be important to a purchaser in view of sub-contracts or otherwise. A man may prefer to receive starch either in small or large or medium bags. If the size of the bags was immaterial, I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of goods will suffice for the purposes of the purchases. The tender by the defendants of starch in bags other than 280 lb. bags was a failure to comply with their contract."

In this case for some reason the sellers and buyers have put into their contract: "About 3,100 cases, with thirty tins to the case." They have put that in as a description, and that is what the seller must tender to the buyer. The arbitrator finds that twenty-four tins to the case are as valuable commercially as thirty tins to the case. That may be so. Yet a man who has bought under contract thirty tins to the case may have sold under the same description, and may be put into considerable difficulty by having goods tendered to him which do not comply with the description under which he bought, or under which he had re-sold. On that point I think the arbitrator was clearly wrong, and that ROWLATT, J., was clearly right.

When the goods were delivered the buyers said nothing, but had a 10 per cent. examination of the tins, and at the end of that examination they rejected them without giving any reason, which, in my opinion, has the same effect as though they had stated a reason which was ultimately found to be a good one. It is said that saying nothing when they got the invoice, and having the examination without raising the objection amounted to a waiver of the objection based on description. I cannot see there is any evidence on which, if that point had been put to the arbitrator, he would have been entitled to find a waiver. I think ROWLATT, J.'s decision was right, and that the appeal should be dismissed.

ATKIN, L.J.—I quite agree. It appears to me, if this transaction were considered apart from any question of variation of the original contract by some waiver, that the matter is beyond dispute, because the stipulation that there should be two and a half dozen in a case is part of the description of the goods. There was, therefore, an implied condition that the goods when tendered should correspond with the description, and it appears to me that that condition was broken, and there was a right to reject. It would be impossible by reason of s. 30

of the Sale of Goods Act, to insist upon the buyer accepting so much of the goods tendered as happened to conform to the description. I think he was entitled to reject the whole. The only question that does give rise to a dispute is whether or not the buyer waived compliance with the condition of the contract as to the goods being packed two and a half dozen to the case. I do not wish to be taken as deciding that in no circumstances can the buyer waive a condition as to description even before he has had examination of the goods. I think it may well be that if one particular defect in the goods is present, or one particular respect in which the goods fail to conform with the contract comes to his notice before he has had the full examination that he is entitled to, he may by his conduct induce the sellers to believe, and act upon their belief, that that condition with that defect will not be relied upon by the buyer, and that he will accept the goods, if they are otherwise in accordance with the contract, notwithstanding the defect. But it is a question of fact in every case.

Appeal dismissed.

Solicitors: *Morgan Veitch & Bilney*; *F. C. Matthews & Co.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

Re GOOCH. Ex parte JUDD

[Court of Appeal (Lord Sterndale, M.R., Warrington and Scrutton, L.JJ.), December 17, 20, 1920, February 15, 1921]

[Reported [1921] 2 K.B. 593; 90 L.J.K.B. 932; 125 L.T. 583; [1921] B. & C.R. 100]

Bankruptcy—Receiving order—Petition founded on judgment debt—Right of court to ascertain whether good debt to support judgment.

Bill of Exchange—Endorsement—Endorsement by drawer below that of surety—Agreement that surety would be liable on bill—Negotiation of bill—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *ss.* 20, 29, 55 (2).

In November, 1919, J. supplied goods to a company, in payment for which the company accepted a bill of exchange for £450, drawn by J. on the company, and endorsed by G., the managing director thereof and another person. The bank at which J. had an account discounted the bill, but it was dishonoured at maturity, as G. wished to raise a defence and counterclaim against J. The bank, however, insisted upon payment, so an agreement was come to between the bank, J., and G., whereby £100 was paid to the bank by the company in cash, and two bills for £175 each were to be given, drawn upon and accepted by the company. One was not a complete bill; it purported to be drawn on and accepted by the company and G.'s name was written on it as endorser. J. filled in his name as drawer, and also endorsed the bill as payee, but in doing so he signed his name below, instead of above, that of G. The bill having been dishonoured at maturity, the bank debited J.'s account with the amount and returned the bill to him. J. sued the company and G. for the amount, and, having recovered judgment, presented a petition in bankruptcy against G., founded on the judgment debt, and a receiving order was made against him.

Held: (i) in considering whether to make a receiving order the county court registrar was at liberty to go behind the judgment and see whether there was a good debt to support it; (ii) there being an agreement by G. that he should be liable on the bill and consideration moving from J. which would support the

A agreement, and J. having authority under s. 20 of the Bills of Exchange Act, 1882, and by agreement with G. to fill in his name as drawer and payee, G. could not have set up any defence against him arising out of circuity of action because of the fact that he was the drawer; (iii) in view of those circumstances and the fact that the bill had been negotiated to the bank, the wrong position of J.'s signature on the bill did not invalidate it, and, therefore, J.
B had a good claim on the bill and the receiving order against G. was rightly made.

M. T. Shaw & Co., Ltd. v. *Holland* (1), [1913] 2 K.B. 15, distinguished.

Per SCRUTTON, L.J.: By s. 55 (2) (c) of the Act of 1882 G., as endorser of the bill, was precluded from denying to J., a subsequent endorsee, that the bill was at the time of his (G.'s) endorsement a valid and subsisting bill.

C **Notes.** Applied: *Gerald McDonald & Co.* v. *Nash & Co.*, [1924] All E.R.Rep. 601; *National Sales Corpn., Ltd.* v. *Bernardi, Bernardi* v. *National Sales Corpn., Ltd.*, [1931] 2 K.B. 188; *McCall Bros., Ltd.* v. *Hargreaves*, [1932] All E.R.Rep. 854.

As to receiving orders in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 313 et
D seq.; and for cases see 4 DIGEST (Repl.) 169 et seq. For liability of endorser of a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 216, 217; and for cases see 6 DIGEST 308, 309, 312, 313. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *M. T. Shaw & Co., Ltd.* v. *Holland*, [1913] 2 K.B. 15; 82 L.J.K.B. 592; 108
E L.T. 543; 29 T.L.R. 341; 18 Com. Cas. 153, C.A.; 6 Digest 314, *2096*.

(2) *Wilkinson* v. *Unwin* (1881), 7 Q.B.D. 636; 50 L.J.Q.B. 338; 46 L.T. 123; 29 W.R. 458, C.A.; 6 Digest 203, *1248*.

(3) *Glenie* v. *Bruce Smith*, [1907] 2 K.B. 507; sub nom. *Glenie* v. *Tucker*, 76 L.J.K.B. 874; 97 L.T. 434; 23 T.L.R. 596; affirmed sub nom. *Glenie* v. *Bruce Smith*, [1908] 1 K.B. 263; sub nom. *Glenie* v. *Tucker*, 77 L.J.K.B.
F 193; 98 L.T. 515; 24 T.L.R. 177, C.A.; 6 Digest 314, *2097*.

(4) *Jenkins & Sons* v. *Coomber*, [1898] 2 Q.B. 168; 67 L.J.Q.B. 780; 78 L.T. 752; 47 W.R. 48; 14 T.L.R. 425; 6 Digest 314, *2095*.

(5) *Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754; 43 L.T. 358; 29 W.R. 17, H.L.; 6 Digest 313, *2092*.

G Also referred to in argument:

Re Lennox, Ex parte Lennox (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest (Repl.) 170, *1566*.

Appeal by the debtor, Charles Gooch, from an order of the Divisional Court
H (HORRIDGE and ROCHE, JJ.).

The facts are summarised in the headnote. The Divisional Court held that the registrar was right in finding that the debtor endorsed the bill incurring liabilities in the ordinary way and in such circumstances that the petitioning creditor, one Judd, was not precluded from suing as endorser because of his own liability, if the circumstances had been different, to pay the first endorser because
I he was drawing. The debtor appealed.

By the Bills of Exchange Act, 1882, s. 20:

"Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit."

By s. 55 (2):

"The endorser of a bill by endorsing it—(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; (c) Is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title thereto."

Clayton, K.C., and *Morle* for the debtor.
Hildersley for the petitioning creditor.
E. W. Hansell for the Official Receiver.

Feb. 15. The following judgments were read.

Cur. adv. vult.

LORD STERNDALE, M.R.—This appeal from a decision of a Divisional Court raises a difficult question as to the law of bills of exchange.

The bankruptcy petition was founded on a judgment debt, but the registrar held that, in the circumstances, he ought to go behind the judgment, and inquire whether there was, apart from it, a good petitioning creditor's debt. It is not disputed before us that this course was correct. The facts are as follows. The debtor, Charles Gooch, was largely interested in, and the managing director of, a company called Cardbox, Ltd. In November, 1919, the petitioning creditor, who traded under the name of F. E. Judd & Co., supplied goods to the company, for which he received a bill accepted by the company for £450. His bank refused to discount this bill because the company's assets were covered by a debenture, and he obtained the endorsement of the debtor. The bank then discounted the bill which was dishonoured at maturity. The registrar held, that in fact there was no consideration for the endorsement as between the petitioning creditor and the debtor. I accept this finding without expressing any opinion whether it was correct or not. The bill was not met at maturity because the debtor wished to raise a defence and counterclaim against the petitioning creditor. This, however, was no defence against the bank, which insisted on payment. An agreement was then made, which is thus described by the bank manager: "The said Mr. Wild (who acted as solicitor both for Cardbox, Ltd., and for Gooch) called again a few days later and asked whether the bank would accept £100 and renew for balance by two bills, at one and two months respectively, at £175 each, which bills would be by same parties as the £450 bill. I said I must refer to my customers, and he left. I telephoned Judd & Co., and told Mr. Judd the proposal, and he said he would accept it, but must have the name of Gooch on the back of the two bills, and his firm must not be charged with any expenses. I telephoned Mr. Wild that the bank and Judd would accept the offer made, on condition that Mr. Gooch must personally endorse the bills, and that all charges—that is, accrued interest on the unpaid bill, and charges for discounting the new bills—must be paid by his clients. On Feb. 27 Mr. Wild brought me a cheque of Cardbox, Ltd., on Lloyds Bank for £100, and two bills of £175 each, accepted by Cardbox, Ltd., and endorsed by Gooch, for F. E. Judd & Co. to draw, and gave me his own cheque for accrued interest and discount charges of the new bills." It was, of course, important for the debtor to avoid proceedings against the company, which would have followed either by the bank or by the petitioning creditor if he took up the bill for £450. It has been held by the registrar and by the Divisional Court that there was an agreement by the debtor that he should be liable on the bill and that there was consideration moving from the petitioning creditor which would support that agreement. I agree with that finding.

It is upon one of these bills for £175 that the petitioning creditor founds his claim. When taken to the bank, it was not a complete bill, but purported to be

drawn upon and accepted by the company, and the debtor's name was written on the bill as endorser. It was so brought by the solicitor acting for the debtor and the company—as the bank manager says, for the petitioning creditor to draw. He filled in his name as drawer, and also endorsed it as payee, but unfortunately he signed his name below, instead of above, that of the debtor. When the bill became due, it was presented to the company as acceptors and dishonoured. The bank debited the petitioning creditor's account and returned the bill to him. He then made a claim upon the debtor and obtained the judgment, and the question is whether he has a good claim. But for the unfortunate misplacing of his name, I think there would be no doubt about the petitioning creditor having a good claim, and I cannot see any merits in the debtor's defence, but the question of law is a difficult one.

I think that, in the circumstances, the petitioning creditor had authority under the Bills of Exchange Act, 1882, s. 20, to fill in his name as drawer and as payee, and by reason of the agreement between him and the debtor, the latter could not, according to the authority of *Wilkinson* v. *Unwin* (2), have set up any defence against him arising out of circuity of action because of the fact that he was drawer. The difficulty arises from the mistake made by the petitioning creditor in signing his name as payee and endorser below, instead of above, that of the debtor, and it was argued that for that reason the bill was irregular, and could not be sued upon. The same state of things existed in one of the bills sued upon in *Glenie* v. *Bruce Smith* (3). A. T. Lawrence, J. in dealing with it, said ([1907] 2 K.B. at p. 512):

> "I think the bill for £124 11s. must be read with the other as though endorsed to the defendant by the drawer and re-endorsed by the defendant to the deceased for value received in the shape of pigs sold to the former pursuant to his request."

In the Court of Appeal, the judgment of A. T. Lawrence, J., was affirmed, and no distinction was made between the bills, and, therefore, I think it must be taken that the whole of his judgment was approved. The debtor, however, relied very strongly on *M. T. Shaw & Co., Ltd.* v. *Holland* (1), before Hamilton, J., and the Court of Appeal, where it was held that a bill endorsed, as in the present case, by the drawer, below the name of the person sought to be made liable, was not a regular bill, and could not be sued upon by the drawer. There are, however, points of distinction between that case and the present. In the first place, no agreement by the endorser to be liable on the bill was found to exist, nor was there found any agreement by which the drawer was authorised to fill up the bill, such as exists here. Again, in that case the bill had not been negotiated. In this case it was negotiated to the bank, and I do not think that the petitioning creditor, as against the bank, could have set up a defence that there was no order by him to pay, and that the bill was, therefore, irregular. Then, when the bill came to maturity, it was met by the petitioning creditor, and handed to him by the bank. He then held the bill thus negotiated to him by the bank with the debtor's endorsement in blank upon it, and became a subsequent endorsee to the debtor. Judging by what was said by Vaughan Williams, L.J., in *M. T. Shaw & Co., Ltd.* v. *Holland* (1) ([1913] 2 K.B. at p. 27), he would have decided that case differently if the bill had been negotiated, and would have considered it as a case of endorsements being in wrong order.

I think for these reasons that the present case is distinguishable from *M. T. Shaw & Co., Ltd.* v. *Holland* (1), and is within the authority of *Glenie* v. *Bruce Smith* (3), and that the petitioning creditor had a good claim upon the bill. If the petitioning creditor became, when the bill was handed to him by the bank after payment, a subsequent endorsee to the debtor, the latter is, by the Bills of Exchange Act, 1882, s. 55 (2), estopped from denying, as against him, that the bill is a valid subsisting bill, and that he had a good title thereto. I think, therefore, that this appeal should be dismissed with costs.

WARRINGTON, L.J.—I agree with the registrar and Divisional Court that

there was consideration moving from Judd, sufficient to support the agreement under which the debtor endorsed this bill. The latter was deeply interested in the company, and I think there is enough to support the view that he joined in the new transaction by giving his name on the back of the new bills in consideration of the abstention by Judd from taking up the bill for £450, and making it the foundation of an action against the company, or of proceedings in winding-up. I confess to having felt great doubt as to the true nature of the agreement, as between the debtor and Judd, to be inferred from the facts, but I am now satisfied that the views expressed by the other members of the court are correct, and that the debtor must be held to have agreed with Judd to be liable to him on this bill for £175 should he become the holder of it, and, but for the unfortunate fact that Judd wrote his name as payee in the wrong place, the debtor would have had no defence: see *Wilkinson* v. *Unwin* (2). If this be the true view, then I think the case falls within the decision in *Glenie* v. *Bruce Smith* (3) rather than within that of *M. T. Shaw & Co., Ltd.* v. *Holland* (1). Moreover, I think the bill was negotiated to the bank and was afterwards taken up by Judd on its not being met at maturity, and it seems that if these facts had been present in *M. T. Shaw & Co., Ltd.* v. *Holland* (1), the judgment of VAUGHAN WILLIAMS, L.J., in that case would have been in favour of the appellants. On the whole, then, I agree that this appeal must be dismissed.

SCRUTTON, L.J.—One F. E. Judd attempted to make a debtor bankrupt for non-payment of a judgment debt. The county court registrar held quite correctly that he was at liberty to go behind the judgment and see whether there was a good debt to support it. He held that there was, and the Divisional Court affirmed his decision. The debtor now appeals to us, and the appeal raises a difficult question of mercantile law.

The debtor has no commercial merits. From a business point of view he ought to pay, and from a business point of view that he should even take the point which causes the difficulty is very unmeritorious. But he has a right to the point, if it is legally good, and the relevant decisions of the Court of Appeal make the determination whether the point is a good one, difficult to arrive at. There are strong grounds for saying that the judge and Court of Appeal who decided *Glenie* v. *Bruce Smith* (3) would have decided against him. There are some grounds for saying that the judge and Court of Appeal who decided *M. T. Shaw & Co., Ltd.* v. *Holland* (1) would have decided in his favour. If Judd had written his name above, instead of below, the debtor's, there would, I think, have been no difficulty. Section 20 of the Bills of Exchange Act, 1882, would have given the person in possession of the bill primâ facie authority to fill up the omission of any material particular in any way he thought fit, and as the debtor had clearly intended to make himself liable to Judd and the bank in a complete bill, he could not have disproved the authority. The bill was wanting in the drawer's name, and in the order of the payee to pay, and Judd might have filled in both of these. This view appears to be justified by *Glenie* v. *Bruce Smith* (3). Further, it would not be possible, when Judd, as holder and subsequent endorser, sued the debtor as prior endorser, for the debtor to reply that Judd was also drawer, and that, therefore, if he paid Judd as subsequent endorser, he could in turn sue Judd as drawer and prior endorser. *Wilkinson* v. *Unwin* (2) and the earlier cases cited in the judgments therein show that if the relations between the prior parties are such that the second could not sue the first, the fact that the third party is also the first is no answer for the second party when sued by the third.

The trouble arises from the fact that Judd did not write his name as an order to pay before the debtor's name, but after it; on this, the position of the authorities is peculiar. In *Glenie* v. *Bruce Smith* (3) one of the two bills had the same defect. A. T. LAWRENCE, J., dealt with it in his judgment apparently by treating the endorsement by the drawer as equivalent to a prior order to pay. The Court of Appeal, although the point, being mentioned in the judgment of the

judge below, must have been before them, do not treat it as making any difference in the drawer's claim. In this case, as the signatures alone were on the bill when handed to the intended drawer, s. 20 of the Bills of Exchange Act, 1882, was clearly applicable. In *M. T. Shaw & Co., Ltd.* v. *Holland* (1), however, the bill was drawn and accepted before the two endorsees put their names on the back, but when they did so, the drawer had not put his endorsement on the back by way of order to pay. HAMILTON, J., found that *Jenkins & Sons* v. *Coomber* (4), where the facts were similar, was recognised as good law in *Glenie* v. *Bruce Smith* (3), because s. 20 of the Bills of Exchange Act, 1882, did not apply to *Jenkins & Sons* v. *Coomber* (4). The reason why it did not apply was that any authority to complete, by inserting the missing order to pay, had not been complied with. The Court of Appeal adopted the reasons of HAMILTON, J. If this cannot be distinguished, the Court of Appeal in *Glenie* v. *Bruce Smith* (3) ought to have decided the case of the second bill the opposite way to that in which they did decide it. And just as the first Court of Appeal said nothing about the point, the second Court of Appeal said nothing about the contrary decision in *Glenie* v. *Bruce Smith* (3), although the point was argued before them.

What differences are there between the present case and *M. T. Shaw & Co., Ltd.* v. *Holland* (1)? In the first place, HAMILTON, J., declines to find any agreement by the endorsers that the drawers shall add anything necessary to make the bill a regular and complete bill of exchange, on which the endorsers might be sued as endorsers. I think it is clear that such an agreement should be implied in this case. LORD WATSON in *Steele* v. *M'Kinlay* (5) said (5 App. Cas. at p. 782):

> "No doubt a proper endorsement can only be made by one who has a right to the bill . . . [and here the debtor, having no order to pay from the drawer, had no right to the bill]. But it is perfectly consistent with the principles of the law merchant that a person who writes an endorsement with intent to become a party to a bill, shall be held—notwithstanding he has not and therefore cannot give any right to its contents—to be subject, as in a question with subsequent holders, to all the liabilities of a proper endorser."

Secondly, the bill in *M. T. Shaw & Co., Ltd.* v. *Holland* (1) was not negotiated. As VAUGHAN WILLIAMS, L.J., pointed out ([1913] 2 K.B. at p. 27):

> "This is not a case of a bill in which endorsements appear to be simply in wrong order; it is a case in which the bill was never negotiated."

"Negotiation" is transference from one person to another in such a manner as to constitute the transferee the holder of the bill: see s. 31 (1) of the Bills of Exchange Act, 1882. It seems to be clear that when Judd filled in the name of the drawer and put his name on the back of the bill, he negotiated it to the bank, and, in a claim by the bank against him on the bill, could not have replied that the bank had no complete bill, for there was no order to pay. As the bank negotiated the bill back to Judd, when he paid them their claim, Judd is a subsequent endorsee, that is, holding under the debtor's endorsement in blank, and in that capacity sues his prior endorser. If there had been negotiations in *M. T. Shaw & Co., Ltd.* v. *Holland* (1) apparently VAUGHAN WILLIAMS, L.J., would have dealt with the wrong order of endorsements in the same way as A. T. LAWRENCE, J., did in *Glenie* v. *Bruce Smith* (3). At any rate, s. 31 (4) of the Bills of Exchange Act, 1882, would give the bank the same title as the drawer, and the right to have the endorsement of the transferor. Further, by s. 55 (2) (c) of that Act, the endorser of a bill, by endorsing it, is precluded from denying to a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto. Now, the debtor intended to be an endorser, giving authority to his drawer to fill in the bill as a regular bill. I think the Act estops him from denying to his subsequent endorsee, Judd, who holds because of the debtor's endorsement in blank—not, it is to be noted, to "a holder in due course" as in s. 55—that the bill, when he endorsed it, was " a valid and subsisting bill."

With these points of difference, and sections of the Act not considered, I think I am at liberty to exercise my own judgment between the contradictory decisions in *Glenie* v. *Bruce Smith* (3) and *M. T. Shaw & Co., Ltd.* v. *Holland* (1). In my view, the debtor clearly intended and contracted to make himself liable as endorser for good consideration moving from Judd. He did so not merely as surety for Cardbox, Ltd., but as a person interested in that company; the consideration being time given to that company and to himself as a person interested in it. Judd's signature, which would make the debtor liable as endorser, is on the bill, although in the wrong place, and I think there is every reason to enforce the statutory estoppel against the debtor's denying to Judd, a subsequent endorsee, that it was a good bill which he endorsed to him. For that is what the debtor wants to say—namely, that the bill he endorsed was a bad bill at the time he endorsed it—and obtained time to pay by so doing. The judges below arrived at the same result by applying the doctrine of *Wilkinson* v. *Unwin* (2) to the case, and did not expressly deal with the point as to the order of the endorsements, it may be because it was not argued before them so clearly or forcibly as it was argued before us. While the case is a difficult one, by reason of the decisions, there is no business difficulty in it. The debtor, to get time, by his solicitor, presents an incomplete bill, and takes advantage of a possible error in filling it up to attempt to escape from liability for a sum for which he clearly intended to make himself liable, and which, from a business point of view, he ought to pay. I am pleased to decide the point against him. This appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *A. F. V. Wild*; *F. H. Munby*; *Solicitor to the Board of Trade.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

R. *v.* EDITOR OF "DAILY MAIL." Ex parte FARNSWORTH

[King's Bench Division (Coleridge, Avory and Salter, JJ.), January 19, 20, 1921]

[Reported [1921] 2 K.B. 733; 90 L.J.K.B. 871; 125 L.T. 63; 37 T.L.R. 310]

Contempt of Court—Court-martial—Jurisdiction of King's Bench Division to punish—Publication of sentence passed on accused and defamatory matter relating to him before confirmation of sentence—Army Act, 1881 (44 & 45 *Vict., c.* 58), *s.* 52 (1), *s.* 126 (3).

The King's Bench Division has an inherent jurisdiction to punish by attachment or fine a contempt of a court-martial by a civilian. This is a general jurisdiction, and is not confined to cases where the president of the court-martial has certified the offence under s. 126 (3) of the Army Act, 1881 [now s. 101 of the Army Act, 1955].

By s. 52 (1) of the Army Act, 1881: "An oath shall be administered . . . to every member of every court-martial . . . in the following form," inter alia that he would not "divulge the sentence of the court until it is duly confirmed." [See now Army Act, 1955, and Rules of Procedure (Army), 1956 (S.I., 1956, No. 162), rr. 28–30, 31 (1), 34].

A newspaper published what purported to be an account of court-martial proceedings, and, before the sentence came before the confirming authority, stated that a sentence of two years' imprisonment had been passed. In fact such a sentence had been passed, but the confirming authority reduced it to eighteen months' imprisonment. The account also contained statements

defamatory of the accused of which no evidence was given before the court-martial.

Held: it was no answer to a rule nisi for attachment granted to the accused that the confirming authority had not been influenced by what was published; the editor of the newspaper had been guilty of contempt and would be fined.

Notes. Considered: *R.* v. *Editor, etc., of "Daily Herald" and Davidson, Ex parte The Bishop of Norwich, R.* v. *Editor, etc., of "Empire News" and Davidson, Ex parte The Bishop of Norwich*, [1932] All E.R. Rep. 516.

As to courts-martial, see 28 HALSBURY'S LAWS (2nd Edn.) 593–598; and for cases see 16 DIGEST 11, 12, and 39 DIGEST 341, 342. For Army Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 443.

Cases referred to:

(1) *R.* v. *Davies*, [1906] 1 K.B. 32; 75 L.J.K.B. 104; 54 W.R. 107; 50 Sol. Jo. 77; sub nom. *R.* v. *Davies, Ex parte Hunter*, 93 L.T. 772; 22 T.L.R. 97, D.C.; 16 Digest 11, *43*.

(2) *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508; 89 L.J.Ch. 417; 122 L.T. 691; 36 T.L.R. 600; 64 Sol. Jo. 513, H.L.; 17 Digest (Repl.) 437, *91*.

Rule Nisi for an order of attachment against the editor of the "Daily Mail" for contempt of court.

On Dec. 8, 1920, the applicant for the rule, one Farnsworth, was tried by a general court-martial for desertion and loss of kit, and, subject to confirmation, the court-martial found that he was guilty and decided that he should be imprisoned for two years with hard labour. On Dec. 14, before the finding had been confirmed or dealt with by the confirming authority, the "Daily Mail" published a statement that a sentence of two years' hard labour had been passed upon the applicant, and the newspaper also made with regard to him some statements of which no evidence had been given before the court-martial. The members of the court-martial were bound by an oath of secrecy until after confirmation, and the newspaper reporter, who was present at the court-martial, must have obtained the information by surreptitious means. On Dec. 20 the confirming authority reduced the sentence to eighteen months' imprisonment, and on Dec. 21 the finding and sentence were promulgated. On Dec. 21 this rule was obtained, and on Dec. 23 a certificate was obtained by the applicant from the president of the court-martial under s. 126 (3) of the Army Act, 1881.

By the Army Act, 1881, s. 126 (3) [see now Army Act, 1955, s. 101]:

> "Where a person not subject to military law is guilty of any contempt towards a court-martial, by using insulting or threatening language, or by causing any interruption or disturbance in its proceedings, or by printing observations or using words calculated to influence the members of or witnesses before such court, or to bring such court into disrepute, the president of the court-martial may certify the offence of such persons, under his hand, to any court of law in the part of Her Majesty's Dominions where the offence is committed which has power to commit for contempt, and that court may thereupon inquire into such alleged offence, and after hearing any witnesses that may be produced against or on behalf of the person so accused, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of such person in like manner as if he had been guilty of contempt of that court.

Sir Edward Carson, K.C., and *H. M. Giveen* showed cause against the rule.
C. M. Kohan in support of the rule.

COLERIDGE, J.—The question is whether an attachment or other process should be issued against the editor of the "Daily Mail" for contempt in publishing on Dec. 14, 1920, words relating to the applicant calculated to interfere with the

due administration of justice in a court-martial where the applicant was the party accused. A

The first point is whether the court has any inherent jurisdiction over courts-martial in the matter of contempt. We were referred to an ancient authority, HAWKINS' PLEAS OF THE CROWN, which in book 2, ch. 3, s. 3, contains this language: B

> "It is certain that this court is entrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanours whatsoever of a public nature tending either to a breach of the peace or to the oppression of the subject."

In s. 4 it declares: C

> "This court being the custos morum of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as suitable to the heinousness of it."

That this court will exercise its power over such a court as a court-martial in regard to no jurisdiction or excess of jurisdiction by prohibition, by certiorari, and in matters of habeas corpus is not denied, nor is it denied that this court has jurisdiction in matters of contempt in the case of all inferior courts, and even in the case of committing justices before committal where the case is or may be remitted to a court of record. No court other than this court has inherent power to protect itself by proceedings for contempt, except where such power is given them by statute. A court-martial has no inherent power apart from statute to protect itself by such proceedings, but, if this court can interfere with the proceedings of courts-martial to check irregularities, it seems to me that it must be clothed with inherent jurisdiction to protect such court from contempt calculated or tending to obstruct the administration of justice in that court unless the Army Act, which regulates the proceedings by courts-martial, has by s. 126 (3) so dictated the procedure to be observed by that court in cases of contempt as to oust the jurisdiction of this court in such cases where the procedure described therein has not been followed. I am of opinion, on the authority of *R.* v. *Davies* (1), that if the Army Act did not exist this court would have inherent jurisdiction in the matter of contempt in the case of courts-martial. D E F

The next point is: Has the Army Act, by s. 126 (3), limited this power and confined it to cases where the president of the court-martial has issued a certificate to this court under the provisions of that section? The section enacts as follows: G

> "Where a person not subject to military law is guilty of any contempt towards a court-martial, by using insulting or threatening language, or by causing any interruption or disturbance in its proceedings, or by printing observations or using words calculated to influence the members of or witnesses before such court, or to bring such court into disrepute, the president of the court-martial may certify the offence of such person, under his hand, to any court of law in the part of Her Majesty's dominions where the offence is committed which has power to commit for contempt, and that court may thereupon inquire into such alleged offence, and after hearing any witnesses that may be produced against or on behalf of the person so accused, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of such person in like manner as if he had been guilty of contempt of that court." H I

Punishment for contempt is a prerogative of the Crown. Unquestionably Parliament can abate by statute all or any portions of the prerogative. We were much impressed by the passage in the judgment of LORD SWINFEN, M.R., quoted and approved of by LORD ATKINSON in *A.-G.* v. *De Keyser's Royal Hotel* (2). The passage is this ([1920] A.C. at p. 538):

A "Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposB ing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

The Army Act confers upon courts-martial a simple and efficient mode of bringing matters of contempt before this court. If the court-martial wishes to take proceedings for contempt against itself it must do so under these regulations, but here the court-martial is not putting the law in motion. It is set in motion by a C person who asserts that in a case in which he is the accused person language has been printed which is calculated to obstruct the due administration of justice in that court. I see nothing in the Army Act to take away the right of such an aggrieved person to apply to this court or to take away our jurisdiction to hear him and adjudicate upon his case. To hold otherwise would be to make the right of an aggrieved person depend upon the discretion of the president of the court. D Clear and specific language alone would abolish such right, and, in my opinion, s. 126 (3) of the Army Act is limited to those cases where the court-martial at its own instance seeks the protection of this court.

The next point is whether this is or is not a case of contempt of court. The statement complained of contains this language, to put it shortly, that a sentence E of two years' hard labour had been passed upon the applicant at the court-martial, and that that was exclusively reported in the "Daily Mail" of Dec. 14, 1920. Further:

"At the Tower court-martial Captain James, prosecuting, said that outside Blackpool Police Court, where he was to answer a charge of desertion, Farnsworth was standing talking with his solicitor and surety, Mr. Marples, F of Sheffield. He hit the latter a heavy blow with his fist and jumped into a taxicab near by and escaped to Preston. From there he went to Carlisle and to Glasgow. From the latter place he wrote to his surety, who had been ordered to forfeit £1,000 bail, stating that he had no money, and would meet him at an hotel outside Sheffield. Arriving there, Farnsworth found to his surprise two detectives instead of a cheque. . . . Instead he remained in London G and became well known to the West End police for his association with women of ill repute."

Those are the main portions of the article which are the matter of complaint. This language was published in the interval between the sentence and confirmation. The appellate officer, under sub-s. (5) of s. 54 of the Army Act, has an alternative duty to perform. He may confirm the finding or sentence or he may refuse to H confirm either the finding or the sentence, and, if so, in either case he can send it back once only for revision, but he must not receive any additional evidence, and during this interval the sentence which has been pronounced by the court-martial is to be the subject of absolute secrecy. By some means, which can only be called surreptitious, the reporter of the "Daily Mail" obtained information in regard to the sentence which had been pronounced by the court-martial, and I during the interval that I have described the unconfirmed sentence was published in spite of the secrecy enjoined by the statute. It is clearly meant that in arriving at his decision the appellate officer shall be completely unfettered by any outside pressure or comment on his revision. To make public that which should be secret may be seriously to interfere with the free action of such officer. It is no answer to say that the officer was not in fact so influenced. It is sufficient contempt if it was calculated or if it tended to interfere with such free action or decision. In regard to the other false statements—for they are false in this respect, that the evidence in regard to the hitting of the surety, and so forth, is set forth as part

of the evidence which took place before the court-martial—no such evidence was in fact produced, and the fact that it was true and had been produced on some other occasion which was not before the court-martial is no answer to the gravamen of the charge. In regard to the third matter, the applicant being well known to the West End police for his association with women of ill repute, no evidence, either in any form of proceeding or before the court-martial, had any reference to any such habits on the part of the applicant. In regard to these statements, which convey a false impression, no opportunity is or can be afforded to the accused, in the interval between sentence and final promulgation, of challenging before the court the truth of such statements. In this court judges are often, and rightly, influenced, when passing sentence on criminals after conviction, by police or other reports as to the character and antecedents of the criminals. These are given in open court with full opportunity of criticism or dispute. The published statements here defamatory of the accused, unconnected in some instances with the crime alleged, and unproved and false, might easily tend to prejudice his case and would be calculated seriously to thwart and interfere with the due administration of justice.

All these conclusions are arrived at on the supposition that a certificate of the president of the court-martial is unnecessary to the decision in this case. Where such a certificate is necessary its production on applying for the rule nisi would be and is made a condition precedent to the right to have a rule nisi granted, and in such a case I should have some difficulty in coming to the conclusion that a certificate given as here to a limited extent—because it only refers to the matter as calculated to bring the court into disrepute—produced for the first time on the hearing of the rule, could cure the absence of the existence of the certificate when the rule nisi was obtained. However, it is unnecessary to decide that point.

On the whole, therefore, I have come to the conclusion, first, that there was a contempt; secondly, that this court had jurisdiction to entertain the contempt; and, thirdly, that the certificate was unnecessary. For all these reasons I am of opinion that this rule nisi should be made absolute.

AVORY, J.—Two questions of law have been raised for our decision in this case. The first question is whether this court has jurisdiction to deal with a contempt of court alleged to have been committed in the course of proceedings at a trial by court-martial of offences against military law under the Army Act—that is to say, while the finding and sentence are under consideration by the confirming authority, and before the sentence is promulgated. The second question is whether, if the court has jurisdiction to deal with the contempt committed before a court-martial, the certificate of the president of the court-martial under s. 126 (3) of the Army Act is a condition precedent to the exercise of that jurisdiction.

Upon the first question it appears to me, having regard to the decision of this court in *R.* v. *Davies* (1), it resolves itself into a question whether a court-martial is an inferior court within the meaning of that judgment. If it is, then that decision applies, and this court has jurisdiction. I desire to refer to one or two passages in the judgment of the court as delivered by WILLS, J. It is clear from the judgment ([1906] 1 K.B. at p. 37) that the learned judge was giving the decision of the court upon the general question whether it has jurisdiction to deal with a case of contempt committed before or in the course of proceedings in any inferior court. After referring to HAWKINS' PLEAS OF THE CROWN (Bk. 2, Ch. 3), which has been read by my Lord, and which I need not repeat, and LORD COKE'S FOURTH INSTITUTE (Ch. 7), WILLS, J., says that these authorities

> "do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom."

He says (ibid. at p. 40), quoting from a judgment of BOWEN, L.J.:

> "The object of the discipline enforced by the court in case of contempt of

court is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice."

After referring to the authorities relating to contempts in the nature of attacks upon judges, he says (ibid. at p. 41):

> "With a few verbal alterations those eloquent words will apply with at least equal force to writings, the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence."

Again he says, after referring to the exercise by the superior courts of that power (ibid. at p. 43):

> "This, however, as it seems to us, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected as well as the misfeasances of the inferior courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others whose conduct tends to prevent the due performance of their duties by those courts have to be corrected as well as the courts themselves."

The result of that judgment is to show that wherever and whenever this court has power to correct an inferior court it also has power to protect that court by punishing those who interfere in the due administration of justice in that court. It is admitted that this court always has had jurisdiction to correct courts-martial either by the process of certiorari or by prohibition, and, that being so, it appears to follow from this judgment in *R.* v. *Davies* (1) that the court also has power to protect a court-martial by punishing those who interfere with the due administration of justice in it.

Upon the second point, whether the certificate of the president of the court-martial under s. 126 is a condition precedent, it is clear that a court-martial has no power, and never had any, to protect itself by punishing for contempt of court for anything either committed in the face of the court or otherwise. The only power that it has is that which is conferred by s. 126 of the Army Act. The argument of counsel showing cause upon s. 126 requires careful consideration. As I understand it, it is that s. 126 must be read as imposing a limitation upon the powers of this court to deal with contempt committed in the course of a trial before the court-martial, and he relies in support of that argument upon the passage which has been read by my Lord in *A.-G.* v. *De Keyser's Royal Hotel* (2). If a court-martial had, before the Army Act, exercised or claimed to exercise the power to deal with contempt of court, this principle which has been quoted might apply, and the statute would impose a limitation on that power, but I am at a loss to see how this section can be said to curtail or impose any limitation upon the pre-existing power of this court. The argument assumes that this court had that pre-existing power, and in that respect and to that extent it is inconsistent with the argument on the second point. So far from this section imposing any limitation on the power of this court, it appears to me merely to confer on the president of the court-martial a new power which he had not before, and which the court-martial had not before, namely, the power of remitting to this court a case of contempt with which the court-martial cannot itself deal. I find nothing in that section—no word and no indication in that section—to take away the right of an aggrieved party to move this court to exercise its inherent jurisdiction over all inferior courts.

With regard to the certificate which has been produced during the course of the argument of this case, I desire to say that, speaking for myself, if the certificate were necessary for the exercise of the jurisdiction of this court, a certificate obtained after a rule nisi had been moved for and granted would be ineffective. In my opinion, any certificate which was necessary must be one which has been

granted before the rule nisi has been moved for, and the obtaining of one afterwards could not cure the defect. A

With regard to the question whether there has been a contempt of court, I agree entirely with what my Lord has said, and would only refer to the provisions of s. 52 of the Army Act, which requires that every member of the court shall take an oath not to divulge the sentence of the court until it is duly confirmed, and to s. 54 (6), which is in these words: B

> "Subject to the provisions of this Act with respect to the finding of acquittal, the finding and sentence of a court-martial shall not be valid except in so far as the same may be confirmed by an authority authorised to confirm the same."

In this case the reporter who is said to be responsible for what appeared in this issue of the "Daily Mail" was himself present at the court-martial, as appears C by the affidavit filed by the editor. Being present at that court-martial he must have been aware, or ought to have been aware, of the oath of secrecy under which the members of the court were not to divulge this sentence. As my Lord has said, his obtaining information as to what this sentence was supposed to be must obviously be reprehensible in the last degree. There is nothing upon the affidavit of the editor to show in what way he obtained it. The editor merely says that, the D reporter having obtained that information, he thought he was justified in publishing it. The editor ought to have known that if the reporter had obtained it he must have obtained it improperly, and at least he might have expected some information as to the source from which he did obtain that information. I agree, therefore, that there has been contempt.

SALTER, J.—I am of the same opinion, and I agree that in this case, at any E rate, one ought to take the facts as they existed when the rule was granted. On the first question with which AVORY, J., has dealt I have nothing to add. The second question is, in substance, whether s. 126 (3) of the Army Act amounts to an enactment that for the future the King's Bench Division shall not deal with contempt of a court-martial except on the invitation of the president, and according to the procedure therein provided. It is of the first importance to assert and F maintain the inherent power of this court to protect the administration of justice in all the inferior courts unless Parliament has shown a plain intention to restrict that power. Section 126 (3) provides a simpler and speedier method than the procedure by rule nisi, by which the court-martial, through its president, may obtain the protection of this court. It does not, in my opinion, take away the right of an accused person, who fears that his fair trial may be prejudiced, of applying G to this court by way of rule nisi. The matter which is prejudicial to a fair trial may be published while the accused is awaiting trial, and before the court-martial has been constituted. It can hardly be doubted that the accused would apply to this court in such cases by rule nisi, and I see no indication that Parliament intended to take away the right of such accused person after the court had been constituted. So far from showing any intention to restrict the powers of this H court, the subsection seems to me to show an intention to facilitate their exercise.

COLERIDGE, J.—The judgment of the court is that the editor of the "Daily Mail" is fined £200, with costs as between solicitor and client.

Rule absolute.

Solicitors: *Lewis & Lewis*; *Langford & Redfern.* I

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

Re WOMBWELL

[King's Bench Division (Horridge, J.), March 23, 1921]
[Reported 125 L.T. 437; 37 T.L.R. 625; [1921] B. & C.R. 17]

Bankruptcy—Forfeiture clause—Partial avoidance—Provision for forfeiture in B *settlement by bankrupt—Part of property dealt with not property of bankrupt—Charged to another party to deed.*

The bankrupt had mortgaged his reversionary life interest in certain real property and leaseholds, and the sums thereby secured had been further secured by policies of life assurance. These incumbrances and policies were transferred to the bankrupt's father, to whom there was then due £20,000. C By a deed of settlement the bankrupt, in consideration of his father releasing his claim for the £20,000, and agreeing to pay to the bankrupt an annuity of £400, assigned and released to his father his equity of redemption in the policies and settled his reversionary interest on the trusts declared in the deed. The deed contained a forfeiture clause providing that the settlor's interest in the property should determine in the event of his bankruptcy. He D having become bankrupt, on a motion by the trustee in bankruptcy for a declaration that the life interest of the bankrupt was vested in him,

Held: the bankrupt could not settle his own property with a condition determining his interest therein in the event of his bankruptcy, and, therefore, the forfeiture clause was void, but only to the extent to which the property dealt with in the deed was the property of the bankrupt; the whole E of the property was not the property of the bankrupt since, when he settled it, it was subject to a charge of £20,000; accordingly, the clause was invalid as against the trustee except to the extent of the moneys due under the mortgages vested in the bankrupt's father.

Rule stated in footnote to *Wilson* v. *Greenwood* (1) (1818), 1 Swan. 471, 481, applied.

F **Notes.** As to conditions for forfeiture on bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 351, 357, 417–419; and for cases see 4 Digest (Repl.) 638 and 5 Digest (Repl.) 705 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

G (1) *Wilson* v. *Greenwood* (1818), 1 Swan. 471; 1 Wils. Ch. 223; 36 E.R. 469, L.C.; 5 Digest (Repl.) 708, *6182*.

(2) *Re Eyre*, *Ex parte Eyre* (1881), 44 L.T. 922; 24 Digest (Repl.) 1132, *140*.

(3) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; 72 L.T. 251; 43 W.R. 247; 39 Sol. Jo. 218; 2 Mans. 27; 13 R. 254; sub nom. *Mackintosh* v. *Pogose*, 64 L.J.Ch. 274; 5 Digest (Repl.) 707, *6173*.

H Also referred to in argument:

Denny's Trustee v. *Denny and Warr*, [1919] 1 K.B. 583; 88 L.J.K.B. 679; 120 L.T. 608; 35 T.L.R. 238; [1918–19] B. & C.R. 139; 24 Digest (Repl.) 1132, *142*.

Higinbotham v. *Holme* (1812), 19 Ves. 88; 34 E.R. 451; sub nom. *Higginbotham* v. Holme, Mont. 479, n.; 5 Digest (Repl.) 706, *6169*.

I *Whitmore* v. *Mason* (1861), 2 John. & H. 204; 31 L.J.Ch. 433; 5 L.T. 631; 8 Jur.N.S. 278; 10 W.R. 168; 70 E.R. 1031; 5 Digest (Repl.) 708, *6184*.

Motion by the trustee in bankruptcy of one Victor Menzies Wombwell for "a declaration that the life interest of the bankrupt under a settlement dated July 13, 1918, and made between William Dudgeon Graham Menzies, of the first part, the bankrupt, of the second part, and the respondents, Cecilia Clementina Menzies, Robert Nevill Dundas, and William Scott Hart (the trustees of the settlement), of the third part, had become vested in the applicant as such trustee as aforesaid notwithstanding the provisions for forfeiture in such settlement contained."

The settlement recited that the bankrupt had created certain incumbrances on his reversionary life interest under the will of Sir George Wombwell which were further secured by policies on his life effected in 1914. It further recited that these incumbrances and the securities therefor had been transferred to William Dudgeon Menzies, the bankrupt's father, to whom there was due, in respect of divers advances, interest, premiums paid, &c., about £20,000—this being a charge on the bankrupt's interest. The settlement further recited that certain incumbrances in favour of the Clarehill Investment Co. had been taken over by the father at the express request of the bankrupt, and that on the treaty therefor it had been agreed that, subject to the payment by the bankrupt out of his life estate when it should fall into possession under the will of premiums, &c., to keep the policies of insurance alive, the father should release all claims against the bankrupt under the incumbrances, and should pay to the bankrupt £400 a year during his life and the life of Lady Julia Sarah Alice Wombwell (then seventy-five years of age), and that in consideration of such release the bankrupt should release his right or equity of redemption in all the policies, and should settle his interests under the will in a certain way. Accordingly, it was provided that the bankrupt "as settlor grants conveys assigns and confirms unto the trustees" the life estate in the said property expectant on the death of the widow (Lady Wombwell) upon trust when it should fall into possession (inter alia) to pay the rents and profits to the bankrupt until bankruptcy and upon his bankruptcy to apply them to the maintenance of the bankrupt and his wife or others at their absolute discretion. The deed contained an alienation clause in the usual form. On Sept. 25, 1920, during the life of Lady Wombwell, a receiving order was made against the bankrupt. The applicant was appointed trustee. There were secured creditors' claims for £17,958, while the assets apart from the settlement amounted to about £500. The bankrupt's interest in the property referred to in the will was worth about £50,000. The trustees under the settlement having claimed the property, the trustee in bankruptcy launched this motion on the ground that the bankrupt, being the settlor under the settlement, could not avail himself of the alienation clause as against the trustee.

Clayton, K.C. (*Hunt* with him), for the trustee in bankruptcy.
E. W. Hansell for the bankrupt.
E. W. Hansell (*A. L. Morris* with him) for the trustees of the settlement.

HORRIDGE, J.—This case is important and not free from difficulty. Under the will of the late Sir George Wombwell, who was the grandfather of the bankrupt, the bankrupt was, before entering into the settlement in question, entitled to a reversionary life interest in certain freehold, leasehold, and copyhold estates and certain heirlooms, and he was entitled to the absolute reversionary interest in certain furniture. He had raised considerable sums by mortgage of his life interest, and at least two of the mortgagees were putting on pressure. In these circumstances the arrangement which is contained in a settlement dated July 13, 1918, was entered into.

This was preceded by negotiations between W. D. G. Menzies, the father of the bankrupt, and the bankrupt. I think the only negotiations with which I need deal are those contained in a letter of March, 1918, from the father to the son, and what took place afterwards. The letter provided that the son, the bankrupt, should agree to transfer to the father all his life and other interests under his grandfather's will, including the furniture

> "and the policies comprised in the mortgages which I already hold and those which will be transferred to me. The transfer by you to be completed as soon as arrangements can be made and the documents prepared. I need not say that I have no intention whatever of making any profit, and propose to re-settle the life and other interests under Sir G. Wombwell's will transferred to me for your benefit, but subject to conditions providing for the determination of your life interest and interest in the furniture in the event of your borrow-

A ing on security thereof or assigning or on your bankruptcy, and subject also to my right that all moneys which I have provided for the discharge of your debts, which with interest and premiums will amount to date to nearly £20,000, shall rank as a first charge on the life interest, furniture, and policies, and that I may if I please keep up such life and other policies as I may think requisite to complete my security for my advances, and add the premiums to
B my securities or have them paid out of the income of the Wombwell estates."

Therefore, broadly speaking, the suggestion was that the son should transfer to the father his life interests and his interest in the furniture, and the father should settle them in trust so that they should go over in the event of his son coming to grief again. But there was a provision that all the moneys advanced by the father, either by way of paying off the mortgages or by way of premiums, should
C be a first charge before the settlement. That agreement was never carried out. There were negotiations, and the evidence is that in the negotiations the terms were altered for the benefit of the bankrupt. I have no further evidence before me as to stipulations being made between the date of that agreement and the settlement, but it is quite clear that that agreement was not carried out by the settlement, and I have nothing to guide me if I could look at it, as to what the
D completed agreement was, apart from the settlement itself. In my view, I cannot look at anything before the settlement, because there is no claim here for ratification. But if I could, there is no evidence before me of any concluded agreement other than, or in any way inconsistent with, the agreement as disclosed by the deed itself. I am entitled to look at the circumstances; I am entitled to know that at the time when that deed was entered into the father was proposing to acquire, and
E in fact did acquire, the rights of the mortgagees in regard to his son's life interests. I also am entitled to know that he had previously made his son an allowance of £400, and that there were policies existing, two of which were the policies in the life Association of Scotland for £5,000.

In those circumstances this deed was entered into. On the one hand, it is said that this was a settlement by the father of property which, by the same document,
F I must treat as conveyed to him by the son. On the other side, it is said that this document is a settlement of the interests of each of them on the terms of the settlement, and, so far as it included the property of the son, it comes within the rule as to which there is no dispute, and which is correctly stated in the footnote to *Wilson* v. *Greenwood* (1) (1 Swan. at p. 481 n.), as follows:

G "The general distinction seems to be that the owner of property may on alienation qualify the interest of his alienee by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest by a like condition determining or controlling it in the event of his own bankruptcy to the disappointment or delay of his creditors, the jus disponendi, which for the first purpose is absolute, being in the latter instance subject to
H the disposition previously prescribed by law."

It is said, first, that I ought to consider the whole settlement as made by the son, and, consequently, that I ought to consider, at any rate, the settlement of the interest which the son then possessed in the property as being settled by the son upon himself with the clause as to going over in the event of bankruptcy. It is necessary, therefore, to consider very carefully the terms of this settlement.
I Before doing so, I think it is convenient that I should refer to the case which, I think, is the sheet anchor of the case for the trustees, namely, *Ex parte Eyre* (2). In that case there was the clearest possible evidence that the agreement was a concluded agreement before the deed was entered into, and it was an agreement that the son should transfer the property to the father for considerations which were stated, and that the father, as one of the considerations for buying the son's interests as mentioned below, should re-settle it with a clause as to its going over on bankruptcy, but the deed itself contained that recital and showed exactly what was being done. After reciting that V. A. Eyre had contracted with H. E. Eyre

for the absolute purchase of the reversionary interests of H. E. Eyre under certain family settlements at the price of £2,500 to be paid down, and also in consideration of an annuity of £300 to be paid to H. E. Eyre for the limited period thereinafter mentioned, and reciting that V. A. Eyre had in part satisfaction of the said purchase money paid and satisfied three charges of £500 each, to which the reversionary interests of H. E. Eyre were subject, and reciting also that, in consideration of natural love and affection, the said V. A. Eyre had resolved, "notwithstanding that the purchase was for his own sole benefit" (I draw attention to those words) to settle the reversionary interests so purchased by him, as well as the annuity of £300, upon the trusts thereinafter expressed, it was witnessed that, in pursuance of the said agreement, V. A. Eyre covenanted to pay to the trustees during the life of his son an annuity of £300, to be held by them upon trust to pay the same to H. E. Eyre until he should become bankrupt. Therefore, the father, V. A. Eyre, bought the property out and out for his sole benefit, and agreed to pay to the trustees during the life of his son an annuity of £300, to be held until the son became bankrupt. It is quite true that in that deed the form which the conveyance took was:

> "And it was further witnessed that, in consideration of the sum of £1,000 paid by V. A. Eyre to H. E. Eyre, making together with the three sums of £500 each so paid as before mentioned the total purchase money of £2,500, H. E. Eyre assigned, and V. A. Eyre confirmed, to the trustees all the reversionary interests . . ."

No doubt that took the form of a conveyance by the son and confirmation by the father, but it must be read with the recital, and it makes it perfectly clear that, although it took the form of an assignment by the son with the concurrence of the father, it was carrying out the recital that the father absolutely purchased and as a portion of the bargain for purchase agreed to settle, although as a matter of conveyancing the parties did not quite approve the system of conveying to the father and his re-settling back. That seems to me to be the whole ratio decidendi of *Eyre's Case* (2).

We come to the question what the deed in this case does. It recites the interests of the son under the will of the grandfather, and then come these recitals:

> "And whereas the son has created certain incumbrances on his interests under the said will particulars whereof are specified in part 1 of the second schedule hereto and the sums thereby secured are further secured respectively by certain policies of insurance on the life of the son including two policies effected with the Life Association of Scotland for the sum of £5,000 each and numbered 95,360 A3 and 95,361 A3 respectively, and both dated June 25, 1914. And whereas under and by virtue of certain transfers of mortgage the particulars whereof are specified in part 2 of the said second schedule hereto the said incumbrances (other than the charge dated Nov. 15, 1915, in favour of the father) and all securities therefor have been respectively transferred to and are now vested in the father. And whereas in the events which have happened there is now due to the father upon the security of the several incumbrances and transfers specified in the second schedule hereto in respect of principal moneys, costs, and moneys paid for keeping on foot the said policies of assurance or some of them, and for interest down to the date of these presents a sum of upwards of £20,000 as the son doth hereby acknowledge."

There it recites the position which I have already stated, that at the time when the deed was entered into the father was entitled to securities to the extent of upwards of £20,000 on the son's interest. Then it recites that Lady Wombwell is now of the age of seventy-five years, and we come then to the most important recital of all, which, so far as I know, is the only document showing the completed agreement which has been made between the father and the son. It certainly is not the agreement as mentioned in the letter of March. It is a different agreement altogether:

A "And whereas the incumbrances created by the son in favour of the Clarebell Investment Co., Ltd. (being the three last-mentioned incumbrances specified in part 1 of the second schedule hereto) were taken over by the father at the express request of the son and upon the treaty therefor it was agreed between the father and the son that subject to the payment henceforth out of the life estate of the son under the said will when the same shall fall into possession B of the premiums or other sums of money (if any) necessary for keeping on foot the said two policies in the Life Association of Scotland or any policies substituted therefor the father should release all claims against the son under the several incumbrances and transfers specified in the second schedule hereto or any of them or against the property therein comprised except the various policies of assurance therein respectively comprised and should covenant to C pay to the son during the joint lives of the said Lady Julia Sarah Alice Wombwell and the son an annual sum of £400 in manner and subject as hereinafter mentioned and that in consideration of such release and covenant the son should assign and release to the father his right or equity of redemption in all the said policies and should settle all his interests under the said will in manner hereinafter appearing and should enter into such covenants for assum- D ing the name and arms of Wombwell and in regard to the said two policies in the Life Association of Scotland as are hereinafter contained."

That is a perfectly simple recital, that, in consideration of the father releasing his claim of £20,000 and an agreement to pay an annuity of £400, the son agreed to assign and release to the father his right or equity of redemption in all the policies, and to settle all his interests under the will of Sir George Wombwell E upon the trusts declared upon the deed I am now reciting.

In those circumstances, if that recital is true, it was a settlement as a portion of the bargain by the son of all his interests, subject to the father's mortgage, and the father concurred in the settlement by releasing his claim to £20,000 so that the property might be held on the trusts of the settlement free and discharged from that incumbrance. Does the deed carry that out? The father as mortgagee F grants, conveys, and assigns, and the son as settlor grants, conveys, assigns, and confirms unto the trustees all his interests, freehold, copyhold, and leasehold, and in the heirlooms and furniture upon the trusts contained in the deed. Therefore, the son conveys as settlor, carrying out the recital, implying under s. 7 (1) (e) of the Conveyancing Act, 1881 [see now Law of Property Act, 1925, s. 76 (1) (e), Sched. 2, Part 5] a covenant for further assurance, and the father as mortgagee G grants, conveys, and assigns, and in that capacity also carries out the provisions of the recital. How can I say that the deed was anything else than the deed which it purports to be and which it is consistently from first to last?

One other matter is the clause which deals with accumulations. If the father was the settlor, that clause provides for accumulations during an improper period; if the son was the settlor, then the clause with regard to accumulations is perfectly H right. The deed is upon the face of it, to my mind, capable of only one interpretation—that the son was the settlor. I say I cannot go behind the deed and look at the prior arrangements, but, if I do, I have got no evidence of any completed agreement, before the deed was signed, which was inconsistent with or contradictory of the agreement as ultimately entered into, because up to the time of the deed we have no evidence of any actual completed agreement, for it is admitted I that the document which was signed by the bankrupt approving the March letter was not carried out in fact.

That being the effect of the settlement, what is the effect of the clause dealing with alienation? In my view, that clause only deals with the life interest in the realty, or chattels real in the sense of leaseholds, capable of producing rents and profits. Clause 5 is as follows:

"The trustees shall as and when the life estate and interest of the son under the said recited will first hereinbefore conveyed and assigned to them

shall fall into possession enter into possession of or receipt of the rents and profits of the hereditaments and premises settled by the said will." A

The hereditaments "first hereinbefore conveyed and assigned," when one goes back to cl. 4, are

"the life estate and interest of him the son under the said will expectant on the death of the said Lady Julia Sarah Alice Wombwell of and in the freehold copyhold and leasehold hereditaments and the heirlooms." B

The words there are "freehold copyhold and leasehold hereditaments," and the words in cl. 5 are

"life estate and interest of the son under the said recited will first hereinbefore conveyed and assigned to them shall fall into possession enter into possession of or receipt of the rents and profits of the hereditaments and premises settled by the said will." C

I think "hereditaments and premises" there means, as I have said, "lands," and do not mean "heirlooms," because I do not think that what comes out of the heirlooms could be said within the second division of that clause to be rents and profits out of which the trustees were to make payments. Therefore, that being so, D in my view the only portion of the settled property to which the alienation clause applies is the life interest of the bankrupt in the freehold, copyhold, and leasehold estates. The words of the alienation clause are these:

"And subject as aforesaid if no act or event shall have been done or happened (other than the exercise of the power of charging portions in favour of the younger children of the son in the said will contained and the payment of any E sums by way of advancement consequent upon such exercise) whereby the said rents and profits or some part thereof would if belonging absolutely to the son become vested in or payable to or charged in favour of some other person."

It is said that I ought to include heirlooms, because heirlooms were settled under the will of Sir George Wombwell on the same trusts as the hereditaments. That is quite true, and that is why, perhaps, they are referred to with the hereditaments F in cl. 4, but I think what I have got to look at is the meaning of the trusts created by cl. 5, and cl. 5, I think, limits it to rents and profits proper, and I do not think that those words in any way could refer to the use of heirlooms. That being so, I think that, to the extent to which the reversionary interest of the bankrupt in the freehold, leasehold, and copyhold estates is settled by this deed—in fact, I have held that all his interest is settled—the clause operating on bankruptcy is bad as G against the trustee, and that the trustee takes all his interest, which he was possessed of at the time that he entered into this deed. That interest was subject to a charge of £20,000 and upwards. As to that I think the trustee is entitled to his declaration.

As regards the heirlooms and furniture, it is said that the life interest in those is of no value. I cannot say that. They may be let with the mansion house or H they may be sold, and the proceeds may be invested. I cannot say that they are of no value, and I think the trustee is entitled to those, because there is no gift over of those in the event of bankruptcy, since the clause as interpreted by me is limited to lands and properties, and it does not extend to the heirlooms and furniture. I think it is admitted that it does not extend to the furniture. If it does extend to the heirlooms, the trustee is entitled to claim them also on the ground I that I have held that the gift over of the property the subject-matter of the gift over is bad, and, therefore, if the heirlooms are a portion of that subject-matter the gift over is equally bad as regards those, and the trustee is equally entitled to have them on that ground, but I think he is entitled to have them on the ground that they are not included in the gift over, and that they pass to the trustee under the ordinary rule that they are the property of the bankrupt and become the property of the trustee. I think I may take into account the fact that the bankrupt was not absolutely entitled to this property, but as regards £20,000 there was a charge

upon it, and counsel for the trustee is not right when he says that I ought to declare the gift over as applying to all the property settled other than the heirlooms and furniture settled and ought to make a declaration that the trustee is entitled to it free from the charge of £20,000. I think the language of LORD HATHERLEY, which is referred to by STIRLING, J., in *Mackintosh* v. *Pogose* (3), points to my being entitled to do what I have said, because STIRLING, J., quotes LORD HATHERLEY as follows:

> "Looking at all the cases in which a limitation over in the event of a husband's bankruptcy has been supported to the extent of the money received from the wife, I take the principle of the decisions to have been, that where there is a covenant on the part of the husband to settle a definite sum of money, say, £10,000, and the husband has received another definite sum, say, £5,000, as the wife's fortune, the court has treated £5,000 of the £10,000 as if it were identically the wife's money, and has set it off accordingly."

I think I am entitled to treat the £20,000 mortgage which was waived by the father, and purported to be settled by the son, as being a portion belonging to the father of the settlement made by the son, and it is just the same as where a husband is settling money which he got from his wife. Counsel says that that is limited to cases between husband and wife, and is justified on the principle of the husband making restitution of property that he has taken from the wife. I do not think that is the principle. I think the principle is the one rightly stated in *Wilson* v. *Greenwood* (1) that a man cannot settle his own property with a condition determining his own interest in the event of his own bankruptcy. It does not matter what the ultimate trusts of the bankruptcy are, whether for the benefit of the persons whose money it really is or for their children or for anybody else. The gift over on bankruptcy is void to the extent to which the property was the property of the bankrupt. In this case, I do not think that the whole of this property was the property of the bankrupt when he settled it because it was subject to a charge of £20,000.

[An order was made that the provisions for forfeiture on bankruptcy were invalid as against the trustee except to the extent of the moneys due under the mortgages vested in the father, the rents and profits when the property fell into possession to be received by the trustees of the settlement until they amounted in the aggregate to the sum due together with interest subsequent to the date of the settlement to be held on the trusts upon which they ought to be held, and thereafter to be paid to the trustee in bankruptcy.]

Motion allowed.

Solicitors: *M. A. Jacobs*; *Burton, Yeates & Hart.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

A

FOSTER *v.* FOSTER

[Court of Appeal (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), July 15, 1921]

[Reported [1921] P. 438; 90 L.J.P. 363; 126 L.T. 50; 37 T.L.R. 942; 66 Sol. Jo. (W.R.) 1] B

Divorce—Cruelty—Venereal disease—Knowledge of both parties of infection of husband—Insistence of husband on intercourse—No communication of disease.

A husband who knows that he is suffering from venereal disease and insists on having connection with his wife, who also knows of his condition, may be guilty of cruelty, although the disease is not communicated to the wife. C

Ciocci v. *Ciocci* (1) (1854), 1 Ecc. & Ad. at p. 132, overruled on this point.

Notes. Under s. 8 (1) (c) of the Matrimonial Causes Act, 1950 (29 Halsbury's Statutes (2nd Edn.) 397) a marriage is voidable if at the time of the marriage the respondent was suffering from venereal disease in a communicable form provided that the petitioner was ignorant of this fact, that proceedings are instituted within a year from the date of the marriage, and that marital intercourse has not taken place with the consent of the petitioner since the discovery by the petitioner of the existence of the grounds for a decree. D

As to communication of venereal disease as a ground for divorce, see 12 Halsbury's Laws (3rd Edn.) 275; and for cases see 27 Digest (Repl.) 305, 306.

Cases referred to: E

(1) *Ciocci* v. *Ciocci* (1854), 1 Ecc. & Ad. 121; 18 Jur. 194; 164 E.R. 70; 27 Digest (Repl.) 305, *2522*.

(2) *Popkin* v. *Popkin* (1794), 1 Hag. Ecc. 765, n.; 162 E.R. 745; 27 Digest (Repl.) 297, *2423*.

(3) *Russell* v. *Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 307, *2551*. F

(4) *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; 31 L.T.O.S. 122; 164 E.R. 678; 27 Digest (Repl.) 294, *2395*.

Also referred to in argument:

R. v. *Clarence* (1888), 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 37 W.R. 166; 5 T.L.R. 61; 16 Cox, C.C. 511, C.C.R.; 15 Digest (Repl.) 986, *9646*. G

Browning v. *Browning* [1911] P. 161; 80 L.J.P. 74; 104 L.T. 750; 27 T.L.R. 404; sub nom. B. v. B., 55 Sol. Jo. 462; 27 Digest (Repl.) 305, *2520*.

Appeal from a decision of Horridge, J.

The parties were married in 1902 and in 1912 the wife obtained a decree of judicial separation. For some months previous to her separation from the husband the wife had known that he was suffering from venereal disease. In the month H of January, 1912, the husband, though suffering from venereal disease, forced his wife to sleep with him and have marital intercourse with him. The disease was not, however, communicated to her. As a result of this conduct on his part she left him on or about Feb. 5, 1912, and afterwards obtained the separation order above referred to. She never subsequently resumed cohabitation with him, and ultimately filed a petition for the dissolution of her marriage on the ground of the I husband's cruelty and adultery. Horridge, J., (following *Ciocci* v. *Ciocci* (1)) refused to grant the decree, on the ground that, inasmuch as the disease was not communicated to the wife, the conduct of the husband did not amount to an act of legal cruelty. From that decision the wife appealed.

Sir William Geary for the wife.

LORD STERNDALE, M.R.—I think that, in the state of the authorities, Horridge, J., could not have come to any other conclusion than that to which he

A came, because he has the authority, as long ago as 1853, of a court of co-ordinate jurisdiction, that one cannot have cruelty by reason of an attempt to communicate venereal disease unless the disease is actually communicated. That seems to me to be quite clearly stated, though perhaps more widely than was necessary for the mere facts of the particular case by DR. LUSHINGTON in *Ciocci* v. *Ciocci* (1). He says:

B

> "I am of opinion that it is essential, to support that charge, that the corpus delicti should be proved, and here there is not adequate proof. And if there be not adequate proof of the fact, however great the moral delinquency of consummating a marriage with the probable chance of communicating the venereal infection, I am not prepared to say that so doing constitutes legally an act of cruelty as understood in these courts. In order to constitute an act of legal cruelty there must be, in my opinion, an actual communication of the disease, and the running the risk is not sufficient."

C

In the face of that statement by DR. LUSHINGTON, nearly sixty years ago, I think that HORRIDGE, J., could hardly have done anything but what he did. It is quite true that *Popkin* v. *Popkin* (2) was cited, and in the circumstances of that case

D LORD STOWELL does seem to have stated that an attempt to have connection with his wife when he was suffering from venereal disease might be, and was, cruelty on the part of the husband; but although LORD STOWELL had laid that down, HORRIDGE, J., was met by the broad distinct statement of DR. LUSHINGTON that, in order to have cruelty, one must have an actual communication of the disease. I think that that statement is too broad. I think it is inconsistent with *Popkin*

E v. *Popkin* (2), which is certainly an authority, and recognised as such by HORRIDGE, J., that in some circumstances an attempt to have connection and so risk the communication of venereal disease is an act of cruelty on the part of the husband. I quite agree with that, and I think, as I say, that what was laid down in *Ciocci* v. *Ciocci* (1) is too broad.

F In this case we have these facts: the husband knew he had venereal disease, and the wife knew that he had venereal disease. The wife had abstained from marital intercourse for a considerable time, because the husband had venereal disease, and there is evidence that the husband knew that that was the reason why she had abstained from marital intercourse. In those circumstances, on Jan. 5, 1912, he did have connection with her. She says it was against her wish. She says that he took advantage of her; but the actual circumstances are, to my

G mind, left very vague indeed from the unfortunate habit people so often have, in dealing with these matters, from, I suppose, a so-called feeling of delicacy, of using ambiguous and conventional terms instead of speaking plainly and straightforwardly; and for that reason I do not feel myself in a position to say that we should grant the petition and make a decree nisi here. I think that the matter must go down to be investigated. I think that the actual facts of the matter

H want more investigation than they have received. There are several circumstances: there is the fact that the wife did not leave the husband for a month after that, and there is no evidence of any complaint for something like eight or nine years. There is evidence that she obtained a separation order on the ground of desertion, but there is nothing that I can see upon the evidence to show any complaint. There may be nothing in the fact that she did not make a complaint; I am

I not saying there is; but these are matters that want investigation. What she means exactly by "took advantage of me," to my mind, needs investigation. What exactly she means by "against my wishes" needs investigation. I think the case ought to go down to be re-heard, with this direction: that an attempt by a husband, who knows that he has a venereal disease, to have connection, against her wishes with his wife, who also knows the state in which he is, may in some circumstances amount to cruelty, although in fact the disease is not communicated.

ATKIN, L.J.—I agree, and I only add a few words because I think this case is a case of very great public importance. The definition of cruelty I take from an

authoritative judgment of the House of Lords, namely, the judgment of LORD HERSCHELL in *Russell* v. *Russell* (3), where there was a very important dissentient body of opinion in favour of extending what was at that time, I think, considered to be the law of legal cruelty—at any rate giving it a wider scope; therefore I say it is of significance that this passage is a passage in the judgment of the majority, who were inclined to retain the definition of cruelty within narrower limits than that which was proposed by the dissenting law lords in that case. LORD HERSCHELL is citing from the judgment of SIR CRESSWELL CRESSWELL in *Tomkins* v. *Tomkins* (4) which was given in 1858, and what SIR CRESSWELL CRESSWELL said was this:

> "There must, however be bodily hurt—not trifling or temporary pain; or a reasonable apprehension of bodily hurt. It will be for you to determine whether the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health."

LORD HERSCHELL then said:

> "This is a clear, and, I apprehend, an accurate statement of the law administered by the Ecclesiastical Courts. It has been suggested that it was not a complete exposition of the law, but merely such a statement as was necessary, having regard to the facts proved in the particular case. I am unable so to regard it."

That being the test, if a husband, knowing that he has venereal disease, insists on having intercourse with his wife, who also knows that he has venereal disease, I think that by his conduct he is guilty of conduct causing reasonable apprehension of bodily suffering. In that I am assuming that he insists or threatens to have intercourse against his wife's will, and, by insisting on having intercourse, it appears to me that it is unnecessary to prove actual violence such as, without considering the right to marital intercourse, would amount to an assault. I think it would be sufficient if the husband, who has got the right to intercourse, does in fact insist upon it and make his wife know that he intends to insist upon it against her will.

In reference to the facts in this case, it appears that this man had been suffering from venereal disease for a long time, and, in consequence of it, the wife had abstained from sleeping with him, or, at any rate allowing him intercourse, for a period which she says was a year and eight months; that she had refused, and, in consequence of her refusal, upon one particular occasion, according to her evidence, he took advantage of her and had intercourse with her "against her wishes." I agree in thinking that those facts require investigation, and it will be for the judge to determine, upon the fresh evidence that is brought before him, whether the case comes within the definition which we are laying down. The case will no doubt be re-opened and re-heard when it goes down for a new trial, and the wife will explain the circumstances, and, in so far as she can get corroborative evidence, no doubt it will be admitted. On the other hand, the nature of the occurrence, as between husband and wife, is one that, in ordinary circumstances, at any rate, makes it unlikely that the wife would complain unless she had some person in a very close and confidential relation, and that I do not know about. The case must go back to be re-heard. I quite agree with what has been said by the Master of the Rolls as to the state of the authorities. I think we must be taken to be definitely differing from *Ciocci* v. *Ciocci* (1), which is the case which was followed by the learned judge.

YOUNGER, L.J.—I am of the same opinion, and I desire to make only one observation. This case is not a case merely of an attempt. Here there was actual

connection. It appears to me that, where knowledge of her husband's malady is possessed by the wife, it is very necessary that it should be very plainly shown, in this and in any other such case, that the husband's conduct really took place in spite of the wife's unavailing remonstrance, if not resistance.

Case remitted.

Solicitor: *W. Drake.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

FORD *v.* METROPOLITAN POLICE DISTRICT RECEIVER

[KING'S BENCH DIVISION (Bailhache, J.), March 7, 1921]

[Reported [1921] 2 K.B. 344; 90 L.J.K.B. 929; 125 L.T. 18; 37 T.L.R. 467; 19 L.G.R. 686]

Riot—Damage to property—Empty house—Crowd armed with iron bars and pick axes—No person threatened with violence.

An assembly, which is apparently good natured and is not using any force because they were not interfered with, may constitute a riot.

During the Peace celebrations in 1919 a crowd of over one hundred persons assembled in the streets near the plaintiff's property, some armed with iron bars and others with pick axes. They entered one of the plaintiff's houses which was empty, and took all the inflammable material from it, with which they made a bonfire. The crowd were good humoured and offered no threat of violence to any person, but the occupant of a neighbouring house, who was held to be a person of reasonable firmness and courage, was of the opinion that, if he interfered with them, he would have been killed.

Held: there had been an execution of a common purpose by not less than three persons with intent on the part of those persons to help one another, by force if necessary, against anyone who might oppose them in the execution of the common purpose; there had also been a use of force or violence, not merely in or about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage; and, therefore, what had occurred amounted to a riot and the plaintiff was entitled to compensation.

Principle in *Field* v. *Metropolitan Police Receiver* (1), [1907] 2 K.B. at p. 860, applied.

Notes. Applied: *Munday* v. *Metropolitan Police District Receiver*, [1949] 1 All E.R. 337.

As to what constitutes a riot at common law, see 10 HALSBURY'S LAWS (3rd Edn.) 587 et seq.; and for cases see 15 DIGEST (Repl.) 791 et seq. For the Riot (Damages) Act, 1886, see 18 HALSBURY'S STATUTES (2nd Edn.) 96.

Case referred to:

(1) *Field* v. *Metropolitan Police Receiver*, [1907] 2 K.B. 853; 76 L.J.K.B. 1015; 97 L.T. 639; 71 J.P. 494; 23 T.L.R. 736; 51 Sol. Jo. 720; 5 L.G.R. 1121, D.C.; 15 Digest (Repl.) 791, *7428*.

Action tried by BAILHACHE, J., without a jury.

The plaintiff, Mr. S. Ford, was the owner of a house known as No. 2, Ford's Park Road, and of other premises at Canning Town, all of which premises were situated in the Metropolitan Police District. In July, 1919, he made a claim for compensation under the Riot (Damages) Act, 1886, in respect of damage done

to the above-mentioned property during the celebrations at the end of June, 1919, in connection with the declaration of peace, but his claim was resisted by the defendant on the ground (inter alia) that there did not appear to have been any riot on the occasion in question. The plaintiff then commenced this action for damages under the Riot (Damages) Act, 1886, alleging that the said premises were injured, damaged, and partly destroyed by persons riotously and tumultuously assembled together on or about June 28 and 29, 1919. The defendant in his defence denied that the premises were injured, damaged, and partly destroyed by persons riotously and tumultuously assembled together within the meaning of the said Act.

On the occasion in question crowds collected and kindled bonfires in some of the streets in the neighbourhood of the plaintiff's property, and the facts (which are taken from the judgment) in the case of No. 2, Ford's Park Road are as follows: A number of persons—a crowd estimated at from 100 to 150 or rather more persons —assembled in the neighbourhood, some of them armed with iron bars and some with pick-axes, and went to this house, which had been empty for some years and had had its internal fittings to some extent taken away. They took from the house all the inflammable material upon which they could lay their hands, such as doors and floor boards, and made a bonfire which was composed partly of these materials. It appeared from the evidence that the crowd was good humoured throughout the proceedings and showed no inclination to offer violence to anyone, although the occupant of a neighbouring house decided that it would be dangerous to interfere with them. Evidence was also given with regard to the allegations affecting the remaining property of the plaintiff. The material sections of the Act are as follows:

"Section 2 (1). Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction.

Section 3 (1). Claims for compensation under this Act shall be made to the police authority of the district in which the injury, stealing, or destruction took place, and such police authority shall inquire into the truth thereof, and shall, if satisfied, fix such compensation as appears to them just.

(2) A Secretary of State may from time to time make regulations respecting the time, manner, and conditions, within, in, and under which claims for compensation under this Act are to be made.

Section 4 (1). Where a claim to compensation has been made in accordance with the regulations, and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim . . . he may bring an action against the police authority to recover compensation in respect of all or any of the matters mentioned in such claim. . . ."

By the regulations, dated June 30, 1894, and made by the Secretary of State under the above-mentioned Act, and which are material in connection with the preliminary point hereinafter referred to, it is provided as follows:

Regulation 8. In all cases the claim shall state generally the evidence which the claimant is prepared to offer in support of it . . . and the place where such documents as he proposes to put in evidence may be inspected.

Regulation 9. The claimant, if so required by the police authority, shall verify the claim by himself making such a statutory declaration, and by procuring and furnishing to the police authority such statutory declarations of other persons as the police authority may require."

The preliminary point above mentioned, which is sufficiently referred to in the early part of the judgment, was taken on behalf of the defendant.

Van den Berg for the plaintiff.
Barrington Ward, K.C., and *du Parcq* for the defendant.

BAILHACHE, J.—This is an action brought by the plaintiff, Mr. S. Ford, in respect of damage done to some property of his in Ford's Park Road and elsewhere, in Canning Town or that neighbourhood. It is alleged that this damage was done, in consequence of riots which took place there, by rioters on peace night, June 28, 1919. The action is brought under the provisions of the Riot (Damages) Act, 1886, which Act provides compensation for losses by riots. That Act provides that compensation is to be paid out of the police rate in respect of damage done in consequence of riot. The Act provides that, in the first place, the matter shall be investigated by the receiver of police, who is to have particulars sent to him of the losses claimed within fourteen days of the happening of the injury, and is to be furnished with certain declarations and information if he requires them. There was a preliminary point urged against this action, that the receiver of police had not received the evidence to which he was entitled, and as it is a necessary preliminary to the right to bring an action that the receiver of police should first of all investigate the claim and either refuse it or allow it, it is urged that the necessary preliminaries had not been observed and that the action did not lie, that it was premature, and that it did not lie yet. I have come to the conclusion that that preliminary objection fails. It depends upon the words of the statute and upon the regulations made thereunder. The declarations which are called for in support of any claim that is put forward are, obviously, declarations which relate to the nature and the amount of the damage done, and the compensation claimed. The receiver of police required to see the proofs of Mr. Ford's witnesses. Those proofs he was not in terms entitled to see. He may have been entitled to statutory declarations made by some of the witnesses, but those he did not ask for, and, in my opinion, the preliminary objection fails. To ask for information and evidence to which one is not entitled, and to demand it as a condition of making the inquiry, is, in substance, a refusal to make the inquiry. I think the intention of the Act is that, so far as the circumstances of the riot are concerned, the receiver of police shall make his own investigations into them aided, no doubt, by such information as the person claiming damages can give, if that information is asked for. But it is obvious that, in most cases at any rate, the receiver of police would have under his own hand better information as to the circumstances of a riot than a private person can have who is claiming compensation.

The next point raised was that there was, in fact, no riot. That depends, of course, upon the circumstances of the case. [HIS LORDSHIP stated the facts with regard to the premises in Ford's Park Road and continued:] That was, no doubt, a malicious injury to Mr. Ford's property and, so far as that is concerned, it was a determination, i.e., there was a common purpose on the part of these people, to do an unlawful act. But counsel for the defendant says that is by no means sufficient to constitute a riot, and he refers me to what is, I believe, the last decided case on this subject, *Field* v. *Metropolitan Police Receiver* (1). The circumstances of that case were very different from the circumstances of this case, but the Divisional Court, in a very careful judgment, after examining all the authorities, laid down the following five elements as necessary to constitute a riot, and what I have to see is whether these elements are to be found in the facts of this case:

> In order to constitute a riot: (i) A number of persons not less than three (that element, of course, is complied with here); (ii) a common purpose (that, again, is satisfied here); (iii) execution or inception of the common purpose (that, again, is satisfied here); (iv) an intent on the part of the number of persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose.

I think, again, that that is satisfied here. They went with these weapons, these bars, and these pick-axes, and I think there is no doubt that anybody who had

opposed them in the execution of their common purpose would have met with rough usage. Then comes (v) force or violence, not merely used in or about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage, and it is around that element, and what is necessary to constitute a riot, that the discussion in this case has most largely turned. There is the evidence, so far as Ford's Park Road is concerned, of a man named Whowell, who lives next door to Mr. Ford's premises; and Whowell says that he saw these people coming, and that he was afraid they would break into not only Ford's premises, but his own premises also; that he went out and begged them not to do so, and that they did not do so; and I do not think they were ever minded to do so. The attraction of Mr. Ford's premises was that the house was an unoccupied house and had been partly dismantled. But Mr. Whowell says that, although he was not actually afraid of them, inasmuch as he did not interfere with them, he did not like to interfere with them and would not interfere with them, because he thought that if he had interfered with them he would have been killed. That may be an exaggeration, but at any rate he was afraid that he would be subjected to very rough usage, and the question to my mind is whether that is sufficient to establish this element: "Force or violence not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage." I have no reason to doubt that Mr. Whowell is "of reasonable firmness and courage," and he is "at least one person." It seems to me that Mr. Whowell's evidence is sufficient to satisfy this fifth element. I do not think that it can be the case that there can be no riot because of the absence of this fifth element if the rioters (the persons who are bent on some unlawful act, such as the demolition of property) go about their business, and go about their business quietly, so far as other persons are concerned, if they are not interfered with. If that were so, any number of persons might at any time assemble together with the unlawful intent of demolishing anybody's house and, if that house was unoccupied, so that there was nobody in it to be frightened by their violence, and if nobody interfered with them, it would be said that, inasmuch as they never threatened anybody else with violence, but only went about this particular unlawful purpose, it was not a riot. That seems to me an impossible view to take; that view might be true of any riot, where the acts of violence were directed against property and not against the person; that might be true of any riot that ever took place. Take the historical case of the throwing down of the Hyde Park railings. I dare say that if nobody had interfered with them at all, the people who went there to destroy and throw down the Hyde Park railings would not have interfered with anybody else; they were there for that particular purpose, and for that purpose only, and if they had been allowed to execute that purpose without interference, there would have been no violence threatened to anybody else; and it seems to me that it is impossible to hold that, in such a case as that, there was no riot resulting in damage to property for which the owner of the property would be entitled to damages. I think it is enough to say that these people went there for this common purpose; they went there truly in good humour; they went armed with crowbars and pick-axes; they did not interfere with anybody else because nobody interfered with them; they were allowed to execute their common purpose unimpeded. But the man living next door said: "They did not interfere with me, it is true; when I asked them not to demolish my property they desisted, they never intended to demolish my property; but I dared not interfere with them; I dared not interfere to protect Mr. Ford's property. If I had interfered I am satisfied that I should have been killed or seriously injured." It seems to me that in this case, so far as No. 2, Ford's Park Road is concerned, there were all the elements of a riot, all the five elements which justify this action. I am not concerned with the quantum of damages; that is a matter that must be referred. I think it is quite likely that the damage actually attributable to the riot is considerably exaggerated, because the premises were obviously in a more or less dismantled and broken down con-

dition before the riot took place. [HIS LORDSHIP here stated that the evidence failed to satisfy him that there had been anything in the nature of a riot in connection with the other property in respect of which the plaintiff was said to have suffered injury. HIS LORDSHIP then proceeded as follows:] The action, therefore, in my opinion, succeeds so far as No. 2, Ford's Park Road is concerned, and fails so far as the rest of the premises are concerned.

Solicitors: *Greenwood & Greenwood*; *Ellis & Ellis.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

HORTON *v.* GWYNNE

[KING'S BENCH DIVISION (Darling, Avory and Horridge, JJ.), April 8, 1921]

[Reported [1921] 2 K.B. 661; 90 L.J.K.B. 1151; 125 L.T. 309; 85 J.P. 210; 26 Cox, C.C. 744; 19 L.G.R. 351]

Criminal Law—Killing pigeon—Killing in mistaken, but honest, belief that bird wild—Larceny Act, 1861 (24 *& 25 Vict., c.* 96) *s.* 23.

The respondent shot and killed a house pigeon which had lost its way and settled on the ground in a field. He honestly believed that the pigeon was a wild pigeon, and that he had the right to shoot it.

Held: a mistaken belief that the pigeon was a wild one which he might lawfully kill was no defence to a charge of killing a house pigeon.

Notes. Distinguished: *Farey* v. *Welch*, [1929] 1 K.B. 388. Followed: *Cotterill* v. *Penn*, [1935] All E.R.Rep. 204. Referred to: *Hamps* v. *Darby*, [1948] 2 All E.R. 474.

As to mens rea in statutory offences generally, see 10 HALSBURY'S LAWS (3rd Edn.) 273, and as to mens rea in pigeon shooting, see 1 HALSBURY'S LAWS (3rd Edn.) 660; and for cases see 14 DIGEST (Repl.) 38. For the Larceny Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 727.

Case referred to:

(1) *Taylor* v. *Newman* (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L.J.M.C. 186; 8 L.T. 424; 27 J.P. 502; 11 W.R. 752; 9 Cox, C.C. 314; 122 E.R. 393; 2 Digest (Repl.) 302, *95.*

Case Stated by Hereford justices.

An information was preferred by the appellant John Edmund Horton against the respondent William R. Gwynne for that he, on June 8, 1920, at Grafton, in the county of Hereford, did unlawfully and wilfully kill a pigeon, the property of William Pegg, of Blaby, of the value of £5, under such circumstances as did not amount to larceny at common law.

The justices heard the information on July 3, 1920, and dismissed the same. The following facts were given in evidence or were admitted before the justices. The pigeon which was killed belonged to William Pegg, of Blaby, near Leicester, and was of the value of £5. It was a homing pigeon and started with nine other pigeons to fly from Bournemouth to Leicester, and was the only one of the said pigeons that did not return to Leicester. It was shot by the respondent whilst it was sitting on the ground in a field about two miles from the city of Hereford, and at a distance of 40 yards from the respondent. The body of the pigeon was not produced to the justices, but only the legs with rings thereon. The constable, however, who saw the pigeon shot, stated that the bird was "a very dark bird, almost black," and the said William Pegg stated that it was a "dark chequer bird."

The deputy chief constable, who saw the pigeon when brought in by the constable, deposed that it was a dark bird. The respondent, who was not represented by a solicitor, did not give evidence on oath but stated in answer to the charge that he thought that the pigeon was a wild pigeon when he shot it. The justices, being satisfied that the respondent believed that the said pigeon, whilst feeding on the ground as aforesaid, was a wild pigeon, and that he had a right to shoot it, were of opinion that he did not unlawfully and wilfully shoot the same within the meaning of s. 23 of the Larceny Act, 1861, and they therefore dismissed the information.

Section 23 of the Larceny Act, 1861, provides:

"Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds."

H. H. Joy for the appellant.

The respondent was not represented.

DARLING, J.—The respondent in this case was charged with having unlawfully and wilfully killed a pigeon in such circumstances as did not amount to larceny at common law. The respondent shot it while it was on the ground at a distance of 40 yards from him. His explanation to the justices, which they accepted, was that he thought that it was a wild pigeon, but he did not deny that he intended to kill this particular pigeon. In those circumstances I think that the respondent's act was both wilful and unlawful. In my opinion, the offence was proved when it was shown that he killed this pigeon intentionally, although he mistook it for a wild pigeon. House pigeons have long been protected by law as a valuable species of property, and in my opinion s. 23 of the Larceny Act, 1861, was intended to protect house pigeons from being killed, whether the person killing them knows, or does not know, that they are house pigeons. A person who shoots at a particular pigeon must take the chance of its being a house pigeon. The appeal must be allowed and the Case remitted to the justices.

AVORY, J.—I agree. *Taylor* v. *Newman* (1) supports the view that the respondent's belief that the pigeon was a wild pigeon affords no defence. In that case a farmer, who was prosecuted under the same section, set up the defence that he shot the particular pigeon while it was feeding on his crops. The justices convicted, but the court came to the conclusion that this was a good defence. If, however, the farmer had not been acting in defence of his property the court would obviously have upheld the conviction.

HORRIDGE, J.—I agree.

Appeal allowed and Case remitted.

Solicitors: *Murr & Vyvyan Hicks*, for *Sharpe, Darby & Millichip*, West Bromwich.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

R. *v.* CAMPBELL. Ex parte MOUSSA

[King's Bench Division (Darling, Avory and Sankey, JJ.), April 11, 1921]

[Reported [1921] 2 K.B. 473; 90 L.J.K.B. 818; 125 L.T. 310; 85 J.P. 189; 37 T.L.R. 611; 19 L.G.R. 461; 26 Cox, C.C. 747]

Quarter Sessions—Appeal to—"Penalty adjudged"—Alien—Recommendation for deportation—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict.* 71), *s.* 50.

The applicant was charged under art. 6 (1) (c) of the Aliens Order, 1920, for that, being an alien, he had failed to notify to the registration officer an intended change of residence. At the hearing he admitted that he was an Egyptian, and that he had not notified his intended change of residence. The magistrate entered a plea of Guilty, sentenced the applicant to a month's imprisonment, and recommended him for deportation. The applicant gave notice of appeal to quarter sessions against the conviction, but the magistrate declined to take the recognisances of the applicant and of his sureties on the ground that there was no right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839, because the penalty was not more than a month's imprisonment, and that there was no right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 (1) of the Criminal Justice Administration Act, 1914, because the applicant had admitted the truth of the information. The magistrate refused to hold that an Egyptian was not an alien. A rule nisi having been obtained for a mandamus to the magistrate to take the recognisances, the Foreign Office gave a certificate that the existence of the British Protectorate over Egypt did not make Egyptians British subjects.

Held: the recommendation for deportation was not part of the "penalty adjudged" within s. 50 of the Metropolitan Police Courts Act, 1839, and, therefore, the applicant had no right of appeal under that section, but (Avory, J., dissenting) the applicant had not pleaded Guilty or admitted the truth of the information, and, therefore, he had a right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 (1) of the Criminal Justice Administration Act, 1914, and the rule must be made absolute.

Notes. The Summary Jurisdiction Act, 1879, s. 19, has been repealed by the Magistrates' Courts Act, 1952, s. 132 (1) and Sched. VI, and the Criminal Justice Administration Act, 1914, s. 37 (1), has been repealed by the Criminal Justice Act, 1948, s. 83 (3) and Sched. X, Part I. Neither section has been replaced. By s. 83 (1) of the Magistrates' Courts Act, 1952, a person convicted by a magistrates' court may appeal to quarter sessions (a) if he pleaded Guilty against his sentence, or (b) if he did not, against conviction or sentence.

Considered: *R.* v. *Durham Quarter Sessions, Ex parte Virgo*, [1952] 1 All E.R. 466.

As to appeals to quarter sessions from a magistrates' court, see 25 Halsbury's Laws (3rd Edn.) 290 et seq.; and for cases see 33 Digest 390 et seq. For the Metropolitan Police Courts Act, 1839, s. 50, see 14 Halsbury's Statutes (2nd Edn.) 752.

Rule Nisi to Graham Campbell, Esq., one of the metropolitan police magistrates, for a mandamus directing him to take the recognisances of the applicant, Ahmed Hamid Moussa, and of his sureties on his appeal against his conviction under art. 6 (1) (c) of the Aliens Order, 1920, for failing, on Mar. 12, 1921, when he was about to change his residence, to notify to the registration officer of the district in which he resided particulars as to the date of the intended change and as to his intended place of residence.

The applicant was charged on Mar. 14, 1921, and, at the hearing, he elected to be tried by the magistrate instead of a jury. The clerk to the magistrates thereupon, as foreigners frequently did not understand the question "Do you plead guilty?" asked the applicant whether he was an Egyptian, and the applicant

replied that he was. The applicant was thereupon asked whether he had told the registration officer that he intended to change his residence and when and where he was going. The applicant said that he had not done so. The magistrate then entered a plea of guilty and sentenced the applicant to a month's imprisonment without hard labour and recommended him for deportation. The applicant had been previously convicted of a similar offence. Notice of appeal to quarter sessions was given, but the magistrate refused to take the recognisances of the applicant and of his sureties on the ground that the applicant had no right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839, because the penalty adjudged was not more than a month's imprisonment, and that he had no right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, or under s. 37 (1) of the Criminal Justice Administration Act, 1914, because he had admitted the truth of the information. The magistrate declined to hold that an Egyptian was not an alien. On cause being shown against the rule, the following certificate was read:

"By the authority of the Secretary of State for Foreign Affairs, I certify that in virtue of the protectorate declared over Egypt by His Majesty's Government on Dec. 18, 1914, His Majesty's Diplomatic and Consular officers afford protection to Egyptians, but the existence of the protectorate does not make Egyptians British subjects.—(Signed) EYRE A. CROWE, Permanent Under-Secretary of State for Foreign Affairs."

By the Metropolitan Police Courts Act, 1839, s. 50:

". . . In every case of summary order or conviction before any of the said magistrates, in which the sum or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace, . . . and it shall be lawful for the magistrate by whom such order or conviction shall have been made to bind over the witnesses who shall have been examined, in sufficient recognisances, to attend and be examined at the hearing of such appeal. . . ."

By the Summary Jurisdiction Act, 1879, s. 19:

"Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a court of general or quarter sessions against such conviction or order . . ."

By the Criminal Justice Administration Act, 1914, s. 37 (1):

"Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions."

The Attorney-General (*Sir Gordon Hewart, K.C.*) and *G. A. H. Branson* showed cause.

Holman Gregory, K.C., and *J. D. Casswell* in support of the rule.

AVORY, J.—In my opinion this rule ought to be discharged. The question is whether the magistrate should be ordered to take the recognisances of the applicant with a view to an appeal to quarter sessions. The magistrate cannot be ordered by this court to take the recognisances unless the applicant has established his right to appeal to quarter sessions. In order to show that, he must bring himself either within s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal

Justice Administration Act, 1914, or s. 50 of the Metropolitan Police Courts Act, 1839. To bring himself within either s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914, he must satisfy this court for this purpose that he did not either plead guilty or admit the truth of the information or complaint. To bring himself within s. 50 of the Metropolitan Police Courts Act, 1839, he must satisfy this court that the sum or penalty adjudged to be paid was more than £3, or that the penalty adjudged was imprisonment for any time more than one calendar month. Counsel contended that the applicant has brought himself within the Acts of 1879 and 1914 on the ground that he did not admit the truth of the information or complaint within the meaning of those Acts, and, further, that he has also brought himself within s. 50 of the Act of 1839 on the ground that the penalty adjudged in this case was, in fact, something more than imprisonment for one calendar month.

On the first point, a difference of opinion arises between the members of this court. In my opinion, the applicant did admit the truth of the information or complaint in this case. It must be taken for the purpose of this application that he is admittedly an Egyptian subject. In my view, it follows that, if he is an Egyptian subject, he is an alien. He was charged that he, being an alien, failed to notify to the registration officer particulars as to his intended change of address. He is a man who had already been convicted, before Mar. 14, 1921, when this case was heard, of an offence under the Aliens Order, 1920. We are informed that he is an educated man who understands English perfectly, and he, therefore, knew quite well the nature of the offence that was charged against him on this occasion. The magistrate, seeing a foreigner before him, took the course which, he says, is generally taken in such cases. Instead of saying to him as in the ordinary case, "Do you plead Guilty or Not Guilty?" he said to him, "Are you an Egyptian?" And the applicant replied, "Yes." The magistrate then said, "Do you admit that you have failed to notify to the registration officer particulars as to your change of address?" And the applicant replied, "Yes." It appears to me that there was nothing more which could be admitted by the applicant in order to constitute an admission of this offence. When he admitted that he was an Egyptian subject, he admitted that he was an alien; and, having admitted that he was an alien, he further admitted that he had failed to notify the registration officer; and, therefore, he admitted the truth of the charge or information. I cannot myself see what more he could be called on to admit in order to admit that he had committed the offence. It is suggested that he ought to have been asked whether he admitted that he was an alien. If he had been asked that question and had said "Yes," I could quite understand the argument being put forward on his behalf that that was not an admission of the truth of the information, because he might have been mistaken in his view of the law as to what constitutes an alien. As soon as he admitted that he was an Egyptian subject, it was for the magistrate to determine as a matter of law and common sense whether he was an alien, and the magistrate could not determine otherwise than as he did, namely, that an Egyptian subject is an alien. Therefore, in my view, the applicant had no right of appeal, either under s. 19 of the Summary Jurisdiction Act, 1879, or under s. 37 of the Criminal Justice Administration Act, 1914.

With regard to s. 50 of the Metropolitan Police Courts Act, 1839, I am also of opinion that the applicant had no right of appeal under that section. This is not a case where a sum of money was adjudged to be paid by way of a fine, and the only question is whether it is a case where the penalty adjudged was for any time more than one calendar month. It is quite clear that the penalty adjudged was for one calendar month. It is quite true that, in addition to the adjudication of that penalty, the magistrate made a recommendation to the Home Secretary that the applicant should be deported, and it has been pointed out by counsel for the appellant that, by art. 12 (7) of the Aliens Order, 1920, in any case where a court has made a recommendation for deportation, and where there is an appeal to a higher court, that court may certify to the Secretary of State that it does not

concur in the recommendation, and thereupon the recommendation shall be of no effect. That appears to me to have no bearing on the question whether in fact in this case the penalty adjudged was imprisonment for more than one calendar month. The recommendation by the magistrate to the Secretary of State that the applicant should be deported is not, in my opinion, any part of the penalty adjudged. So far as this section is concerned, I would suggest a further illustration of my view by a case which is of almost daily occurrence, where a man is charged with an assault and is either sent to prison for one month or ordered to pay a fine of 40s., and in addition is ordered to find sureties to keep the peace. I cannot myself entertain any doubt whatever that, in such a case as that, no right of appeal is conferred because, in addition to the imprisonment or fine, the man is ordered to find sureties to keep the peace. That is not a case where the penalty adjudged is imprisonment for more than one calendar month within this section, and no one has ever suggested, during all the years during which this section has been in operation, that such an adjudication by the magistrate would give a right of appeal. Therefore, I have come to the conclusion that the magistrate was right, and I do not agree with the suggestion of counsel for the applicant that a person who wishes to argue the question whether he has a right of appeal can call on the magistrate to take the recognisances so as to give him the opportunity of arguing that question in the court of quarter sessions. In my opinion, when it is as plain as I think it is here, that there is no right of appeal, the magistrate is quite justified in refusing to take the recognisances, as the magistrate refused in this case, and, therefore, I think that the rule should be discharged.

SANKEY, J.—The only question that falls for our determination in this case is whether the applicant has a right to appeal. Counsel has argued on his behalf that he has a right to appeal either under s. 50 of the Metropolitan Police Courts Act, 1839, or under s. 19 of the Summary Jurisdiction Act, 1879, or s. 37 of the Criminal Justice Administration Act, 1914. It appears that the applicant was sentenced by the magistrate at Bow Street to a period of imprisonment for one month without hard labour, and that the magistrate further certified to the Secretary of State that he had so convicted him and recommended the making of a deportation order in addition to the sentence of imprisonment.

The charge against the applicant was a charge under the Aliens Order, 1920, of failing to notify to the proper authority an intended change of residence. I shall first deal with counsel's point that the applicant has a right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839. [His Lordship read the section.] Counsel has argued that his client comes within the words of that section. It is said (i) that the penalty was more than imprisonment for one calendar month, and (ii) that, in fact, the applicant has served more than one calendar month. As to these two points, I do not think that it is possible to say that, in the circumstances, the recommendation comes within the meaning of the word "penalty," as used in s. 50. I doubt whether it is a penalty at all, because it is no part of the order of the magistrate that the applicant should be deported. The most that the magistrate can do is to recommend that that course should be taken by the Home Secretary, and it is entirely for the Home Secretary to say whether he will act on that recommendation or not. I also do not think that it is possible to say that the applicant was adjudged imprisonment for more than one calendar month. It is true that he was in fact imprisoned for a longer time than the one calendar month ordered by the magistrate, but the reason is not because he was adjudged imprisonment for any time more than one calendar month, but because, by art. 12 (4) of the Aliens Order, 1920, it is provided:

> "An alien with respect to whom a deportation order is made, or a certificate is given by a court with a view to the making of a deportation order, may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be

deemed to be in legal custody whilst so detained, and until the ship finally leaves the United Kingdom."

Therefore, there are two different periods: (i) the period during which he is serving the penalty of a month's imprisonment; and (ii) the period during which he is detained in legal custody till the vessel leaves the United Kingdom. Therefore, I think that counsel's point on s. 50 fails.

With regard to his point under s. 19 of the Summary Jurisdiction Act, 1879, and s. 37 of the Criminal Justice Administration Act, 1914, both those sections contain the same words. [HIS LORDSHIP read the latter section.] The narrow point on which I desire to decide this case is the question whether the applicant pleaded guilty or admitted the truth of the information. That is merely a question of fact, and it is on that question of fact that I have the misfortune to differ from AVORY, J. The facts are contained in the affidavit of the magistrate which states as follows: [HIS LORDSHIP stated the facts, and continued:] First, I do not read that as indicating that the applicant pleaded guilty. The magistrate states specifically: "I entered a plea of Guilty." Nor do I read it as showing that the applicant admitted the truth of the information. It is true that he had been previously convicted of a like offence, but it may well be that he wished to contend that, though he was an Egyptian, he really was not an alien. It seems to me that he had no opportunity of doing that. Though a plea of Guilty was entered, he did not plead guilty, and on that ground I think he had a right to appeal under the Act of 1879 or the Act of 1914, and this rule should be made absolute.

DARLING, J.—In this case I absolutely agree with my brothers AVORY and SANKEY with regard to the question whether the recommendation to the Home Secretary that he should make an order for the deportation of the applicant was a part of the penalty adjudged. I think, for the reasons given by both my learned brethren, that it was not; and this makes it unnecessary for me to add anything on that question. I entirely adopt as my own opinion what they have said on that subject.

There still remains the question whether this rule should be made absolute or should be discharged. In regard to that, I take the same view as my brother SANKEY has expressed. It seems to me perfectly plain that the applicant, when he was charged. desired to argue that he was not an alien, and to rely on the fact that he was an Egyptian in support of his contention that he was not an alien. That may be a good or a bad contention, and I have a definite opinion on the matter, but it is not necessary to express it, and I do not do so. It is, however, perfectly plain that that is what he wanted to argue. It was part of the charge, not that he was an Egyptian, but that he was an alien. He did not plead guilty, but, in reply to that part of the charge which alleged that he was an alien, he said that he was an Egyptian. He wished, however, to argue that an Egyptian was not an alien. I have, therefore, come to the conclusion that he did not admit the truth of the information or complaint. The argument against the rule resolves itself into a syllogism: All Egyptians are aliens; the applicant admits that he is an Egyptian, therefore he admits that he is an alien. I think that the conclusion is false. The applicant never admitted that all Egyptians are aliens, and, therefore, he did not admit that he was an alien, and, consequently, he did not admit the truth of the information. The magistrate has taken a partial admission as an admission of the truth of the whole of the charge. I think that there he went wrong, and the rule should be made absolute.

Rule absolute.

Solicitors: *Treasury Solicitor*; *J. H. MacDonnell.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

R. *v.* WANDSWORTH LICENSING JUSTICES. Ex parte WHITBREAD & CO., LTD.

[King's Bench Division (A. T. Lawrence, C.J., Darling and Avory, JJ.), April 19, 20, 1921]

B

[Reported [1921] 3 K.B. 487; 90 L.J.K.B. 1114; 125 L.T. 540; 85 J.P. 171; 37 T.L.R. 619]

Licensing—Licensed premises—Alterations—Consent of justices—Condition imposed by justices—Surrender of another licence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 71 (1).

C

The applicants, owners of an on-licence beerhouse, applied to the licensing justices under the Licensing (Consolidation) Act, 1910, s. 71 (1), for their consent to rebuild the premises. The justices refused to grant the application except on the surrender of another on-licence in the same licensing division, however small. The applicants, who had fifteen or sixteen houses with on-licences in the division, refused to comply with this condition and obtained a rule nisi for mandamus calling on the justices to hear and determine their application. The chairman of the justices, in an affidavit showing cause, stated that they had taken into consideration the fact that the reconstruction of the premises would give greater facilities for the sale of intoxicating liquors which would be equivalent to the grant of a new licence while no monopoly value would be payable in respect thereof.

D

Held: (i) the justices were not entitled to take into consideration the question of the monopoly value; (ii) (per A. T. Lawrence, C.J., and Darling, J.) the justices were not entitled to impose the condition that the applicants should surrender another licence of theirs in the division; and, therefore, the rule must be made absolute.

E

Quære (per A. T. Lawrence, C.J., and Darling, J.), whether, if there had been a small or inconvenient licensed house of the applicants in the immediate neighbourhood of the premises in question, the justices might not have asked for the surrender of that licence.

F

Notes. The Licensing (Consolidation) Act, 1910, has been repealed by the Licensing Act, 1953, s. 168 (1) and Sched. X. Section 71 of the Act of 1910 has been replaced by s. 134 of the Act of 1953.

Followed: *R.* v. *Sheffield Justices, Ex parte Rawson*, [1927] All E.R.Rep. 477. Referred to: *R.* v. *Pontypridd Licensing Justices, Ex parte Ely Brewery Co.*, [1948] 2 All E.R. 581.

G

As to alterations of licensed premises, see 22 Halsbury's Laws (3rd Edn.) 547–549; and for cases see 30 Digest (Repl.) 47, 48. For the Licensing Act, 1953, s. 134, see 33 Halsbury's Statutes (2nd Edn.) 264.

H

Case referred to:

(1) *R.* v. *Shann*, [1910] 2 K.B. 418; 79 L.J.K.B. 736; 102 L.T. 700; 74 J.P. 273; 26 T.L.R. 435; 54 Sol. Jo. 474, C.A.; 30 Digest (Repl.) 56, *423*.

Also referred to in argument:

R. v. *Bowman*, [1898] 1 Q.B. 663; 14 T.L.R. 303; 67 L.J.Q.B. 463; 78 L.T. 230; 62 J.P. 374, D.C.; 30 Digest (Repl.) 36, *275*.

I

Leeds Corpn. v. *Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 23 T.L.R. 721; 51 Sol. Jo. 716, H.L.; 30 Digest (Repl.) 45, *345*.

R. v. *Drinkwater, Wincott's Case*, [1905] 2 K.B. 469; 74 L.J.K.B. 722; 93 L.T. 165; 69 J.P. 300; 54 W.R. 95; 21 T.L.R. 514, D.C.; 30 Digest (Repl.) 36, *276*.

Rule Nisi to the licensing justices for the Wandsworth Division of the County of London to show cause why a writ of mandamus should not issue commanding them to hold a transfer sessions meeting, and to hear and determine an application by Whitbread & Co., Ltd., the applicants for the rule, under s. 71 of the Licensing

(Consolidation) Act, 1910, for the consent of the said justices to certain alterations in the Rose and Crown beerhouse situate at 158, Tooting Bec Road.

The applicants were the owners of an ante-1869 beerhouse, known as the Rose and Crown, situate at 158, Tooting Bec Road, in the Wandsworth Division of the County of London. The licence had been held by members of the same family for eighty years and a large and increasing business was carried on. The internal arrangements were old-fashioned, with the result that the premises were crowded during the hours when they were open for the sale of beer. The district was crowded with small dwelling-houses, and there was no other on-licence within a quarter of a mile of the premises. In accordance with their powers under the Metropolis Management Acts, 1855 to 1893, the London County Council, in conjunction with the Wandsworth Borough Council, had acquired land in the Tooting Bec Road for the purpose of setting back the frontages of the houses and widening the road. The only building left to be set back to complete the widening of the particular part of the road was the Rose and Crown beerhouse. On Sept. 14, 1920, the applicants entered into an agreement with the London County Council to sell part of the site of the beerhouse for £3,000, and the applicants also agreed to demolish all those parts of the building which were on the land so sold and to give the county council vacant possession thereof within two months from the completion of the purchase. It therefore became necessary to rebuild the premises. The agreement was conditional on the approval of the plans by the justices for the Wandsworth Licensing Division, and, if such approval was not obtained, the agreement was to be void. On Dec. 3, 1920, an application was made on behalf of Mrs. E. S. Booker, the tenant and licensee, and of the applicants, to the Wandsworth Licensing Justices under s. 71 of the Licensing (Consolidation) Act, 1910, for leave to rebuild the beerhouse in accordance with the plans. On Jan. 17, 1921, the chairman and several other justices who had heard the application having viewed the premises, the chairman stated to the applicants' solicitor that they had taken all the circumstances into consideration and the benefit from the improved accommodation in the new house, but that the application would not be granted except with the surrender of an on-licence in the Wandsworth Division, however small. The applicants had fifteen or sixteen houses with on-licences in the division. At the general annual licensing meeting on Feb. 4, 1921, counsel for the applicants stated that they were not prepared to offer the surrender of an on-licence in the division, and the application was refused. The applicants obtained a rule nisi on the ground that the justices were not entitled, and had no power, to take into consideration what, if any, licence the owners might be prepared to surrender. The chairman of the justices stated in his affidavit that they took into consideration the fact that, if the premises were reconstructed in accordance with the plan submitted, the licensed area of the premises would be considerably increased and greater facilities for the sale of intoxicating liquors would be provided, which would be equivalent to the grant of a new licence, whilst no monopoly value would be payable in respect thereof. The justices also took into consideration the fact that in the vicinity there was a considerable area which might ultimately be built on, and, if at any future time it became necessary to grant an additional licence in the neighbourhood, the monopoly value then obtainable would be reduced if the Rose and Crown was reconstructed in accordance with the plans submitted.

By the Licensing (Consolidation) Act, 1910, s. 71:

"(1). An alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way, shall not be made without the consent of the licensing justices given either at the general annual licensing meeting or at transfer sessions. (2) The

licensing justices may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine . . . ''

Sir Ernest Wild, K.C. (*J. B. Melville* with him), showed cause.
Whiteley, K.C. (*R. E. Otter* with him), in support of the rule.

A. T. LAWRENCE, C.J.—This rule for mandamus was obtained with regard to an order of the licensing justices for the Wandsworth Division refusing to give their consent to an alteration of an old beerhouse called the Rose and Crown. The proposal arose in consequence of an improvement in the district being carried out by the county council. The road was to be widened, and, I understand, had been widened up to the part where the Rose and Crown projected into the ground which was to become the new roadway. A scheme was prepared by the county council and the applicants to reconstruct the Rose and Crown and to throw the ground on which it now stands into the new roadway. The applicants agreed with the county council for a reconstruction, a plan was submitted, and the county council agreed to contribute some portion of the expenses. It then became necessary, in order to carry out this scheme, to apply to the licensing justices, under s. 71 of the Licensing (Consolidation) Act, 1910, for their consent. The licensing justices, when the matter came before them, said that they would not consent unless the applicants made a proposal to surrender some other house in the division, but that, if the proposal were made to surrender another house in the division, however small, they would be prepared to consider the application. I think they said that after they had had a view. The chairman has made an affidavit in which he defends the position which they have taken up by saying that they would lose the monopoly value, or the opportunity of getting monopoly value, because this was such an improvement of the old Rose and Crown that it was practically equivalent to the grant of a new licence. I do not think that that is really a legitimate statement or a true statement. I do not think that it is either in law or in fact equivalent to the grant of a new licence, and I do not think that he was entitled to bring that consideration into the matter. What he had to consider was the needs of the neighbourhood for the supply of intoxicating liquor, and to regard these proposed improvements on their merits, and to come to a decision on the merits of the proposed improvements, whether they ought or ought not to be allowed. But for the justices to introduce this scheme of getting a surrender of another house somewhere in the division and to refuse their consent because that would have an effect on their getting monopoly value seems to me to be applying their minds to the wrong point and refusing their consent on grounds which were not admissible. If there had been a small house or an inconvenient house in the immediate neighbourhood, so that it was supplying liquor to the same portion of the community, I should have great doubt whether they might not ask for a surrender of the licence of that house. But I do not say whether they could or could not. That is a matter which may arise in the future. Counsel in support of the rule contends that they could not. I reserve that point for future consideration. But that they could not do what they were doing here, namely, bargain to get a surrender of a house somewhere in the division, seems to me to be clear on the authorities that have been cited, particularly the decision of FARWELL, L.J., in *R.* v. *Shann* (1). The rule must be made absolute.

DARLING, J.—I agree with what my Lord has said, but I go a little further. It seems to me that what the justices did was plainly a refusal to hear and determine, for these reasons. When the matter came before them, the justices stated that the application would not be granted unless the surrender of an on-licence in the Wandsworth Division, however small, were agreed to. Then there was a subsequent deliberation and a meeting between the applicants and the justices, and it appears to me that what the justices did was this: The applicants went with the desire to make an application, just as anybody might come desiring to make an application to this or any other court, and the justices said: ''We will not

consider your application unless you first of all agree to a condition which we desire to impose." Whether it was a condition which they could impose or not, it appears to me that that was a refusal to consider the application on its merits. I believe that in the Middle Ages it was useless to come to court unless one came with a gift. It was not that justice was sold. It was that the application did not get heard. That was regularised, at least as I understand history, by the charge of certain definite fees to those who come to make an application. It was very wisely provided that the fees should not go to the judge, but that was how it came about. The proposal to put down so much to get an application heard was quite common in early days, and, as the King's authority, and the King's courts became better established, so rules for making applications and as to the necessary preliminaries grew up. But here it seems to me that there was a sort of attempt to return to barbarous times. When a person goes to a tribunal bound to hear and determine on ordinary rules of justice, and when that tribunal says: "We, the judges, have no proposal to make, but before we hear your application we want to know what proposal you have to make to us in the way of parting with something which belongs to you," and when he says, "I am not prepared to make a proposal about it," and they say, "Very well, we do not hear your application," it seems to me that that is wrong, and that this rule must be made absolute.

AVORY, J.—I agree that the rule for a mandamus should be made absolute. I prefer to base my judgment entirely on the admission made by the chairman of the justices in his affidavit where it says that they took into consideration the fact that, if the premises were reconstructed in accordance with the plans, the licensed area would be considerably increased and greater facilities for the sale of intoxicating liquor would be provided which would be equivalent to the grant of a new licence, whilst no monopoly value would be payable in respect thereof. The justices also took into consideration the fact that there was in the vicinity of the premises a considerable area of land which might ultimately be built on, and if at any future time it became necessary to grant an additional licence in the neighbourhood of the premises the monopoly value then obtainable would be reduced if the premises were reconstructed in accordance with the plans. In my opinion, in taking into consideration the monopoly value either of these premises or of some hypothetical premises that might be built in the future, the justices were allowing themselves to be influenced by extraneous considerations which ought not to have influenced them in dealing with this application. On that ground alone the rule should be made absolute for them to hear and determine according to law. I wish to add this. If the case had depended solely on the statement of facts appearing in the affidavit in support of the rule, and if I had come to the conclusion that what was said by the chairman of the justices on Feb. 4, 1920, was consistent with the view that all that the justices were proposing to consider was an application for the surrender of some other licence in the immediate neighbourhood of the existing house, I should not have been prepared on that ground alone to say that this rule should be made absolute. I wish to say that as at present advised, I do not assent to the view which is put forward by counsel in support of the rule that neither under s. 71 of the Licensing (Consolidation) Act, 1910, nor on the application for a new licence are justices entitled to consider, or to invite, the surrender of existing licences. I reserve my final judgment on that point, but I wish to say that my view, as at present advised, is not in accordance with that argument which is put forward by counsel.

Rule absolute.

Solicitors: *Wetherfield, Baines & Baines*; *Martineau & Reid.*

[*Reported by* J. F. WALKER., ESQ., *Barrister-at-Law.*]

A

COMMISSIONERS OF WORKS *v.* HULL

[King's Bench Division (Shearman and Salter, JJ.), November 25, 1921]

[Reported [1922] 1 K.B. 205; 91 L.J.K.B. 308; 126 L.T. 349]

B

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Covenant not to underlet or assign without consent—Right of forfeiture for breach—Ejection proceedings by landlord against assignee in possession—Election to determine tenancy under forfeiture clause.

The plaintiffs' tenant, in breach of a covenant not to underlet or assign without their express authority in writing, assigned his tenancy to the defendant, and later disappeared. There was also a clause in the lease giving the plaintiffs the right of forfeiture if the covenant against assignment was broken. On discovering the facts, the plaintiffs claimed to eject the defendant as a trespasser.

C

Held: in bringing the proceedings against the assignee and not against the original lessee, the plaintiffs' action was a sufficient indication by them of an election to determine the tenancy under the forfeiture clause, and, therefore, they were entitled to judgment against the defendant.

D

Parker v. *Jones* (1), [1910] 2 K.B. 32, distinguished.

Notes. As to forfeiture of a lease, see 23 Halsbury's Laws (3rd Edn.) 665 et seq.; and for cases see 31 Digest (Repl.) 512 et seq.

Cases referred to:

E

(1) *Parker* v. *Jones*, [1910] 2 K.B. 32; 79 L.J.K.B. 921; 102 L.T. 685; 26 T.L.R. 453; 31 Digest (Repl.) 587, *7063*.

(2) *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 19 T.L.R. 510, C.A.; 31 Digest (Repl.) 417, *5465*.

(3) *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 20 W.R. 972; 31 Digest (Repl.) 528, *6513*.

F

(4) *Jones* v. *Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, *4252*.

Appeal from Greenwich County Court.

The plaintiffs were the owners of the Well Hall Estate, Eltham, and on Apr. 1, 1918, they let a dwelling-house on the estate, 14, Lovelace Green, to one Stacey at a rent of 12s. 6d. per week. The agreement of tenancy contained the following G covenants.

> "No tenant shall underlet or take in lodgers without the express authority in writing of the housing manager being first obtained . . . or assign this agreement. In case of breach by the tenant of any of these regulations, the housing manager may determine the tenancy summarily at any time."

H

The rent for the house was subsequently raised to 18s. 6d. per week. Stacey continued to occupy the house up to May, 1921. On May 21, 1921, the collector, on calling for the rent, found that Stacey had gone and that the defendant Hull was occupying the premises. Hull offered to pay the rent then due, but the collector declined to accept it. The plaintiffs brought this action of ejectment under the County Courts Act, 1888, s. 59, against the defendant whom they found in possession of the premises, and the action was tried on the footing that the defendant was an assignee. The original tenant, Stacey, had disappeared. He had sublet the premises to the defendant without the authority of the plaintiffs, which was a breach of the covenants of the agreement. The plaintiffs had heard nothing further of Stacey since he left the premises, and they had not served on him any notice to quit, but, immediately on the facts coming to their knowledge that Stacey had assigned the tenancy in breach of the covenants, they indicated their intention to forfeit the tenancy by claiming to eject the defendant as trespasser.

I

A The county court judge gave judgment for the defendant, holding that he was not a trespasser. The plaintiffs appealed.

Clement Davies for the plaintiffs.
Montague Berryman for the defendant.

SHEARMAN, J.—This is a curious case. The plaintiffs, whose estate is B administered by the London County Council acting through a committee, let some rooms to one Stacey. The tenancy agreement contained covenants that Stacey should not underlet or assign without the express authority in writing of the housing manager, and reserved to the landlords a right of forfeiture in the case of any breach of covenant on the part of the tenant. The tenant sublet the house and the plaintiffs brought this action for ejectment against the defendant who was C found in possession of the premises, on the footing that he was a trespasser. At the trial no reference was made to any rights the defendant might have had as an assignee under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, therefore, no question arises under that Act. In the county court, it was contended that the defendant came into lawful possession of the premises as assignee. It is well-settled law that, if a lessee underlets premises even although D contrary to his covenant, the sub-tenant nevertheless becomes his lawful tenant, but when the letting comes to the landlord's knowledge, he has an option to put an end to the tenancy by enforcing his right of forfeiture and thereby putting an end to the sub-tenancy growing out of the original tenancy. The county court judge thought that the present case was governed by *Parker* v. *Jones* (1). But all that that case decided was that, where the immediate lessee of the landlord E surrendered his tenancy, that did not put an end to the sub-tenancy. A person who surrenders is like a person who assigns; he must assign subject to any equities or tenancies created by himself. The present case is launched entirely on forfeiture, and the defendant seeks to uphold his judgment by saying that he might have succeeded on another ground. The difficulty is that Stacey has disappeared, and the only evidence of the election of the plaintiffs to determine Stacey's tenancy F is the issue of the plaint against the defendant under s. 59 of the County Courts Act, 1888. There does not seem to be any case which decides that, on the disappearance of the tenant, the issue of the plaint or writ against the person actually in possession is a sufficient declaration by the landlord of the exercise of his option. It is well decided since *Serjeant* v. *Nash, Field & Co.* (2) that the best and most irrevocable indication of an intention to claim a forfeiture is the issue of a writ. G I think it follows from the judgment in that case that the issue of a writ against the person claiming to be the lawful sub-tenant is also a sufficient indication. COLLINS, M.R., referring to the judgment of WILLES, J., in *Grimwood* v. *Moss* (3), said ([1903] 2 K.B. at p. 311):

> "The learned judge [WILLES, J.] added with reference to the case of *Jones* v. *Carter* (4): 'I entirely agree that the true principle upon which that decision H was founded was, that the bringing of the action of ejectment is equivalent to the ancient entry'."

In my opinion, it does not necessarily follow from that that the action must be brought against the original tenant, for it would be a vain proceeding if he is out of possession, and does not claim to be in. I think it is sufficient to bring an action I of ejectment against the person claiming to be in possession under the lessee who has gone out. It has been suggested in one text-book that the intention to exercise the option must be communicated to the tenant, and *Jones* v. *Carter* (4) is cited in support of that proposition. PARKE, B., in that case says (15 M. & W. at p. 726):

> "Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of LORD COKE, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical

reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease."

Those words equally apply to an action of ejectment or recovery of possession against the assignee of the lessee if in possession. PARKE, B., says just before the above passage:

"We think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession must be considered as the exercise of the lessor's option."

The meaning of it all is that it is sufficient if process is served, not on the original lessee, but on the under-lessee who claims to be in possession under the lessee, because that is merely a peaceable means of effecting re-entry. It follows that there is a forfeiture and that the defendant had no right to remain on the premises, and this appeal must be allowed with costs.

SALTER, J.—I am of the same opinion. The county court judge was wrong in supposing that the judgment in *Parker* v. *Jones* (1) entitled the defendant to succeed. In that case, the lessee of a field sublet it on a weekly tenancy to the plaintiff in breach of the terms of the lease. The lessor was thereby entitled to forfeit the lease if he wished to do so. The lessor, in fact, did not know what the lessee had done, and did not, therefore, forfeit the lease. The lessee, having without the lessor's knowledge, created the subtenancy, surrendered his interest to the lessor. The lessee, however, could only surrender the interest which he had which was his reversion expectant on the determination of the plaintiff's tenancy. The plaintiff's interest in the land, therefore, remained. In ignorance of the plaintiff's tenancy, the lessor granted a lease of the land to the defendant, who, finding the plaintiff's cattle there, drove them off. The plaintiff sued the defendant for possession of the field and for damages for trespass to his land and cattle, and was successful. It was clear that the plaintiff's interest in the land had never come to an end, and he was, therefore, entitled as against the defendant to possession of the field. If the lessor had learned what was done and had chosen to determine the lease, then no doubt the interest of the plaintiff would have come to an end at the same time; but that was not what had happened. The present case must, however, be dealt with on the footing that the defendant is an assignee of Stacey's interest. The plaintiffs had a right to determine the tenancy and they have taken the proper steps to do so. They are, therefore, entitled to possession of the premises, and the appeal must be allowed.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *F. J. Berryman.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re FARROW'S BANK, LTD.

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), June 22, 1921]

[Reported [1921] 2 Ch. 164; 90 L.J.Ch. 465; 125 L.T. 699; 37 T.L.R. 847; 65 Sol. Jo. 679]

Company—Winding-up—Lease—Covenant not to assign without consent—Power of liquidator to assign.

A lease contained a covenant on the part of a bank, its successors and assigns, that they would not "assign the said demised premises or any part thereof without the previous consent in writing of the lessor first obtained." There was also a proviso for re-entry by the lessor if the company should go into liquidation, either compulsory or voluntary, by reason of insolvency. The company was ordered to be wound-up compulsorily, and the liquidator sought to assign the premises without the consent in writing of the lessor.

Held: the position of a trustee in bankruptcy being different from that of a liquidator, the cases in bankruptcy holding that a trustee in bankruptcy could assign free from the bankrupt's covenant against assignment were not applicable to the liquidator of a company; the acts of the liquidator were the acts of the company, and the covenant in the lease was binding on the liquidator in the winding-up, there being no difference for that purpose between a voluntary and a compulsory winding-up.

Notes. Considered: *Re Wright, Ex parte Landau* v. *Trustee*, [1949] 2 All E.R. 605.

As to the powers of a liquidator in a winding-up by the court, see 6 Halsbury's Laws (3rd Edn.) 587 et seq.; and for cases see 10 Digest (Repl.) 917 et seq.

Cases referred to:

(1) *Doe d. Mitchinson* v. *Carter* (1798), 8 Term. Rep. 57; 101 E.R. 1264; 31 Digest (Repl.) 409, *5381.*

(2) *Re Birkbeck Permanent Benefit Building Society*, [1913] 2 Ch. 34; 82 L.J.Ch. 386; 108 L.T. 664; 57 Sol. Jo. 559; 10 Digest (Repl.) 930, *6366.*

(3) *Cohen* v. *Popular Restaurants, Ltd.*, [1917] 1 K.B. 480; 86 L.J.K.B. 617; 116 L.T. 477; 33 T.L.R. 107; 31 Digest (Repl.) 412, *5419.*

Also referred to in argument:

Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co. (1874), 9 Ch. App. 557; 43 L.J.Ch. 699; 31 L.T. 5; 22 W.R. 810, L.JJ.; 10 Digest (Repl.) 903, *6137.*

Goring v. *Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, *5621.*

Doe d. Goodbehere v. *Bevan* (1815), 3 M. & S. 353; 105 E.R. 644; 31 Digest (Repl.) 435, *5617.*

Appeal from a decision of P. O. Lawrence, J.

By an indenture of lease dated Nov. 23, 1910, and made between Clara Isabella Curtis of the one part and Farrow's Bank, Ltd., of the other part, the premises known as No. 182, Balham High Road, in the county of London, were demised to the bank for twenty-one years. The lease contained a covenant on the part of the bank, its successors and assigns, that they would not "assign the said demised premises or any part thereof without the previous consent in writing of the lessor first obtained." The lease also contained a provision that, if there should be a breach of any of the covenants by the lessees, or if the lessees while the premises should remain vested in them should become subject to the bankruptcy laws or make any arrangement or composition with creditors or enter into liquidation, whether compulsory or voluntary, by reason of insolvency, the lessor might re-enter on the premises, and immediately thereupon the term of the lease should absolutely cease and determine. On Dec. 20, 1920, a petition was presented by a

creditor of the bank for its compulsory liquidation, and on Jan. 11, 1921, an order for the compulsory winding-up of the bank was made, and a liquidator was duly appointed. On Feb. 4, 1921, the lessor, in accordance with the terms of the proviso for re-entry, served on the liquidator a notice in writing requiring the company, in view of the winding-up order, to give up possession of the premises. The liquidator, being of opinion that the lease was an asset of value, proceeded to make the necessary arrangements for the sale of the lease and took out a summons in the winding-up for a declaration (inter alia) that the company might have relief against forfeiture of the lease and that, notwithstanding the covenant restrictive of assignment by the company, he, as liquidator, was entitled to assign the premises without any consent of the landlord.

P. O. LAWRENCE, J., applying the principle in *Doe d. Mitchinson* v. *Carter* (1), held that the liquidator was acting in invitum for the benefit of creditors, that a voluntary assignment and not an assignment in invitum was contemplated by the restrictive covenant in question, and that the liquidator was at liberty to sell and assign the term granted by the lease. An order was, therefore, made to that effect, and relief was granted against the forfeiture. The lessor appealed.

J. W. F. Beaumont for the lessor.
W. A. Greene for the liquidator.

LORD STERNDALE, M.R.—I am sorry to say that I cannot agree with the learned judge in this case. The bank held a tenancy of certain premises at 182, Balham High Road, on certain terms, of which I need only allude to two. One was a proviso that, if the lessees, being a company, should enter into liquidation, whether compulsory or voluntary, by reason of insolvency, the lessor might re-enter. This bank entered into liquidation compulsorily by reason of insolvency, but the trustee has got relief against the forfeiture contained in that proviso, and no question arises on that point. That relief was given in the same order as the declaration with which we have to deal, and, if it were necessary, I am not at all sure that we might not consider the two together, although there is no appeal against the order so far as it grants relief; but I do not think it is necessary to do so.

The covenant with which we have to deal is this: [HIS LORDSHIP read the lessees' covenant against assignment, and continued:] The learned judge has made an order declaring that

> "notwithstanding the covenant restrictive of assignment by the company in the said indenture of lease contained the applicant as such liquidator as aforesaid is entitled to sell and assign the said premises without any consent of the said respondent."

The question turns on the position of the liquidator. I am not going to read all the sections of the Companies (Consolidation) Act, 1908, but s. 151 (1) gives the liquidator power as compulsory liquidator

> "(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company; (b) to carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof";

and s. 151 (2) (a), the power

> "to sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels."

But the whole power that is given to him is given to do acts on behalf of the company. There is no express provision, as there is in the case of voluntary liquidation, that the powers of the directors shall cease on the appointment of the liquidator, but they do in fact cease on the appointment of a compulsory liquidator. He is put there compulsorily by the court to do things on behalf of the company and to carry on the business of the company so far as it shall be necessary for the purposes of the winding-up. It is quite true that they do not choose him; he is

put there by the court, but he is put there as the agent to do the acts which the directors did before their powers ceased; with this restriction, of course, that, in all that he does, he must have regard to the interests of the creditors of the company.

The question is whether an assignment by the liquidator in these circumstances, without the consent of the lessor, is a breach of the covenant to which I have referred. The assignment is made by the liquidator, who acts on behalf of the company. The conveyance is made by the company, and, in my opinion, it is as plain a breach as could possibly be; and I have seen and heard of no authority that seems to me to tend in any way to the contrary, except, possibly, *Re Birkbeck Permanent Benefit Building Society* (2), before Neville, J. I think that is no authority either. In that case, all the property of the company, it being an unregistered company, had been vested in the liquidator, and, therefore, it no longer remained the property of the company; whereas in this case the property remained the property of the company; and, as I have said, all the acts of the liquidator were done on behalf of the company. There seems to have been a provision in the *Birkbeck Case* (2) which would expressly prevent the assignment that took place there from being such an assignment as to work a forfeiture. Therefore, the decision is, in my opinion, of no effect at all, and what Neville, J., said was based on the fact that there had been a vesting of the property of the company in the liquidator. Most of the other cases which have been cited to us have been cases of a trustee in bankruptcy. As was pointed out, the position of the trustee in bankruptcy is quite different. He does not act on behalf of the bankrupt; he does not dispose of the bankrupt's property; all the property is vested in him. The real question that was decided, in my opinion, whatever language may have been used in the cases to which we have been referred as to bankruptcy, was this: There is a covenant that the lessee shall not assign without the consent of the lessor, and that binds him and his assigns. The trustee in bankruptcy has assigned without the consent of the lessor. Is that an act of the lessee or his assigns? Of course, it did not need to be held that it was not his act—that was obvious on the face of it—but what was held was that the trustee in bankruptcy was not his assign within the meaning of the covenant, because the covenant related only to voluntary assigns and not to assigns in law. That is really the basis of all those decisions whatever may have been the language used. But here, as I say, the act is the act of the company acting through its liquidator, who is carrying on its business for the winding-up, and who is doing the act which he does strictly on behalf of the company.

It seems to me, therefore, that this proposed assignment would be distinctly within the actual words of the covenant, and that the declaration should be altered simply by saying that the applicant as such liquidator is not entitled to sell and assign the said premises without the written consent of the said respondent. I think the appeal should be allowed.

WARRINGTON, L.J.—I am of the same opinion. I can state my view in a very few words, and I should not add anything at all were it not that we differ from the learned judge.

In this case, the company has covenanted that it will not assign the demised premises without the previous consent in writing of the lessor. It proposes to assign them without the consent of the lessor, and it proposes to do so under its seal, but the seal will be affixed not by the directors who do the business of the company in the ordinary way, but by the liquidator; and it is said that, because the seal would be affixed by the liquidator, therefore, it is not the act of the company and the company will not be committing a breach of the covenant. In my opinion, there is nothing in the covenant which allows us to put any such construction on it. It is a covenant that the company will not assign without consent. The company proposes to assign without consent, and, therefore, that assignment will be a breach of the covenant.

YOUNGER, L.J.—At the commencement of this liquidation, the bank was possessed of this valuable leasehold property. It was valuable either because it was held at a rent less than a rack rent, and was a realisable asset on that score, or because its continued possession was of advantage to the liquidation. The liquidator was, therefore, desirous to retain as against the landlord the company's interest in this property, and, notwithstanding the liquidation, he would have been entitled to do so without question, but for a provision in the lease to the effect that, in the event of the company, as lessee, going into liquidation, the lessor was entitled to determine the lease and re-enter on the premises. This right the lessor threatened to exercise; the liquidator thereupon applied to the court for relief, and the court in this very order, the subject of this appeal, granted relief on terms not touching the question which is now in debate. The lease contains a covenant that the lessees, the bank, shall not assign the demised premises or any part thereof without the previous consent of the lessor first obtained. The learned judge, at the instance of the liquidator, has declared, not as part of the terms of relief against forfeiture, but in answer to a substantive question that, in this compulsory liquidation, the liquidator in the name of the company may, notwithstanding that prohibition, assign the demised premises without obtaining any consent, and the question we have to determine is whether he was right in so holding.

We have not heard counsel for the lessor in reply, and I may be mistaken in the view I hold, but, as at present advised, I cannot help thinking that this question need not, in the present case, have arisen in the crude form in which it comes before us if the learned judge had regarded the terms on which the liquidator might, on behalf of the company, assign the premises, as appropriate for consideration in connection with the conditions of relief. I cannot doubt that it would have been permissible for the learned judge, had he thought fit, to reserve some veto on assignment as a condition of relief, being of the opinion he was that, by reason of the liquidation, the necessity of obtaining the lessor's consent was gone. I quite agree, however, that it was only on this view of the matter that the learned judge could so have acted. If counsel for the lessor's view that the covenant against assignment without consent remained unaffected by the liquidation was correct, the learned judge could not have modified it without his client's consent. No attempt, however, to deal with the matter on these lines was made. The learned judge disposed of the two questions separately, and declared, as an independent part of the order he made, that the liquidator would, in the name of the company, be entitled to assign this lease without any consent asked for or given.

In my opinion, a liquidator has, in such circumstances as the present, no such right. So far as the terms of the lease are concerned, it would be, I think, a clear breach of the covenant contained in it if any such assignment were executed without first obtaining the lessor's assent. Nor can I myself see any reason or equity why those interested in this liquidation should, at the expense of the lessor, be dispensed from compliance with an essential condition of the company's lease—one regarded as so essential that it is not within the power of the court to relieve against a breach of it. I do not, in saying this, forget that there are passages to be found in the bankruptcy cases referred to by counsel for the liquidator which give force to his argument that we ought to regard this question on what may be called broader grounds, but, speaking for myself, I am not disposed to do so. These bankruptcy cases are somewhat anomalous. They are based on no very intelligible principle; in some degree, for instance, the personal liability of the trustee enters into them, and the question also whether he is an assign under such a covenant. Such considerations have no place where the lessee is a company in liquidation in whose name the liquidator acts, and, when I consider the already favourable position of a company in liquidation in relation to its leasehold property, I am not disposed to extend these bankruptcy decisions, anomalous as they are, to this case. I am the more confirmed in this when I find that the extension would, if made, not

apply to a company in voluntary liquidation. Counsel for the liquidator reluctantly agrees that the application of the principle invoked by him would not entitle him to say that an assignment of the company's leaseholds by the liquidator in a voluntary liquidation is not subject to the same restrictions as an assignment by the company before liquidation. It is only a liquidator acting under a compulsory order who is, he contends, free from such restrictions. As soon as that distinction has to be introduced—and it has judicially been already made (see *Cohen* v. *Popular Restaurants, Ltd.* (3))—the objections against extending the principle to liquidating companies at all are reinforced, because, as we perfectly well know, a voluntary liquidation brought about by the insolvency of a company is in no relevant respect different from a compulsory liquidation arising from the same cause. It would, to my mind, be contrary to all true principle to have to hold that, in a case of a voluntary liquidation, the company's leaseholds remained subject to this restriction, but that in the case of a company, possibly more solvent, but which happened to be in compulsory liquidation, the restriction had disappeared. In my judgment, this principle, if it is to be extended to any company in liquidation, must be extended to all, and I can myself see no sufficient justification for extending the bankruptcy decisions, such as they are, to the liquidation under the Companies Act of any registered company at all. I think any attempt to assign here without the consent of the lessor first obtained remains a distinct breach of covenant, and, accordingly, the declaration to the company made by the learned judge ought not, in my judgment, to stand.

Appeal allowed.

Solicitors: *R. A. L. Broadley*; *Peter Thomas & Clark.*

[*Reported by* J. L. Denison, Esq., *Barrister-at-Law.*]

UNDERWOOD, LTD. *v.* BURGH CASTLE BRICK AND CEMENT SYNDICATE

[King's Bench Division (Rowlatt, J.), May 30, 1921]

[Reported [1922] 1 K.B. 123; 91 L.J.K.B. 355; 126 L.T. 401; 37 T.L.R. 757]

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), October 27, 1921]

[Reported [1922] 1 K.B. 343; 91 L.J.K.B. 355; 126 L.T. 401; 38 T.L.R. 44]

Sale of Goods—Passing of property—Work to be done by seller to put goods into deliverable state—Condensing engine—Removal from concrete bed to which engine bolted—Dismantling of engine—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 18.

By s. 18 of the Sale of Goods Act, 1893, "Unless a different intention appears . . . Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof. . . ."

The owners of a condensing engine agreed to sell it free on rail in London. It weighed thirty tons and was bolted to and embedded in concrete. Before it

could be delivered on rail, it had to be detached and dismantled. In loading the engine on a railway truck, the sellers accidentally damaged it, and the buyers refused to accept it. In an action by the sellers for goods sold,

Held (by ROWLATT, J.): the buyers intended to buy a chattel and the engine did not become a chattel until it had been detached from the soil; therefore, the property had not passed to the buyers at the time of the accident.

Held (by the Court of Appeal): the property in the engine had not passed to the buyers because (i) (per BANKES, SCRUTTON and ATKIN, L.JJ.) the sellers were bound to do something, which they had not done, for the purpose of putting the engine into a deliverable state; (ii) (per BANKES and ATKIN, L.JJ.) the circumstances showed an intention that the property should not pass until the engine was safely placed on rail in London.

Notes. As to a contract for the sale of specific goods, see 29 HALSBURY'S LAWS (2nd Edn.) 83 et seq.; and for cases see 39 DIGEST 482 et seq. For the Sale of Goods Act, 1893, s. 18, see 22 HALSBURY'S STATUTES (2nd Edn.) 996.

Cases referred to:

(1) *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700; 45 L.J.Q.B. 540; 34 L.T. 759; 40 J.P. 725; 24 W.R. 824; 39 Digest 363, *35*.

(2) *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*, [1898] A.C. 200; 67 L.J.Ch. 141; 77 L.T. 573; 46 W.R. 255; 14 T.L.R. 82, H.L.; 39 Digest 495, *1121*.

Also referred to in argument:

Acraman v. *Morrice* (1849), 8 C.B. 449; 19 L.J.C.P. 57; 14 L.T.O.S. 292; 14 Jur. 69; 137 E.R. 584; 39 Digest 503, *1214*.

Action.

On Feb. 19, 1920, the plaintiffs agreed to sell to the defendants a horizontal tandem condensing engine to be delivered free on rail in London. The engine was then on the plaintiffs' leasehold premises in Ferry Street, Millwall, as a trade fixture, and it was necessary to detach it before it could be sent to the defendants. On Apr. 24, 1920, the defendants sent instructions to the plaintiffs to send the engine to Yarmouth. On Aug. 6, 1920, while the engine was being loaded on to a railway truck, it was seriously damaged, the bedplate being broken. The defendants refused to accept it. By their defence, they alleged that, at the date of the accident, the property in the engine had not passed to them, or, in the alternative, that, if it had passed to them, they were entitled to reject it by reason of the plaintiffs' failure to deliver.

A. Neilson, *K.C.*, and *Doughty* for the plaintiffs, the sellers.

Holman Gregory, *K.C.*, and *Jowitt* for the defendants, the buyers.

ROWLATT, J.—This case raises an important point under the Sale of Goods Act, 1893. It turns on the question whether the property in the engine had passed to the buyers at the time when the accident happened. The engine weighed some 30 tons and was, at the time when it was inspected by the buyers, fixed to a bed of concrete by means of Lewis bolts. On account of its weight, it had sunk into the concrete and had become closely united with it, so that the operation of removing it not only involved unfastening it, but also taking it to pieces.

The sale was a sale of a specific chattel to be delivered by the sellers, but the fact that it was to be delivered by them is not the test whether the property passed. The true test is whether anything remained to be done to the engine by the sellers to put it into a deliverable state, and by that I understand a state in which the thing will be the article contracted for by the buyer; I do not mean deliverable in the sense that it is properly packed or anything of that kind. It must have everything done to it that the sellers had to do to it as an article. I do not think that the fact by itself that the sellers had to take the engine to pieces would postpone the time when the property passed. Many chattels have to be taken to pieces

before they can be delivered, e.g., a sideboard or a billiard table; but, nevertheless, the property passes on the sale and is not postponed until the article is actually taken to pieces and delivered. I do not, therefore, lay stress on the fact that the engine had to be taken to pieces. I think the important point is that the parties were dealing with an article which was a fixture, and that is different from the case of a loose chattel. The intention of the buyers was to buy an article which would be a loose chattel when the processes of detaching and dismantling it were completed, and, in order to convert it into a loose chattel, these processes had to be performed. The case of a tenant's fixtures seems an analogous one. It seems to be a safe rule to adopt that, if a fixture has to be detached so as to make it a chattel again, the act of detaching has to be done before the chattel can be deliverable. The same result is arrived at if the matter is looked at a little more technically. This fixture was not personal property any more than tenant's fixtures are, but was part of the freehold, and what was sold was not personal property, but a part of the realty which the sellers had a right to detach and convert into personal property. The law was explained by COCKBURN, C.J., in *Lee* v. *Gaskell* (1). He said (1 Q.B.D. at p. 702):

> "Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or anyone else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them."

In the present case, the sellers did not sell their right to sever, but were to sever the fixture themselves, and, when they had done so, and so produced the chattel, they were to deliver it. If the matter is analysed, that was the contract. The sellers contended that, as between the parties, the intention was that the property should pass at the time of the contract, and that s. 17 of the Sale of Goods Act, 1893, applied. The fallacy of that contention seems to be that it assumes that the sellers had the property in the engine at the time when the contract was made. They had not, though it is true that they had rights which reduced the rights of property of the freeholder in whom the property was to a vanishing quantity. If the property had been mortgaged it would have been no answer to a claim by the mortgagees to say that, in the Sale of Goods Act, 1893, there is a provision that, as between buyer and seller, fixtures are goods and chattels. That would not affect the property of the freeholder.

For these reasons, I think that the property in this engine did not pass to the buyers at the time when the contract was made, and there must be judgment for them.

The sellers appealed.

A. Neilson, *K.C.*, and *Doughty* for the sellers.
Holman Gregory, *K.C.*, and *Jowitt* for the buyers.

BANKES, L.J.—The only question is whether the property in this engine had passed to the buyers before the damage to it was done. The contract of sale was in writing. The subject-matter of the sale was a horizontal condensing engine, which, at the date of the contract, was in place and securely fixed at the works of some firm at Millwall. The sellers agreed to sell it to the buyers at the price of £650 f.o.r. London. The engine weighed 30 tons. It was bolted to a concrete emplacement in which it had become embedded by its own weight, so that it had first to be unfastened, a work of two days, and then to be dismantled, a process which required a further two weeks' work and an expense of some £50, after which another sum of £50 might be required to place it on rail.

Did the property in this engine pass on the contract of sale? No general rule can be laid down which will answer the question when the property passes in every contract of sale. In many sales of specific articles to be delivered, the property

passes on the making of the contract. A man may select and agree to buy a hat and the shopman may agree to deliver it at the buyer's house. There, notwithstanding the obligation to deliver the hat, the property passes at the time of the contract. But that is far from this case. Considering the risk and expense involved in dismantling and moving this engine, I have no hesitation in holding that the proper inference to be drawn is that the property was not to pass until the engine was safely placed on rail in London. In my view an elaborate discussion of the rules in s. 18 of the Sale of Goods Act, 1893, is unnecessary. They only apply where a different intention does not appear, and in this case a different intention does appear, assuming for the moment that this machine was in a deliverable state when it was fixed in its position at Millwall. In *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* (2) ([1898] A.C. at p. 207), LORD HERSCHELL put a hypothetical case in which the facts would lead to the same inference—namely, of an intention different from the effect of s. 18, r. 1. But was this engine in a deliverable state when in its position at Millwall? The sellers contended that where a specific article is complete in itself, for example a complete engine or a complete cart—that is to say, where nothing more has to be done to make it an engine or a cart—it is then in a deliverable state within the meaning of s. 18, r. 1, and, if the owner agrees to sell it, the property passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. I do not accept that test. A "deliverable state" does not depend upon the mere completeness of the subject-matter in all its parts, but on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. Where the vendors have to expend as much trouble and as much money as the sellers had to expend before this engine could be placed on rail, I cannot think that the subject-matter can be said to be in a deliverable state. The appeal must be dismissed.

SCRUTTON, L.J.—I agree. On some of the points raised I do not think it necessary to express a final opinion, because I have formed a clear opinion on one point. I assume that this was a sale of a chattel, and not of a mere right to sever. It was a sale of a specific engine f.o.r. London. At the time of the sale the specific engine was fixed by bolts and embedded by its own weight in concrete. It had first to be detached, which could not be done in less than two days. And then it required a further sum of, perhaps, £100, and two or three weeks' work before it could be put on rail. The sellers had to detach it and take it to pieces; both the expense and the new work were to be provided by them. It is a well-known rule, now embodied in s. 18, r. 2, of the Sale of Goods Act, 1893, that

> "where . . . the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. . . ."

The sellers contended that, if an engine, the subject-matter of a sale, is in its place as an engine, it is in a deliverable state, and that it is immaterial that it has to be taken to pieces by the vendor before it can be delivered. I do not agree. I find it impossible to apply the definition in s. 62 of the Sale of Goods Act of a "deliverable state" as "a state in which the buyer is bound to take delivery" of the goods, to this case where the buyers find an engine so firmly attached that it takes two days before it can be got loose, and in such a state that it cannot be put on rail, where they stipulated to have it, until a further two weeks' work has been done on it. I decide this case on the ground that the sellers were bound to do something for the purpose of putting this engine in a deliverable state, though I do not dissent from the view of BANKES, L.J., that, in all the circumstances, the property was not intended to pass until the engine was placed on rail.

ATKIN, L.J.—I agree. I think, having regard to the terms and conditions of this sale, the parties to it, the subject-matter and the circumstances, that the property was not to pass until the engine was on rail. But, if that inference is

not to be drawn and if it is necessary to invoke the rules in s. 18 of the Sale of Goods Act, 1893, then r. 1 does not apply, because this engine was not at the time of the contract in a deliverable state, inasmuch as it was affixed to the freehold and could not be put in a state in which the buyers were bound to accept it until it was detached and taken to pieces; and r. 2 does apply, because the vendors were bound to do something to the engine for the purpose of putting it into a deliverable state—namely, to detach it and take it to pieces in order to put it on rail. It is quite plain that the property was not to pass till these things were done and that the sellers took the risk of delivery on to rail.

Appeal dismissed.

Solicitors: *Hyman Isaacs, Lewis & Mills*; *Smith & Hudson*, for *Wiltshire, Sons & Jordan*, Great Yarmouth.

[*Reported by* F. FITZROY COWPER *and* W. C. SANDFORD, ESQS., *Barristers-at-Law.*]

MILLETT *v.* VAN HEEK & CO.

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), February 4, 1921]

[Reported [1921] 2 K.B. 369; 90 L.J.K.B. 671; 125 L.T. 51; 37 T.L.R. 411; 65 Sol. Jo. 356]

Sale of Goods—Contract—Breach—Non-delivery—Damages—Price at time of refusal to deliver—Anticipatory breach—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 51 (3).

The Sale of Goods Act, 1893, s. 51 (3), provides: "Where there is an available market for the goods in question, the measure of damages [for non-delivery] is primâ facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Held: the rule in sub-s. (3) that, if no time for delivery of the goods is fixed, the measure of damages is to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver, did not apply where the breach was an anticipatory breach.

Quære, whether a contract for delivery within a reasonable time is a contract for delivery at a "fixed time" within the meaning of s. 51 (3).

Decision of the Divisional Court, [1920] 3 K.B. 535, affirmed.

Notes. Referred to: *Ellis' Trustee* v. *Dixon-Johnson*, [1924] 1 Ch. 342.

As to actions for non-delivery of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 193 et seq.; and for cases see 39 DIGEST 662 et seq. For the Sale of Goods Act, 1893, s. 51, see 22 HALSBURY'S STATUTES (2nd Edn.) 1014.

Cases referred to:

(1) *Melachrino* v. *Nickoll and Knight*, [1920] 1 K.B. 693; 89 L.J.K.B. 906; 122 L.T. 545; 36 T.L.R. 143; 25 Com. Cas. 103; 39 Digest 675, *2616*.

(2) *Frost* v. *Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 17 Digest (Repl.) 108, *224*.

Also referred to in argument:

Brown v. *Muller* (1872), L.R. 7 Exch. 319; 41 L.J.Ex. 214; 27 L.T. 272; 21 W.R. 18; 39 Digest 676, *2620*.

Roper v. *Johnson* (1873), L.R. 8 C.P. 167; 42 L.J.C.P. 65; 28 L.T. 296; 21 W.R. 384; 39 Digest 676, *2618*.

Leigh v. *Paterson* (1818), 8 Taunt. 540; 2 Moore, C.P. 588; 129 E.R. 493; 39 Digest 675, *2613*.

Ashmore v. *Cox & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 15 T.L.R. 55; 4 Com. Cas. 48; 39 Digest 667, *2558*.

Josling v. *Irvine* (1861), 6 H. & N. 512; 30 L.J.Ex. 78; 4 L.T. 251; 39 Digest 674, *2606*.

Appeal from a decision of the Divisional Court (BRAY and SANKEY, JJ.) on appeal from a decision of the official referee.

The plaintiff, a cotton waste merchant, carried on business at Rochdale, and the defendants were cotton spinners and manufacturers carrying on business in Holland. By six contracts made between Jan. 10 and Aug. 23, 1916, the plaintiff agreed to sell to the defendants for export to Holland a quantity of cotton waste. The contracts provided that shipment was to be subject to the permission of the Government to export being obtained. At the time the contracts were entered into cotton waste could not be exported without the licence of the Government, but large quantities of cotton waste were in fact exported by the plaintiff to the defendants under the contracts, licences for the export of cotton waste to neutrals being at that time freely and regularly granted. In January, 1917, the Government prohibited the export of cotton waste, with the result that the plaintiff could not deliver the balance of cotton waste under the contracts. Correspondence followed between the parties whereby it was agreed between them that, during the continuance of the embargo, deliveries were to be suspended, but were to be resumed when a reasonable time had elapsed after the removal of the embargo. In August, 1918, the plaintiff wrote to the defendants repudiating the contract, and the defendants, on Oct. 17, wrote to the plaintiff accepting the repudiation. The embargo was removed in January, 1919. The plaintiff brought an action claiming against the defendants a declaration that the six contracts, in so far as they were unperformed, were dissolved and determined, or, alternatively, that the plaintiff was entitled to determine the same. The defendants by their defence alleged that the plaintiff had entered into a contract to deliver the balance of the goods after the removal of the embargo, and they counterclaimed for a declaration that they were entitled to damages in respect of the plaintiff's repudiation of the contract. GREER, J., held, on the correspondence, that the parties had modified their rights under the contracts, and that they had entered into a new contract that deliveries be suspended during the currency of the embargo and that deliveries be resumed by the plaintiff of the balance of the goods under the six contracts and accepted by the defendants after the removal of the embargo. He refused to make the declaration asked for by the plaintiff, but he made a declaration that the defendants were entitled to recover damages for the plaintiff's repudiation of the contract, the damages to be assessed by the official referee. The plaintiff appealed to the Court of Appeal, who affirmed GREER, J.'s decision. The official referee held that a date was fixed for the delivery of the goods, namely, the date of the removal of the embargo, but that a reasonable time after the removal of the embargo must be allowed for the delivery of the goods. On that basis, deliveries of the goods could not be resumed until March, 1919; the defendants were entitled to recover damages based on the market price of the goods from March, 1919, onwards, and ascertain from time to time the difference between the contract prices at the time when the goods could in the ordinary course of business have been delivered. The plaintiff and defendants appealed to the Divisional Court who held that, when a contract provided for delivery within a reasonable time, it was not a contract for delivery at a fixed time, and that the case did not fall within the rule in s. 51 (3) of the Sale of Goods Act, 1893, that, if no time for delivery was fixed, the measure of damages was to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver. They further said:

"We hold that primâ facie the damages should be the difference in price between the contract price and the price at which the goods should have been delivered according to the terms of the new contract as decided by us.

Deliveries will have to be made at different times, and this rule must apply to each delivery. This is, however, only a primâ facie rule. If it can be shown by either party that the reasonable course for minimising the damages would be otherwise, this primâ facie rule should not be applied. For instance, if it could be shown that the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date when the repudiation was accepted, the damages should be assessed according to the difference between that price in that forward delivery and the contract price, and so, also, if it could be shown that the reasonable course to be pursued would have been to enter into a forward contract at some later date."

The defendants appealed.

Cyril Atkinson, K.C., and *Cockshutt* for the defendants.

Sylvain Mayer, K.C., and *Lowenthal* for the plaintiff.

BANKES, L.J.—This is an appeal from a decision of the Divisional Court as regards the proper method of arriving at the damages to which the successful party in the action is entitled. It is not necessary to state the facts.

The main point is whether the latter part of s. 51 (3) of the Sale of Goods Act, 1893, applies to this case. This raises two questions. The first is whether the latter part of the subsection applies at all except in a case of what is strictly speaking non-performance of a contract as opposed to an anticipatory breach arising from a repudiation of a contract. The second is whether, assuming that the section applies, the contract in this case is a contract in which no time is fixed for the deliveries. Now the second is, to my mind, a very important question on which I desire to reserve my judgment. Opinions of great weight have been expressed in reference thereto. BAILHACHE, J., in *Melachrino* v. *Nickoll and Knight* (1) ([1920] 1 K.B. at p. 696) expressed the opinion that when s. 51 (3) speaks of no time being fixed for delivery, it refers to those contracts in which no mention of time is made and which, therefore, are to be performed within the indefinite period known as a reasonable time under the circumstances; and the same view is expressed by BRAY and SANKEY, JJ., in their judgments in the present case. I do not wish to express any opinion on that point, but to reserve it until it arises for decision.

On the other question, on which the Divisional Court decided this case, I agree with their view, which, shortly expressed, is this: That the latter part of sub-s. (3) of s. 51 has no application to a case like the present, which is not the ordinary case of non-performance in the sense I have indicated, but which is the case of an anticipatory breach by repudiation of the contract before the time for performance arrives. I agree entirely with what BRAY, J., said in the Divisional Court as to the way in which the damages are to be ascertained. I do not wish to add anything to that, because I may say something which may seem to be at variance with what the learned judge said. In my opinion, the rule he has laid down in this case is the correct rule and should be applied by the official referee in assessing the amount of damages in this case.

For these reasons, in my opinion, the appeal fails and must be dismissed.

WARRINGTON, L.J.—I agree. I also wish to reserve my opinion on the question whether a contract to deliver goods within a reasonable time is, for the purposes of s. 51 (3) of the Sale of Goods Act, 1893, a contract to deliver goods at a fixed time. That question ought to be determined only when it is necessary to determine it, and after full argument on both sides. It is not necessary to determine it here, because, whether or not the view of the Divisional Court on it is correct, their ultimate decision is right. The latter part of s. 51 (3), on which their judgment turns, does not appear to me to touch the case of an anticipatory breach—that is, a repudiation of a contract before the time has arrived for its performance which has been turned into a breach giving a cause of action by the acceptance of the repudiation by the other contracting party. As to that, I agree with what is said by the Divisional Court and by BANKES, L.J., and I have nothing

to add; nor have I anything to add as to the mode of ascertaining the damages laid down by the court.

ATKIN, L.J.—I am of the same opinion. I think that the construction of s. 51 (3) of the Sale of Goods Act, 1893, which the defendants contend for, would, if it were admitted, introduce a very serious anomaly into the administration of the law relating to the sale of goods, because the position is this: It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. That is beyond controversy. The law was so laid down by COCKBURN, C.J., in *Frost* v. *Knight* (2) in the Exchequer Chamber, and it was the law at the time when the Sale of Goods Act, 1893, was passed; and there is no reason to suppose that the Act intended to alter it. COCKBURN, C.J., said (L.R. 7 Exch. at p. 113):

> "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

Therefore, if it was such a contract for delivery by fixed instalments at fixed times, then, although the action is brought in respect of the accepted repudiation, the damages would have to be assessed with reference to those fixed times. But it is said that, if no times have been expressed in the contract, and the contract is such as would be construed by law as a contract for delivery by reasonable instalments over a reasonable time, even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled to fix his damages in reference to the market price at the time when the repudiation takes place. That, I think, would introduce an anomaly entirely without any kind of principle. I am satisfied that the Act never intended to make that distinction, or to vary what was the rule of law at the time when it was passed, a rule which has been recorded in countless decisions since the doctrine of repudiation of contract received its development in *Frost* v. *Knight* (2), namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation. Therefore, I think that the view taken by the Divisional Court is right on this point.

Whether they are right in saying that a contract for delivery within a reasonable time is not a contract for delivery at a fixed time, I say nothing. I wish to reserve the point. It will have to be determined after giving very serious consideration to the weighty opinions of BAILHACHE, J., in *Melachrino* v. *Nickoll and Knight* (1), and of BRAY and SANKEY, JJ., in the present case. I think there is something to be said on the other side. It is difficult to see why it should be said that the contract for delivery at times which can be determined by a jury is not a contract for delivery at fixed times. It seems to me that a meaning could be given to the words, "if no time was fixed," by reading them as referring to a contract such as to deliver goods on demand or to deliver goods as required by the purchaser. It might well be argued that that would give a meaning to the words in question. However, I do not wish to determine the question, especially in view of the opinions that have been expressed by the learned judges. For the reasons I have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *H. Whittingham*, Bolton; *Cunliffe, Blake & Mossman*, for *Goulty & Goodfellow*, Manchester.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

THE ARZPEITIA

[Probate, Divorce and Admiralty Division (Hill, J.), July 13, 1921]

[Reported 126 L.T. 29; 15 Asp.M.L.C. 426]

Ship—Necessaries—Payments in respect of cargo—Liability of ship—Charges relating to discharge of cargo and departure from port.

The agents at New York of the steamer A. made payments in connection with the discharge of her cargo at New York. In an action against the A. in rem to recover these disbursements as necessaries it was contended that they were made in respect of the cargo only, and were not necessaries to the ship.

Held: payments, though made in respect of the cargo, were necessaries to the ship if she could not go on her business without them; the business of the A. consisted in entering the port of New York, discharging her cargo, and leaving the port, and, therefore, payment of charges which, being unpaid, would prevent her from doing any of these things was necessary to the A., notwithstanding that the amount disbursed did not become due, nor was the disbursement made, until after the A. had left New York; furthermore, quay rent for cargo, and the cost of destroying putrid cargo, were necessaries to the A., since by the law of New York she was liable for these charges, and could have been prevented from sailing had they not been paid.

Notes. As to what are necessaries to a ship, see 30 Halsbury's Laws (2nd Edn.) 244, 245; and for cases see 41 Digest 261 et seq.

Action for necessaries against the Spanish steamer *Arzpeitia* and her bail.

Bateson, K.C., and *G. P. Langton* for the plaintiffs.
A. T. Miller, K.C., and *Noad* for the defendants.

HILL, J.—This is a claim in respect of disbursements made by the plaintiffs as agents for the defendants' steamship *Arzpeitia* at New York, when she was on a voyage inward with a cargo which included a large quantity of onions, in March, 1920. The plaintiffs were appointed brokers and agents, and throughout were in touch with the master, and it is sworn that what they did had his approval. They incurred a large number of expenses, and it is quite clear on the evidence that the whole of them were expenses incurred within their authority, so as to bind the shipowners personally, and as the shipowners have appeared to a writ in rem they have subjected themselves to the jurisdiction of the court, and there is no difficulty in dealing with the case against them in personam.

The controversy has arisen because bail has been given, and the plaintiffs ask for judgment, not against the defendants as owners, but also against the bail, and it is in the interest of the bail, who have apparently failed to secure themselves vis-à-vis the Spanish shipowners, to show if they can that there is no right in rem against the ship. They seek to show that, not by evidence of their own, but by showing that the plaintiffs have not sufficiently proved that the disbursements were for necessaries, so as to give them (the plaintiffs) a right in rem against the ship. What gives the defendants an opportunity for saying that some of these disbursements were not necessaries is that they were, in fact and immediately payments made in respect of the cargo of the ship, and they say it has become necessary therefore for the plaintiffs to prove that these disbursements made in respect of cargo were necessarily made for the ship, and were necessary in the sense that the ship, as a ship, could not go on her business without them.

It seems to me now that the matter has been ventilated that it is quite sufficiently proved that all these expenses were necessarily incurred on behalf of the ship to enable her to carry out her business. When the ship arrived it was found that a large part of the onions on board were unfit for any use, and the consignees never turned up to claim them. The health authorities interfered. A good part of the onions were finally removed, and dumped somewhere in the sea, and so

got rid of at considerable expense. Others were sold. Two or three items show the sort of expenses which the defendants say were not necessary items. A good part of an item 6026.11 dollars, is for quay rent on space occupied by the cargo, some of it at a date before the ship sailed from New York, but the bulk of it subsequently to the time she sailed. There is another item of 2873.14 dollars nearly all expenses for labour for loading cases and crates for onions into scows in connection with the dumping. These three items together made 12,839 dollars. By a payment on account on April 2, 1920, the plaintiffs received from the defendants the sum of 21,122.74 dollars being the whole of the disbursements account except 11,728.37 dollars, the amount claimed in the present action. If the defendants are right in saying that this 12,839 dollars was not a necessary disbursement they would be right in saying that all the items, which were for necessaries, had already been discharged, and that in respect of the balance there is no liability in rem.

After the ship arrived, and it was discovered what the condition of the onions was the plaintiffs cabled the shipowners and wrote them in reference to the matter, and saying that they were taking steps with the customs authorities to endeavour to get them to authorise the sale of the onions. The cost of destroying was a charge upon the ship, and with 43,000 packages the cost would be considerable. On Mar. 31 the plaintiffs asked for money on account saying that the estimated amount required for dealing with the onions was 21,122 dollars. It was upon that estimate that authority to pay 21,122 dollars was called out, and the amount was paid. There was a statement that otherwise the plaintiffs would be obliged to hold the ship to protect themselves. That seems to me that the obligation of getting rid of the damaged cargo was a charge upon the ship by the law of New York, and would be enforced by the authorities there against the ship.

The employment of the ship that we have to consider is the inward and outward voyage, and any expenditure in relation to the ship or her cargo which she was bound to incur before she could either enter port, or discharge her cargo, or leave port seems to me to be a necessary expenditure for the ship within the meaning of the law. When I have looked at the plaintiffs' affidavit it seems to me quite clear that the ordinary method of arranging discharge—the method which they were within their authority fully justified in adopting—was that they should hire quay space on behalf of the ship, and remain liable for the hire so long as the quay space remained occupied by the ship's cargo. When the cargo was put out of the ship, she, in the circumstances, became under two liabilities: (i) To pay all expenses of the health authorities, and of the destruction of the cargo; (ii) to pay for the quay space as long as the onions occupied it. They were liabilities which were incurred by the ship's agents for the ship, not after the ship sailed, but before the ship came in at all. They were the terms which the agents were bound to enter into on behalf of the ship, or were a legal liability on the part of the ship from the moment the agents engaged the quay space for the ship's cargo. And it is quite immaterial that these liabilities accrued into money demands at a date subsequent to the sailing of the ship. The money payments were all a result of liabilities which the ship's agents incurred in order to provide that which was necessary for the ship in the adventure of entering New York, discharging at New York and leaving New York.

Therefore, it seems to me that the plaintiffs have established that the whole of these items were necessaries. There is no dispute as to their having been incurred, and as what I have stated covers the whole matter I see no advantage in sending the case to the registrar and merchants.

Judgment for the plaintiffs.

Solicitors: *Downing, Handcock, Middleton & Lewis*; *W. A. Crump & Co.*, for *Gilbert Robertson & Co.*, Cardiff.

[*Reported by* Geoffrey Hutchinson, Esq., *Barrister-at-Law.*]

BLUNDELL-LEIGH *v.* ATTENBOROUGH

[COURT OF APPEAL (Bankes, Warrington and Atkin, L.JJ.), March 16, 1921]

[Reported [1921] 3 K.B. 235; 90 L.J.K.B. 1005; 125 L.T. 356; 37 T.L.R. 567; 65 Sol. Jo. 474]

Pledge—Validity—Jewellery—Delivery to pledgee—Pledge by pledgee in fraud of pledgor to third person—Delivery of jewellery to third person—Jewellery not in possession of pledgor or pledgee at time of completion of pledge.

On Nov. 1 the plaintiff handed to one M. jewellery for appraisal with a view to him making an advance on the security thereof. On Nov. 3, in fraud of the plaintiff, M. pawned the jewellery for £1,000 with the defendant, who acted in good faith. On Nov. 5 M. agreed to lend the plaintiff £500 and in return the plaintiff signed a promissory note providing that he would pay M. or order £600, payable in six monthly instalments, and that M. should retain possession of the jewellery as security for re-payment of the loan. On Dec. 8 M. borrowed £300 from B., and deposited with B. the plaintiff's promissory note together with the defendant's counterfoil deposit note. B. gave the plaintiff notice of the deposit of the promissory note and required all payments to be made to him. On Dec. 16 M. died. The plaintiff paid B. £400 on account of the sum due on the promissory note, payment being made with notice of the defendant's position and claim. The plaintiff made no tender of the debt to the defendant. In an action by the plaintiff claiming the return of the jewellery,

Held: the delivery of the jewellery by the plaintiff to M. on Nov. 1 was a good delivery for the purpose of creating a pledge whenever the pledge should be created, which pledge was in fact completed on Nov. 5, and, the delivery being a good delivery for the purpose of pledge which was subsequently completed, its character was not altered by the facts that M. had in the meanwhile pledged the jewellery to the defendant, and that neither the plaintiff nor M. was in possession of the jewellery at the time of the completion of the pledge to M.; but, as the plaintiff had made no tender to the defendant, she was not entitled to recover the jewellery.

Judgment of SALTER, J., [1921] 1 K.B. 382, reversed.

Notes. As to delivery of pledges, see 29 HALSBURY'S LAWS (3rd Edn.) 214 et seq.; and for cases see 37 DIGEST 4 et seq.

Case referred to:

(1) *Whitehorn Bros.* v. *Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 37 Digest 21, *169*.

Appeal from an order of SALTER, J.

The plaintiff claimed to recover possession of certain jewellery, her property, which had been pawned by a third party, one George Miller, with the defendant, a pawnbroker. The defendant, by his defence, in para. 1 said that the goods were not the plaintiff's goods. In para. 2 he denied that he detained the said goods or any of them. Paragraph 3 was as follows: Alternatively, the defendant says that on or about Nov. 3, 1919, the plaintiff delivered all the . . . goods to one George Miller and verbally authorised him to raise money upon the same by pledging them, and that on the said Nov. 3, 1919, the said George Miller pledged all the said goods with the defendant for the sum of £1,000 and interest upon the terms of a contract in writing of that date. The said sum of £1,000 with interest at the rate of 15 per cent. per annum still remains due and owing to the defendant. Paragraph 4: Further alternatively, the defendant says that the plaintiff pledged all the said goods with the said George Miller to secure the payment to the said George Miller of the sum of £600 then due from the plaintiff to the said George Miller, and that the said George Miller pledged the said goods with the defendant as aforesaid. The plaintiff has not paid the said sum of £600 nor

any part thereof, and that sum still remains due and owing from her. Paragraph 5: Further alternatively, the defendant says that on Nov. 3, 1919, the said George Miller was a mercantile agent within the meaning of the Factors Act, 1889, and was then in possession of the said goods with the consent of the plaintiff, and that thereupon the said George Miller when acting in the ordinary course of business of a mercantile agent pledged all the said goods with the consent of the plaintiff, and that thereupon the said George Miller when acting in the ordinary course of business of a mercantile agent pledged all the said goods with the defendant in manner and for the consideration alleged in para. 3 hereof. The defendant received the said goods in pledge from the said George Miller in good faith and without notice that the said George Miller had not authority to make the said pledge.

SALTER, J., held (i) that, even if Miller was a mercantile agent, the fraudulent pawning of the jewellery was not a disposition made by him when acting in the ordinary course of business as a mercantile agent; (ii) Miller acquired no right to the goods against the plaintiff by the original bailment, and he could therefore give no such right to the defendant; (iii) nor did the defendant acquire any right against the plaintiff by virtue of the transaction between the plaintiff and Miller on Nov. 5, because there was no valid pledge of the jewellery by the plaintiff to Miller; (iv) no valid pledge was possible where, as in this case, the goods were not at the time of the contract to pledge and have never been since in the actual or constructive possession of the pledgor or pledgee, or of the agent of either; and (v) the plaintiff was not estopped from denying that Miller made a valid pledge to the defendant, or that she made a valid pledge to Miller. Therefore the plaintiff was entitled to the return of her jewellery and nominal damages. The defendant appealed.

Schwabe, K.C., and *C. L. Attenborough* for the defendant.

J. D. Cassels (*Sir Ellis Hume-Williams*, K.C., with him) for the plaintiff.

BANKES, L.J.—This is an appeal from a judgment of SALTER, J., and, with respect to the learned judge, I do not take the same view of the case that he took. I do not think that I differ from his view of the law at all, but it seems to me that the point on which I differ from him is the inference that is to be drawn from the facts.

The plaintiff, a lady, was the owner of a considerable amount of valuable jewellery. She was in need of money, and she got into communication with a man named Miller with a view to his procuring money for her. On Nov. 1 they had a discussion, and the plaintiff describes what happened in these terms. She said:

> "I did not give Miller the jewellery to see if he could raise money on it. If I did not pay he was to have the jewellery. He was to examine the jewellery and see the value of it, and then he was to let me know what offer he could make as to lending me money. He was to keep the jewellery as security if he made the advance."

I agree that the effect of what passed between the lady and Miller on that day was to constitute him a gratuitous bailee of this jewellery for the purpose of his ascertaining what its value was, and deciding whether he could make an advance, and, if so, what amount. But there was on that day a bailment and a delivery, and the conclusion of fact that I draw from what occurred is that the delivery, although it accompanied the bailment on that day, and was, therefore, a delivery for the purpose of the bailment, was also a delivery which as between these parties was to constitute a delivery for the purpose of creating a pledge if Miller found that he could and did advance a sum which the plaintiff could accept. On that same Nov. 1 Miller went to Messrs. Attenborough and pledged the jewellery with them, obtaining a first advance of £500, and on Nov. 3 he obtained a second advance upon the jewellery. It was not until after that that he went and saw the plaintiff on Nov. 5, and then finally arranged with her the terms of the pledge of her goods to him.

A The learned judge says this:

> "Pledge is a conveyance pursuant to a contract, and it is essential to a valid pledge that delivery of the chattel shall be made by the pledgor to the pledgee in pursuance of the contract to pledge. Delivery may of course be made by and to agents, and it may be actual or constructive. If at the time of the
B contract to pledge the pledgee is already in possession in another capacity, the contract to pledge is itself constructive delivery. Even if the pledgee is not in possession at the time of the contract, but acquires possession from a third party subsequently, it may be that such acquisition of possession would, by virtue of the contract to pledge, amount to constructive delivery by the pledgor."

C I do not think anybody would quarrel with the learned judge's statement of the law. But then he goes on in reference to the facts of this particular case to say this:

> "But where, as in this case, the goods were not at the time of the contract to pledge, and have never since been, in the actual or constructive possession of the pledgor or pledgee, or of any agent of either, I think that no valid
D pledge was at any time possible."

That is where I disagree with the learned judge, and I disagree because upon the facts I draw the inference that there had been an agreement between these parties on Nov. 1; a delivery which was a good delivery for the purpose of creating a pledge whenever that pledge was created. It was in fact created or completed, I would
E say, on Nov. 5. The argument of counsel for the plaintiff is that the effect of the delivery on Nov. 1 was at an end from the moment when Miller parted with the goods. I cannot accept that as what appears to me to be the true inference from the facts. It is obvious to my mind that the plaintiff intended, when she handed over this jewellery to Miller, to create a valid pledge as between him and her from the moment when he handed her money by way of loan which she was prepared
F to accept. In those circumstances it does not seem to me to affect the character of the delivery that Miller did something between Nov. 1 and 5 that he had no right to do. In those circumstances I think that the decision in *Whitehorn Bros.* v. *Davison* (1) had the effect which SALTER, J., thought it had, and I think rightly thought it had, namely, that to use the language used in that case, "the transaction of Nov. 5 went to feed the defendant's title."

G For these reasons I think, there having been no tender, that counsel for the defendant is right in saying that the defendants were entitled to judgment. I think, therefore, this appeal must be allowed with costs and judgment for the plaintiff set aside and entered for the defendants with costs.

WARRINGTON, L.J.—I am of the same opinion. The goods were unquestionably delivered to Miller, who had possession of them at the time when he delivered
H them to the defendants, Messrs. Attenborough. The question is, What were the terms upon which he had possession of the goods at the time? I think those terms are best expressed in the evidence of the plaintiff in cross-examination. She said that she had deposited the jewellery with him. Then she went on to say: "He was to examine the jewellery and see the value of it, and then he was to let me know what offer he could make me as to lending the money." Then come these words,
I which are of the utmost importance: "He was to keep the jewellery as security if he made the advance." It seems to me quite plain that the arrangement made between them was this, that if he made the advance the jewellery was to stand as security for the advance, and the possession given originally before the advance was made was the possession which was to be kept by him for the purpose of creating the security by way of a pledge. Now it seems to me that in this case no perfect delivery of possession was required; that although it was perfectly open to the plaintiff to refuse an advance, in which case, of course, Miller would remain a mere gratuitous bailee, as soon as the advance was made and was

accepted by the plaintiff, as it was in fact made and accepted, then there was a complete contract, and the legal position of the pledgor and pledgee was constituted not by new delivery of possession at the time of the advance, but by the original delivery of possession which had been made for the purpose of creating the security which it was ultimately agreed to deliver. It is there that I differ from the view of the learned judge. I do not think under these circumstances it was necessary at the time of the actual advance that the goods should be actually in the possession of Miller. I agree, therefore, that the judgment ought to have been for the defendants, and that the existing judgment for the plaintiff must be set aside and judgment now entered for the defendants.

ATKIN, L.J.—I agree. I think it is sufficient for the purposes of this appeal to say that in one small particular I draw a different inference of fact from that drawn by the learned judge. After stating the arrangement that the plaintiff should hand Miller the jewellery so as to examine and value it so as to enable him to decide whether or not he would make an offer to assist her, the learned judge says she handed him the jewellery in pursuance of this arrangement and for this purpose only. With great respect I do not think that is a true inference from the facts. I think it was handed to him for the purpose indicated, namely, that he should value it to enable him to decide whether or not he would make an offer to assist her, and that if he did make an offer to assist of the kind that had been discussed between them, of £500, that then he was to hold the jewellery as security for that advance. Therefore that was a delivery which, it seems to me, as soon as he made the proposed arrangement, which was assented to, would be good delivery so as to constitute a good pledge. I think under those circumstances the title that was given to Miller would under any circumstances enure to the benefit of the defendants. Therefore, for the reasons given by my brothers, I agree that this appeal should be allowed, and that judgment should be entered for the defendants.

Appeal allowed.

Solicitors: *A. Ross Dagg*; *Stanley Attenborough & Co.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

BARNETT *v.* COHEN

[King's Bench Division (McCardie, J.), April 6, 8, 1921]

[Reported [1921] 2 K.B. 461; 90 L.J.K.B. 1307; 125 L.T. 733; 37 T.L.R. 629; 19 L.G.R. 623]

Fatal Accident—Damages—Loss of pecuniary advantage—Need to prove reasonable probability of advantage—Death of child, aged four—Help to father in future—Possibility of father predeceasing child.

In an action under the Fatal Accidents Act, 1846, it is not sufficient for the plaintiff to prove that by the death of the deceased he lost a mere speculative possibility of pecuniary benefit. To succeed he must prove a reasonable probability of pecuniary advantage.

The plaintiff claimed damages under the Fatal Accidents Act, 1846, for the loss of his son, aged four years old, who was living with him and was killed while walking along the pavement by being crushed by a pole which fell while being unloaded from a van owing to the negligence of the defendant's servants. The plaintiff made some £1,000 per year from a retail business.

A He was forty years of age, his wife was thirty-three, and neither of them was in good health. The plaintiff intended to give the child, who was an intelligent boy, a good education, probably up to university level, and his claim to damages rested on his anticipation of the services and help or pecuniary aid of the son in the future.

Held: the plaintiff's claim was based on contingencies and uncertainties B which, owing to the extreme youth of the deceased child, combined with the fact that the plaintiff himself, because of his ill health, might have predeceased the child, one was unable to predict with reasonable certainty would materialise, and, therefore, he had failed to prove a reasonable expectation of pecuniary benefit, and the action failed.

Fatal Accident—Evidence—Defendant's negligence—Depositions, and verdict C *and rider of jury at inquest.*

In an action under Lord Campbell's Act (Fatal Accidents Act, 1846), the depositions, verdict and rider of the jury at the coroner's inquest are not admissible in evidence as proof of the defendant's negligence.

Notes. Under the Fatal Accidents Act, 1959 (39 HALSBURY'S STATUTES (2nd D Edn.) 941) the classes of dependants who may claim under the Acts has been extended and provision made for excluding certain benefits in assessing damages. By s. 1 of the Law Reform (Contributory Negligence) Act, 1945 (17 HALSBURY'S STATUTES (2nd Edn.) 12), provision is made for the apportionment of liability in case of contributory negligence.

Referred to: *Baker* v. *Dagleish Steamship Co.*, [1922] 1 K.B. 361.

E As to negligence causing death, see 28 HALSBURY'S LAWS (3rd Edn.) 34 et seq., 100 et seq.; and as to depositions and verdict of coroner's inquest as evidence in civil proceedings, see ibid., vol. 8, p. 538; and for cases see 36 DIGEST (Repl.) 208 et seq., 13 DIGEST (Repl.) 172, 173. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Cases referred to:

F (1) *Bird* v. *Keep*, [1918] 2 K.B. 692; 87 L.J.K.B. 1199; 118 L.T. 633; 34 T.L.R. 513; 62 Sol. Jo. 666; 11 B.W.C.C. 133, C.A.; 13 Digest (Repl.) 173, *418*.

(2) *Calmenson* v. *Merchants' Warehousing Co.*, (1921), 90 L.J.P.C. 134; 125 L.T. 129; 65 Sol. Jo. 341, H.L.; 13 Digest (Repl.) 172, *411*.

(3) *Printing Telegraph and Construction Co. of Agence Havas* v. *Drucker*, [1894] 2 Q.B. 801; 64 L.J.Q.B. 58; 71 L.T. 172; 42 W.R. 674; 10 T.L.R. 641; G 38 Sol. Jo. 661; 9 R. 677, C.A.; 22 Digest (Repl.) 126, *1093*.

(4) *Morgan* v. *Nicholl* (1866), L.R. 2 C.P. 117; 36 L.J.C.P. 86; 15 L.T. 184; 12 Jur.N.S. 963; 15 W.R. 110; 22 Digest (Repl.) 125, *1079*.

(5) *Re De Burgho's Estate*, [1896] 1 I.R. 274; 21 Digest 226, *p*.

(6) *Llanover* v. *Homfray*, *Phillips* v. *Hanover* (1881), 19 Ch.D. 224; 30 W.R. 557, C.A.; 22 Digest (Repl.) 126, *1099*.

H (7) *Blake* v. *Midland Rail. Co.* (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 36 Digest (Repl.) 221, *1176*.

(8) *Holleran* v. *Bagnell* (1879), 6 L.R.Ir. 333; 36 Digest (Repl.) 212, **2005*.

(9) *Taff Vale Rail. Co.* v. *Jenkins*, [1913] A.C. 1; 82 L.J.K.B. 49; 107 L.T. 564; 29 T.L.R. 19; 57 Sol. Jo. 27, H.L.; 36 Digest (Repl.) 213, *1124*.

(10) *Dalton* v. *South Eastern Rail. Co.* (1858), 4 C.B.N.S. 296; 27 L.J.C.P. 227; I 31 L.T.O.S. 152; 4 Jur.N.S. 711; 6 W.R. 574; 140 E.R. 1098; 36 Digest (Repl.) 214, *1129*.

(11) *Chaplin* v. *Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 27 T.L.R. 458; 55 Sol. Jo. 580, C.A.; 17 Digest (Repl.) 89, *96*.

(12) *Bramall* v. *Lees* (1857), 29 L.T.O.S. 111.

(13) *Duckworth* v. *Johnson* (1859), 4 H. & N. 653; 29 L.J.Ex. 25; 33 L.T.O.S. 274; 5 Jur.N.S. 630; 7 W.R. 655; 157 E.R. 997; 36 Digest (Repl.) 211, *1112*.

(14) *Stimpson* v. *Wood & Son* (1888), 57 L.J.Q.B. 484; 59 L.T. 218; 52 J.P. 822; 36 W.R. 734; 4 T.L.R. 589, D.C.; 36 Digest (Repl.) 214, *1131*.

(15) *Harrison* v. *London and North Western Rail. Co.* (1885), Cab. & El. 540; 1 T.L.R. 519; 36 Digest (Repl.) 214, *1130.*

(16) *Wolfe* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.I. 548; 36 Digest (Repl.) 212, **2007.*

(17) *Price* v. *Glynea and Castle Coal and Brick Co.* (1915), 85 L.J.K.B. 1278; 114 L.T. 264; 60 Sol. Jo. 274; 9 B.W.C.C. 188, C.A.; 36 Digest (Repl.) 222, *1186.*

(18) *Clark* v. *London General Omnibus Co., Ltd.*, [1906] 2 K.B. 648; 75 L.J.K.B. 907; 95 L.T. 435; 22 T.L.R. 691; 50 Sol. Jo. 631, C.A.; 36 Digest (Repl.) 207, *1083.*

Action tried by McCardie, J., without a jury.

The plaintiff claimed under the Fatal Accidents Act, 1846, to recover damages for the death of his son Sidney, aged four years, through the alleged negligence of the defendants. He sued as legal personal representative for his own benefit.

The facts and arguments sufficiently appear from the judgment.

Hawkin for the plaintiff.

T. Scanlan and *Montague Berryman* for the defendants.

Cur. adv. vult.

April 8. **McCARDIE, J,** read the following judgment.—This action is brought by the plaintiff under Lord Campbell's Act, 1846, to recover damages for the death of his son Sidney through the negligence of the defendants. He sues as legal personal representative, and states that he brings the suit for his own benefit. The child was killed in December, 1919, and was then just under four years of age. He lived with the plaintiff. The case is of legal interest for two distinct reasons. In the first place it raises a question as to the admissibility in evidence of the testimony given before, and the verdict of, a coroner's jury. In the second place it raises a question as to the proof of damage required under Lord Campbell's Act.

The facts as to the death can be stated very briefly. On Dec. 24, 1919, the child, Sidney Barnett, was walking along the pavement in Whitechapel Road. The defendants' servants were unloading long and heavy poles from a van which was drawn up by the kerb. Two of the defendants' men took one of the poles, which was about 35 ft. long and weighed about 5 cwt. One held the butt end of the pole on his shoulder, while the second man held the other end of the pole on his arm. In order to get the pole through the gateway, it was necessary for one of the men to wheel round and thus allow it, or cause it, to project temporarily into the horse-way. While it was so projecting, a horse and cart came along. The driver failed to notice the pole and his van struck it, thereby knocking it out of the hold of the defendants' two servants. As the pole fell to the ground, it struck the plaintiff's child, who was just under it, and seriously crushed him. He died almost at once. Hence the plaintiff's action against the defendants for the negligence of their servants. Such are the undisputed facts. The other brief facts I will state later. To the circumstances already stated, counsel for the plaintiff claimed to add as admissible testimony (i) the evidence before the coroner on Dec. 31, 1919, and (ii) the verdict and rider of the coroner's jury. A substantial amount of evidence, which I need not detail, was given in the Coroner's Court. The verdict was accidental death. The rider was this:

> "The jury are of opinion that there should have been more careful outlook and supervision of such a dangerous operation."

This, I think, was, in substance, a finding of negligence against the defendants, and counsel for the plaintiff claims that I should act on that finding. Counsel for the defendants vigorously argues that I should reject in toto the evidence, verdict and rider or finding before the coroner. Both counsel asked that I should give a definite ruling on the question inasmuch as uncertainty prevails in the profession as to the law. I cannot myself think that the matter admits of any real doubt at the present day. It is well, however, to deal clearly with the point so far as it

A concerns civil causes. In former days a measure of confusion existed as to the effect of proceedings before a coroner: See Phipson on Evidence (5th Edn.) p. 336. The distinction between judgments as to status or judgments in rem on the one hand and judgments or findings of a different nature was not fully or clearly appreciated: See Taylor on Evidence (11th Edn.) s. 1674. I need not analyse the question now, for the whole subject is illuminated by the judgments of the Court B of Appeal in *Bird* v. *Keep* (1). There a question arose under the Workmen's Compensation Act, 1906. It was held by the court that the record of the coroner's inquisition was not admissible as evidence of the cause of death. The relevant decisions were carefully examined by Swinfen Eady, M.R., and Bankes, L.J., and the principles involved were considered. The argument of Mr. A. Powell, K.C., for the applicant may be taken as representing the submission of counsel for the C plaintiff in the present case. It was pointed out by Swinfen Eady, M.R., that, at different periods of our legal history, different views have existed on the position. The effect of the judgment of Swinfen Eady, M.R., is thus put ([1918] 2 K.B. at p. 699):

> "I am of opinion that the result of an investigation conducted by the coroner, D however valuable for certain purposes, cannot in law be treated as primâ facie evidence against any person of the facts found by the jury."

Bird v. *Keep* (1) is not, perhaps, as widely known as may be wished. That the view of the Court of Appeal in that case may be treated as authoritative seems to be clear from the opinions expressed in the House of Lords in *Calmenson* v. *Merchants' Warehousing Co.* (2). There Lord Dunedin (with the concurrence of Lord E Shaw) deprecated reliance in an action under Lord Campbell's Act, upon the proceedings before the coroner. He said this:

> "The primary object of an inquiry before a coroner is not to fix responsibility on anyone; the parties to the action at law are not necessarily represented at the inquest, and attention is not directed by examination and cross-examination to many points which may be of importance in the action. The expression of F opinion of the coroner's jury, even if it touches the question of responsibility, cannot be made evidence in the action of any admission. Evidence given at an inquest may legitimately be used for the purposes of cross-examination of a witness at the trial."

Such are the two guiding authorities. I therefore reject wholly in the present case the evidence, verdict and rider in the proceedings before the coroner. I should G mention that counsel for the plaintiff sought to rely on R.S.C., Ord. 37, r. 3, which provides that

> "an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on ex parte applications by leave of the court or a judge, to be obtained at the time H of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

In my view, that rule of court does not assist the plaintiff. In the first place it relates to evidence only, and not to verdicts or judgments. Secondly, it does not alter the law of evidence. As Lord Esher, M.R., put it in *Printing, Telegraph and* I *Construction Co. of Agence Havas* v. *Drucker* (3) ([1894] 2 Q.B. at p. 803): "The rule does not make that evidence which is not by law evidence." The conditions under which advantage can be taken of Ord. 37, r. 3, are shown by the case just cited and by such decisions as *Morgan* v. *Nicholl* (4); *Re De Burgho's Estate* (5) and *Llanover* v. *Homfray* (6): see the notes to Ord. 37, r. 3, in the Yearly Practice of the Supreme Court 1921 [see now notes to Ord. 37, r. 3, of the Annual Practice, 1960]. I must, therefore, form an independent opinion whether the defendants were guilty of negligence causing the death of the plaintiff's son. In my view, such negligence is established. A considerable body of evidence was called before

me at the trial. I need not detail it. On that evidence, I am satisfied that the defendants were negligent in several respects. First, they failed to exercise proper supervision over the unloading of the poles. Secondly, they failed to warn approaching traffic of the projection of the poles into the horseway. Thirdly, they failed to warn foot passengers on the pavement of the danger of a falling pole; and fourthly, the two servants of the defendants ought not to have allowed the pole in question to project into the roadway just as a horse and cart were approaching. I therefore find that the death of the plaintiff's son was due to the defendants' negligence.

This finding gives rise to the second question—namely, has the plaintiff proved the pecuniary loss requisite to establish a cause of action? This point was well and fully argued by counsel. I need only state a few relevant facts. The deceased child was a bright and healthy boy. He had gone to school when only two years of age. The plaintiff (his father) has two other children, both boys, aged nine and thirteen. The plaintiff is a retail and wholesale trading engineer. He has a good business. He makes about £1,000 a year. His age is forty. His health is not good; he suffers from nerves and a dilated heart. His wife is thirty-three; her health is defective. The plaintiff meant to give the deceased child a good education; to send him to an ordinary school until about fourteen years old, then to a secondary school, and then, perhaps, to a university. The plaintiff's claim to damages must rest in substance upon his anticipation of the future services and help or the pecuniary aid in the future of the son who, at four years of age, is now dead. The directly material words in s. 2 of Lord Campbell's Act, 1846, are these:

> "In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

These words are but rarely cited in the decisions, but it is essential to recall them if those decisions are to be understood. Lord Campbell's Act created a wholly new cause of action with a novel body of features as to damages: See POLLOCK ON TORTS (11th Edn.) pp. 66, 68. Nothing can be given by way of solatium for the injured feelings of the relatives (*Blake* v. *Midland Rail. Co.* (7)). All that can be dealt with or assessed is pecuniary loss: See *Blake's Case* (7); and BEVEN ON NEGLIGENCE (3rd Edn.) pp. 184, 185. I need not consider the cases where a wife sues for the death of her husband, or a child for the death of its father. Here the father sues for the death of his infant child. Now, at one time it was thought that a father would fail in his action unless he gave proof of pecuniary advantage in actual existence prior to or at the time of the death of the child: See *Holleran* v. *Bagnell* (8). In that case, the child was seven years of age. She rendered some slight household services. MORRIS, C.J., said that there was no instance of an action for loss caused to a plaintiff by the death of a person of such tender age. He added: "There should be distinct evidence of pecuniary advantage in existence prior to or at the time of the death." This latter remark of MORRIS, C.J., has, however, been nullified by the opinion of the House of Lords in *Taff Vale Rail. Co.* v. *Jenkins* (9), where the dead child was a girl aged sixteen. There LORD HALDANE said ([1913] A.C. at p. 4):

> "The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in the statute or in any doctrine of law, which is applicable; nor do I think it is really established by the authorities when you examine them."

Later LORD HALDANE said:

> "I have already indicated that in my view the real question is that which

A Willes, J., defines in one of the cases quoted to us: *Dalton* v. *South Eastern Rail. Co.* (10): 'Aye or No, was there a reasonable expectation of pecuniary advantage?' "

The House of Lords affirmed the verdict of the jury for £75 damages. This question of reasonable expectation of pecuniary advantage seems to me to be a mixed question of fact and law. Mere difficulty in assessing damages should not bar a
B plaintiff from recovering: See the principle involved in *Chaplin* v. *Hicks* (11). But, on the other hand, I think the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff. Such a basis was held to exist in *Bramall* v. *Lees* (12), where the father secured a verdict for £15 before Crompton, J., and a jury, although the child was only twelve years old, was earning nothing, and was at the time of
C its death pecuniarily a burden to its parents. Apparently the verdict was based on the ground that in the course of a year or two the child would have earned wages at a factory near its father's home. A rule nisi for a new trial was granted by the Exchequer Court, but was not, I gather, further pursued. In *Duckworth* v. *Johnson* (13) the father gained a verdict for £20 for the death of his son, aged fourteen, who had, when twelve years old, earned 4s. a week in a painter's shop.
D In discharging the rule nisi for a new trial, Pollock, C.B., said (4 H. & N. at p. 657):

> "My opinion is that, looking at the Act of Parliament, if there was no damage, the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who
E are guilty of negligence by making them pay costs."

The court, however, felt that there was just enough evidence there to support the verdict. The matter was put somewhat vaguely by Watson, B., in the course of his judgment, when he said: "There must be some evidence of a prospect of benefit." I think that the only way to distinguish between the cases where the
F plaintiff has failed from the cases where he has succeeded, is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage. The latter is assessable. The former is non-assessable. This test, though necessarily loose, seems to be the only one to apply. The plaintiff, a widow, failed in *Stimpson* v. *Wood & Son* (14). Because, as I read the decision of Manisty, J., and Stephen, J., there was nothing
G more than a mere possibility of loss upon the facts of the case. So, too, in *Harrison* v. *London and North Western Rail. Co.* (15), the plaintiff, a husband, was also defeated because he failed to prove anything more than a possibility of loss through the death of his wife. As Lopes, J., said (Cab. & El. at p. 541):

> "I must take into account all the circumstances of the case, and all the contingencies and uncertainties that arise."

H The case which might appear to go nearest in favour of the present plaintiff is *Wolfe* v. *Great Northern Rail. Co. of Ireland* (16), where the plaintiff, a telegraph clerk, obtained a verdict for £150 for the death of his daughter, aged ten, who helped her parents in the house and who, moreover, was of such exceptional value in that way as to enable them to dispense with a servant. The Irish Court of Appeal held that there was evidence which justified the jury in the conclusion that
I the services of the deceased were of a pecuniary value exceeding the cost of her maintenance and education. The verdict, however, was reduced to £50. The facts in that case were exceptional as to the value of the child.

In the present action the plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might or might not have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never

have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. In any event, he would scarcely have been expected to contribute to the father's income, for the plaintiff even now possesses £1,000 a year by his business and may increase it further, nor could the son have been expected to aid in domestic service. The whole matter is beset with doubts, contingencies and uncertainties. Equally uncertain, too, is the life of the plaintiff himself in view of his poor health. He might or might not have survived his son. That is a point for consideration, for, as was pointed out by BANKES, L.J., in *Price* v. *Glynea and Castle Coal and Brick Co.* (17):

> "Where a claim is made under Lord Campbell's Act, as it is here, it is not only a question of the expectation of life of the deceased man, but there is also a question of the expectation of the life of the claimant."

Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore fails. Even if I had awarded damages, they would not have exceeded the £10 paid into court by the defendants with a denial of liability. The suggested heads of damage, other than the one I have above dealt with, are clearly invalid. The burial expenses are not recoverable: See *Clark* v. *London General Omnibus Co.* (18) [now recoverable under s. 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934]. Upon the same principle, I am debarred from allowing either the expenses incurred by the plaintiff, in deference to his religious duties as a Jew, in procuring a watcher upon the body of his dead child, or the loss he was put to through the like duties in abstaining from business labours for a space of time after the death. I sympathise with the plaintiff in the loss of his child, but I am bound in law to give judgment for the defendants.

Judgment for defendants.

Solicitors: *Saunders, Sobell & Co.*; *F. J. Berryman.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

STONEHOUSE AND ANOTHER *v.* MASSON

[KING'S BENCH DIVISION (A. T. Lawrence, C.J., Darling, Avory, Shearman, and Greer, JJ.), April 19, 1921]

[Reported [1921] 2 K.B. 818; 91 L.J.K.B. 93; 125 L.T. 463; 85 J.P. 167; 37 T.L.R. 621; 19 L.G.R. 477; 27 Cox, C.C. 23]

Vagrants—Fortune-telling—"Pretending or professing to tell fortunes"—Need to prove intent to deceive—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By s. 4 of the Vagrancy Act, 1824: ". . . every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . ." shall be deemed a rogue and vagabond.

The words "to deceive and impose on any of His Majesty's subjects" do not qualify "pretending or professing to tell fortunes," and on their true construction they do not mean "with intent to deceive or impose on . . .". Therefore, if a person is found to have pretended or professed to tell fortunes the offence under the section is complete without proof of any such intent on his part.

Davis v. *Curry* (1), [1918] 1 K.B. 109, disapproved of.

Notes. Section 4 of the Vagrancy Act, 1824, has been repealed so far as it extends to persons purporting to act as spiritualistic mediums or to exercise any

powers of telepathy, clairvoyance or other similar powers, or to persons who, in purporting so to act or to exercise such powers, use fraudulent devices: see Fraudulent Mediums Act, 1951 (30 HALSBURY'S STATUTES (2nd Edn.) 40), which makes new and express provision for the punishment of such fraudulent persons.

Followed: *Irwin* v. *Barker* (1925), 69 Sol. Jo. 589.

As to fortune telling, see 10 HALSBURY'S LAWS (3rd Edn.) 699; and for cases see 15 DIGEST (Repl.) 924, 925. For Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202.

Cases referred to:

(1) *Davis* v. *Curry*, [1918] 1 K.B. 109; 87 L.J.K.B. 292; 117 L.T. 716; 82 J.P. 21; 34 T.L.R. 24; 26 Cox, C.C. 100; 15 L.G.R. 923, D.C.; 15 Digest (Repl.) 924, *8865*.

(2) *R.* v. *Entwistle, Ex parte Jones*, [1899] 1 Q.B. 846; 68 L.J.Q.B. 580; 80 L.T. 657; 63 J.P. 423; 43 Sol. Jo. 417; 19 Cox, C.C. 317, D.C.; 15 Digest (Repl.) 924, *8864*.

(3) *Monck* v. *Hilton* (1877), 2 Ex.D. 268; 46 L.J.M.C. 163; 36 L.T. 66; 41 J.P. 214; 25 W.R. 373, D.C.; 15 Digest (Repl.) 924, *8861*.

Also referred to in argument:

Smith v. *Neilson* (1896), 23 R. (Ct. of Sess.) 77; 15 Digest (Repl.) 925, **5677*.

Williamson v. *Norris*, [1899] 1 Q.B. 7; 68 L.J.Q.B. 31; 79 L.T. 415; 62 J.P. 790; 47 W.R. 94; 15 T.L.R. 18; 43 Sol. Jo. 29; 19 Cox, C.C. 203, D.C.; 30 Digest (Repl.) 89, *672*.

Penny v. *Hanson* (1887), 18 Q.B.D. 478; 56 L.J.M.C. 41; 56 L.T. 235; 35 W.R. 379; 3 T.L.R. 409; 16 Cox, C.C. 173, D.C.; 15 Digest (Repl.) 924, *8862*.

Case Stated by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Marylebone Police Court an information was preferred by the respondent, Detective Inspector William Masson, under the Vagrancy Act, 1824, s. 4, against the appellant, Jean Stonehouse, for that she on Oct. 20, 1920, at 11, Oppidans Road, Primrose Hill, within the metropolitan police district, did pretend to tell fortunes with intent to deceive and impose on two of His Majesty's subjects. A further information was preferred by the respondent under the Summary Jurisdiction Act, 1848, s. 5, and the Vagrancy Act, 1824, s. 4, against the appellant Kate Smyth for that she on the said Oct. 20, 1920, at 11, Oppidans Road aforesaid, did aid and abet the appellant Stonehouse. The informations were heard on Nov. 18, 1920, and Nov. 25, 1920, when the magistrate amended the summons against the appellant Stonehouse by striking out the word "pretend" and substituting the word "profess," and Dec. 2, 1920, when he convicted the appellants and ordered each of them to pay a fine of £5 or in default to be imprisoned for one month.

Upon the hearing of the informations the following facts were proved or admitted. (i) The appellant Smyth was a widow and rented a flat on the third floor at 11, Oppidans Road. The appellant Stonehouse was a spinster and had been an invalid for a period of about three years, during which period she had resided with the appellant Smyth. They described themselves as spiritualists. (ii) On each day from Sept. 4 to 11, 1920, except Sept. 6, 1920, women were seen to go to 11, Oppidans Road. They rang the bell, asked for the appellant Stonehouse, and were shown upstairs by the appellant Smyth. (iii) On Oct. 4, 1920, Eleanor Parry, a spinster, and Minnie Kemp, a married woman, and women police patrols, called at 11, Oppidans Road. The appellant Smyth opened the door. Eleanor Parry asked if the lady who told fortunes lived there. The appellant Smyth said: "Yes," and further said, "We only tell fortunes by appointment. Will you make an appointment by letter? Don't mention the fortunes in writing. We are not allowed by law to tell fortunes and it might mean prison for us." (iv) On Oct. 20, 1920, Eleanor Parry and Minnie Kemp again went to 11 Oppidans Road. The appellant Smyth opened the door and said: "Are you Mrs. Parry and Miss Kemp?" Eleanor Parry said: "Yes." The appellant Smyth took them up two flights of

stairs and showed Eleanor Parry into a room where the appellant Stonehouse was reclining on a sofa. The appellant Smyth introduced Eleanor Parry as Mrs. Parry and left her alone with the appellant Stonehouse. Eleanor Parry was wearing a wedding ring lent by the said Minnie Kemp. When Eleanor Parry came out, the appellant Smyth showed Minnie Kemp into the room and said: "This is Miss Kemp." (v) To both women the appellant Stonehouse, after shuffling cards, consulting a small book, and asking the dates of their births, told a great deal of their "past" which was entirely erroneous, mistaking the married woman for the single, and vice versa, and a good deal of the future. Each woman paid a fee of 2s. 6d. (vi) The appellant Stonehouse, giving evidence on her own behalf, said: "There is nothing outside to show I tell fortunes, and I do not advertise. I have no need to do so. I do it by psychometry. I get the conditions of the people through the magnetism by the cards, the glove, or anything that is worn by persons. I give them the cards to shuffle in order to get the magnetism. I also do it by a piece of hair. I am also born with the gift of second sight, which enables me to see the spirit forms around me, and I also get communications from the other side. I have comforted people who contemplated suicide with such messages. I was a music teacher, but am now a cripple. I have not been out for three years. I honestly believe, and I have convinced people, that I can foresee their future and also see their past." In cross-examination she said: "I told these ladies' fortunes by magnetism and by second sight. I used the same pack of cards for each. The magnetism never makes a mistake. I certainly scented something about these women. They were most uninteresting and they didn't seem to be taking much notice. What they say is all lies. If I told witness Parry she had a little girl of six, I saw the child clairvoyantly. Probably she has such a child. I have a little white book and I study astrology. I'm sure that what is in the book is true. I've proved it. Generally it is true! I don't know that it is ever wrong. The book is founded on the ruling planets." (vii) The appellant Smyth also gave evidence on her own behalf. She stated that she believed in second sight. She believed that the appellant Stonehouse had the powers which she claimed. She used to open the door because the appellant Stonehouse could not get down. She further said: "If you have the gift, it doesn't matter what medium you use—cards or anything—none at all would do if she just held the person's hand. People have told me they were astonished at what she told them." The appellant Stonehouse gave her half what she earned for her board. It might be 10s. a week or in a good week £1. In cross-examination she said: "It isn't fortune-telling, it is clairvoyance." (viii) Evidence was also given on behalf of the appellants by persons who had had interviews with the appellant Stonehouse on other occasions. Fanny Amelia Dixon, a married woman, said: "I've known Miss Stonehouse five or six years, and have often visited her. All she has told me has been true. In June, 1915, she foretold that my mother would have a serious illness, and I would be fetched in the night. It happened on the last Friday in the old year as she said. I don't consider I have been imposed upon or deceived. She foretold a serious illness of my husband and about my sister-in-law dying." Georgette Raymond, a married woman, said: "I have known Miss Stonehouse for years. I have visited her regularly and often have my fortune told when I feel inclined, perhaps once a month or even more. I've not been imposed upon. What she has told me has turned out true. On one occasion she saw behind me a friend of mine who died four years ago. I have acted on her advice and improved my circumstances."

The magistrate was of the opinion that in the ordinary interpretation the word "professing" to tell fortunes, whether they believed in what had been described before him or not, brought the appellants within the principle of the Vagrancy Act, 1824, s. 4. He could not say on the evidence before him whether the appellants believed in Stonehouse's statements or not, but he held that, in the same way as the two women, Fanny Amelia Dixon and Georgette Raymond, called for the defence, had been induced to believe in her statements, whereby the very mischief aimed at by the statute had been perpetrated, so there had been an intent on the

part of the appellants to make the women, Eleanor Parry and Minnie Kemp, believe in her statements to them, erroneous as they in fact were, whereby they would have been deceived had they believed in them. He, therefore, convicted both appellants and ordered each of them to pay a fine of £5 or in default to be imprisoned for one month.

By s. 4 of the Vagrancy Act, 1824: ". . . every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be liable to a penalty.

J. P. Eddy for the appellants.

Artemus Jones, K.C. (*H. D. Roome* with him), for the respondent.

A. T. LAWRENCE, C.J.—This is a Special Case stated by a metropolitan police magistrate, and it raises a question whether it was necessary that he should find that the persons charged with professing to tell fortunes believed that they were able actually to tell fortunes or not. The charge was brought under s. 4 of the Vagrancy Act, 1824, and it was made by amendment a charge of "professing" to tell fortunes. There were also the words "with intent to deceive and impose," but the learned magistrate declined to determine whether the accused had so intended. He said that upon the evidence before him he could not say whether they believed in their statements or not, but he found that they did in fact deceive or did in fact make statements intending the women to believe in those statements, which were in fact untrue. I cannot imagine why he hesitated to find whether there was an intention to deceive—it is a very subtle distinction between intending persons to believe an untrue statement and intending to deceive them—but that is the point at which he pauses in his findings.

The question is whether it was essential that he should go on to find in so many words that they intended to deceive. I do not think it was necessary. I am astonished that he did not so find, because I cannot imagine any persons holding themselves out as fortune-tellers and telling fortunes for money who do not perfectly well know that they are deceiving the persons to whom they profess to tell fortunes, and intend to deceive them into thinking that what they say is true, whereas they do not know or care whether it is true or untrue. I entirely agree with the general proposition that was cited to us that in all criminal cases as a general rule there must be mens rea. But that is not true of every statute creating an offence. Where the statute is passed for the protection of the community against some evil influence, whether it is a physical or an intellectual influence, mens rea is not always necessary in order to convict under the statute. There are a number of cases in which no mens rea is necessary, and this appears to me to be one of them. I think so, partly from the framing of this statute itself, but also more particularly from the statutes which it replaces. There has been a series of statutes dating from the 39 Eliz. [c. 4 or c. 17] up to the statute of 1824 dealing with the question of telling fortunes, and they use, in some respects, very similar language. The words which have been relied upon here appear to have been derived from 17 Geo. 2, c. 5 [Justices Commitment Act, 1744], s. 2. That is the second of the series of statutes, and it first introduces the words to deceive or impose on any of His Majesty's subjects, but that does not qualify the pretending to have skill in physiognomy, palmistry or like crafty science or pretending to tell fortunes; it only says "use any craft to deceive and impose on any of His Majesty's subjects." One has to go back to 39 Eliz., c. 4, to see that telling fortunes was considered at that date to be fantastic imagination. The words as used in that statute are:

> "All idle persons going about . . . either begging or using any subtle craft or unlawful games and plays, or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other like fantastical imaginations."

That statute regards the telling of fortunes as a fantastic imagination, and all the subsequent statutes dealing with it merely treat the pretending to tell fortunes as in itself a crime.

Our attention has been called to cases in which it has been said that one cannot go the length of saying that all persons who tell fortunes commit a crime. That may very well be. It may be, as my brother DARLING pointed out in *R.* v. *Entwistle* (2) that one might tell fortunes without committing a crime if one said: "I am not meaning to deceive you. I am not saying that this is a fortune; but I tell you your fortune by these cards, and this system of dealing with them." There would, in that case, be no intent to deceive the person, nor would the person be deceived, and that would be no crime at all. But when a person professes to be a fortune-teller and able to tell fortunes, those words seem to me to connote the serious telling of fortunes by a person who professes to be able to tell fortunes, that is to say, to tell truly that which will happen to a person in the future, and that is the thing which the statute says is a public mischief, because it affects the lives and happiness of those members of the community who are weak enough to patronise such people. One of these women was told that her husband and her mother and somebody else were likely shortly or within some moderately short time to die. One can imagine how that might affect some people; it might prevent their being able to attend to their ordinary duties; it is a public mischief that ought to be repressed; and that is why, it seems to me, that this statute has been enacted. I think that the first case which says that it is necessary to prove an intent to deceive or words to that effect, is *Davis* v. *Curry* (1). I think that in that case SANKEY, J., went beyond what was necessary for the upholding of this section of the statute. It seems to me that those words "to deceive and impose on any of His Majesty's subjects" only qualify the words "or using any subtle craft, means, or device, by palmistry or otherwise," and they do not refer to or qualify the words "pretending or professing to tell fortunes," because that ipso facto is a deceiving of the person whose fortune you profess to tell. Therefore, the magistrate's decision was correct and ought to be upheld.

DARLING, J.—After a good deal of doubt and in consequence of the full argument which has been addressed to us I have come to the conclusion that the decision of the magistrate was right. This conclusion is in conflict with the judgment which I gave in *Davis* v. *Curry* (1), although it is in accordance with the judgment that I gave in *R.* v. *Entwistle* (2). What has convinced me that the judgment which I gave in *Davis* v. *Curry* (1) was wrong is a consideration of the old statutes, passed before the statute upon which this prosecution was founded, which had not been brought to the notice of the court in which my brother SANKEY and I differed from my brother AVORY.

The prosecution was founded on the Vagrancy Act, 1824, but one should have regard to the statute 39 Eliz., c. 4, which was passed in 1597. That statute enacts the punishment of

> "all idle persons going about in any country either begging or using any subtle craft or using any craft or unlawful games and plays or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other like fantastical imaginations."

There you have the words making it an offence to pretend to tell destinies or fortunes or indulge in other such fantastic imaginations. There is nothing there about intent to deceive or impose upon Her Majesty's subjects. It is assumed that the telling of fortunes is all nonsense, fantastical imagination, it is boldly enacted that it is an offence to do it, and that was enacted without any provision that there must be an intent to deceive anybody or that it must be done to deceive. That was followed by a statute of James I, which has been repealed and with which I need not concern myself. Afterwards comes the statute in 1744 of 17 Geo. 2, c. 5. It enacted as an offence, among other things,

A "all persons pretending to be gipsies, or wandering in the habit or form of Egyptians, or pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or using any subtle craft to deceive and impose on any of His Majesty's subjects."

That is, I think, where we first get the words "deceive and impose on any of His B Majesty's subjects." I read that to be really describing three separate offences—pretending to be gipsies or wandering in the habit or form of Egyptians, pretending to tell fortunes, or using any subtle craft to deceive or impose on any of His Majesty's subjects. I think the words "to deceive or impose on any of His Majesty's subjects" qualify the telling of fortunes or use of subtle craft in this way. It is as though the Act had said "tell fortunes, or use any subtle craft, because C telling fortunes and using subtle craft imposes upon His Majesty's subjects," and, therefore, each of those is made an offence in itself. Then comes the statute 3 Geo. 4, c. 40 [Vagrancy Act, 1822]. Section 3 makes it an offence to pretend to be a gipsy—of course it does not make it an offence to be a gipsy—but to pretend to be a gipsy is made an offence. Then it goes on:

D "All persons pretending to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects."

That is the first time in these statutes that the word "device" is used. Instead of "craft to deceive" it says "craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." I come to the conclusion E that that means that professing palmistry or telling fortunes or using any subtle craft is a thing which in itself is done to deceive or impose on His Majesty's subjects, because the legislature had come to the conclusion that all such things were foolish nonsense, or what, in Queen Elizabeth's time was called fantastic imagination.

Now comes the statute which we are here to consider, the Vagrancy Act, 1824, F s. 4 of which provides:

". . . every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects."

It does not say "with intent to deceive and impose on," and, although the words G have been construed by judges, including myself, as meaning "with intent to deceive and impose on," I think that that is a wrong construction, and I think so because of the wording of the earlier statutes. I think that what is meant is that this device of palmistry or telling fortunes is a deceptive device, and, instead of saying, "using the deceptive device of professing to tell fortunes," the word "device" is introduced at the end and the section says, "professing to tell fortunes . . . H to deceive and impose on any of His Majesty's subjects." On reflection and consideration of the earlier statutes I have come to the conclusion that the legislature had decided that fortune-telling was a fraud and that the professing to tell fortunes was the professing to say what was false; that it was satisfied that His Majesty's subjects were deceived by it; and, therefore, it was a deceptive device in itself, quite independently of whether the person who professed to tell the fortunes believed I that he or she could tell fortunes or not. The thing itself was the thing which deceived His Majesty's subjects; the legislature decided it was false and, in Queen Elizabeth's words, "fantastical imagination," and the statute forbade it to be practised because it was a fantastical imagination harmful to His Majesty's subjects, equally whether the person, subject to that fantastical imagination, was a believer in it or pretended to believe in it. For these reasons, I have come to the conclusion that the judgment which I gave in *Davis* v. *Curry* (1) was wrong, and I am thankful to find that the judgment I gave in *R.* v. *Entwistle* (2) is considered by counsel for the respondent to be right.

AVORY, J.—I adhere in this case to what I said in *Davis* v. *Curry* (1), and I think it useful to repeat what the magistrate in that case found. He was of opinion that the question of bona fides, in the sense that the appellant herself believed or had persuaded herself that she possessed what she called supra-normal power, was irrelevant to the issue, because the act of pretending or professing to tell fortunes, especially when done for gain, is prohibited by the statute, which imports that deception is practised thereby irrespectively of the actual frame of mind of the person so pretending or professing, or any special evidence of dishonesty. That, in my view, expresses entirely the true construction of this statute, and I only wish to add that, according to the view which I take of the decided cases which have been quoted to us, there were at least five judges who had expressed before *Davis* v. *Curry* (1) the view that the words "to deceive and impose on any of His Majesty's subjects" did not govern the words "professing or pretending to tell fortunes." In *Monck* v. *Hilton* (3), CLEASBY and POLLOCK, BB., both took the same view that the pretending or professing to tell fortunes was in itself an offence without the addition of any other words. I think that my brother DARLING and CHANNELL, J., in *R.* v. *Entwistle* (2), really took the same view, because my brother DARLING said that he agreed with what had been said by CLEASBY, B., whether it was an obiter dictum or not. CHANNELL, J., obviously agreed with it, because he said in effect that the later words "to deceive and impose on" do not apply to the words "pretending or professing to tell fortunes," but the deceit or the deceitful intent is really included in the words "pretending or professing." I am satisfied, looking at the earlier legislation on the subject, that these words, "to deceive and impose on," are not any necessary part of the offence. If they were, *R.* v. *Entwistle* (2) could not have been decided as it was because that case decided that the intent to deceive was implied in the words "pretending or professing," and, therefore, it was unnecessary that the intent should be specifically alleged. If the intent had been a necessary part of the offence, it is obvious that the conviction, to be good on the face of it, must have alleged that what was done was done to deceive. The result is that in such cases it is not necessary for the magistrate to enquire or determine whether the alleged offender believes in this kind of—I find it difficult to find an appropriate word for it—fantastic imagination—I was going to call it by another word. It is not desirable in my view that the magistrate should waste his time in inquiring into the question at all, and therefore I think the conviction should be supported.

SHEARMAN, J.—I am of the same opinion. I understand that this court, consisting as it does of more than the usual number, has been called together because there has been a conflict in the reported decisions. I do not think that I can serve any useful purpose by discussing the cases because we were brought here in order that it might be decided what is the true construction of the statute. Had this statute been a new statute recently passed, I think that a difficult question would have arisen as to whether in this part of s. 4 of the Act the words, "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," describe a class by itself, one of about twenty classes of persons who are described as rogues and vagabonds. Without any elucidation thrown upon the matter by the history of the legislation and by the object of the Act, it might have been extremely difficult to decide whether the words "to deceive and impose on any of His Majesty's subjects" mean "with intent to deceive and impose," and whether they govern the whole of the preceding words, or whether the words "means or device . . . to deceive" are another way of saying a deceptive means or device. As soon as one looks into the history of the matter, which has been gone into at length by my brother DARLING, I think it is quite clear. From the earliest times the legislature described as rogues and vagabonds and treated as rogues and vagabonds persons who practised certain devices which were considered to be bad for the public generally. One of them was telling fortunes, and there are a number of old statutes which clearly included amongst rogues and vagabonds persons who did

A certain things with an intention to be wicked and an intention to deceive, but among the classes of acts were also certain acts obviously prohibited as bad in themselves with whatever intention or state of mind they were done. The 1824 Act is the one which we have to interpret, and it took almost literally from the Act of 1822 the words in question, with the addition of the words "professing or pretending." In my opinion, it necessarily follows that the words, being taken almost B literally from the other Acts, were intended to bear the same meaning, and in the earlier Act the words "craft to deceive or device to deceive" meant a deceptive advice. Therefore, I think the true construction of the words in s. 4 of the Act of 1824, "to deceive and impose," is not "with the intent to deceive and impose," and they have nothing to do with the earlier words of the Act as to pretending or professing to tell fortunes. To my mind, the true meaning of this section is that C it is an offence in itself when it is proved that a person has pretended or professed to tell fortunes. This brings us back to the ordinary problem which one has to meet in every criminal case. Before there can be a conviction in any criminal case, it is necessary that there should be mens rea. In dealing with a statute creating an offence one has to see whether it prohibits an act per se or only makes it criminal when done feloniously or fraudulently or with an intent to deceive. D That one can usually find expressly stated in the statute, or, if not, one can gather it from the words of the statute. To my mind, the mens rea in the case of this particular offence is the intent to do the act prohibited by the statute, namely, to pretend or profess to tell fortunes, and, as soon as that is proved, it is quite immaterial whether the person who professed or pretended did in fact believe that he or she could do as he or she professed to do. In my judgment, the finding of E the magistrate was right.

GREER, J.—I agree. In order that the words, "using any subtle craft, means, or device," might not include any patentee or any person who had discovered a useful device for any purpose, it was necessary to qualify the sort of craft, means, or device, which was meant by the section, and, in order to qualify "craft, means, F or device," the words "by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects" were added. There is no reason whatever why the previous words "pretending or professing to tell fortunes" should be qualified by any such limitation, because without such limitation they are both intelligible and reasonable—that is to say, there are good reasons why Parliament should desire to make pretending or professing to tell fortunes an offence, even in the case of persons who G believe they are truly telling those fortunes. I think that the words "to deceive" do not qualify the words "pretending or professing to tell fortunes." The offence is complete in this case without any finding by the magistrate of any intention to deceive.

Appeal dismissed.

Solicitors: *Tiddeman & Enthoven*; *Wontner & Sons.*

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

A

REDERIAKTIEBOLAGET AMPHITRITE *v.* R.

[KING'S BENCH DIVISION (Rowlatt, J.), July 27, 1921]

[Reported [1921] 3 K.B. 500; 91 L.J.K.B. 75; 126 L.T. 63; 37 T.L.R. 985]

B

Crown—Fettering future executive action—Binding force of undertaking.

During the 1914–18 war, the suppliants, a Swedish shipping company, obtained from the British legation in Stockholm an undertaking that, if they sent their vessel, the A., to England with a certain class of cargo, she would be allowed free passage without being detained in England. On the faith of this undertaking, the suppliants sent the A. to Hull with an approved cargo, C which was discharged. While the A. was at another British port to load its cargo to take back to Sweden, the British government withdrew the undertaking and refused the A. clearance. On a petition of right for damages for breach of contract,

Held: in the absence of an undertaking contained in a contract the government could not fetter its future executive action by a mere expression of D intention, and, therefore, the undertaking was not legally enforceable.

Notes. This case was distinguished and criticised by DENNING, J., in *Robertson* v. *Minister of Pensions*, [1948] 2 All E.R. at p. 770, but his judgment was itself criticised in *Howell* v. *Falmouth Boat Construction Co., Ltd.*, [1951] 2 All E.R. at p. 280. See also articles by J. D. B. Mitchell in 13 MODERN LAW REVIEW (1950) 318 et seq., 455 et seq. E

As to legal proceedings against the Crown and its servants, see 7 HALSBURY'S LAWS (3rd Edn.) 249 et seq.

Petition of right.

In 1918, the suppliants, a Swedish steamship company of Helsingborg, owned the steamship *Amphitrite*. She was then free and the suppliants were minded to put her into trade between Sweden and the United Kingdom. There was an F intensified blockade of British ports by the Germans, and an arrangement had been made between the British government and the governments of neutral countries that neutral ships in British ports should be allowed to leave only if they were replaced by other ships of the same tonnage. The suppliants had had two of their ships detained in British ports and they now desired to get the most binding assurance that was possible that, if this vessel was employed in that trade, she G would be allowed free passage without being detained in the United Kingdom. On Mar. 8, 1918, they wrote to the British legation at Stockholm as follows referring to the *Amphitrite*.

> "We should be disposed to put her in trade between Sweden and England in case you could give us a guarantee that the boat should be allowed free passage without being detained in Great Britain." H

The legation, on Mar. 18, after communicating with the proper authorities in Great Britain, replied as follows:

> "I am instructed to say that the steamship *Amphitrite* will earn her own release and be given a coal cargo if she proceed to the United Kingdom with a full cargo consisting of at least 60 per cent. approved goods." I

A further letter from the British legation of the same date was as follows:

> "I am instructed to inform you that upon the arrival at a port of discharge in the United Kingdom with an approved cargo of the steamship *Aphitrite*, either this vessel or some other Swedish vessel will be allowed to leave the United Kingdom for Sweden, always provided that this vessel is not already under any obligation to the British authorities."

The vessel was duly loaded and sent to Hull with a cargo of approved goods and

arrived there on May 1, 1918. All facilities were given to her on that occasion, and, after discharging her cargo, she loaded a cargo of coal, obtained her release and returned to Sweden. In contemplation of a further voyage, the suppliants, on May 9, 1918, obtained from the British legation, in answer to a request for information, the following:

> "In reply to your letter of the 1st inst. I beg to inform you that steamship *Amphitrite* will be allowed to release herself in her next voyage to the United Kingdom."

Thereupon, on May 23, 1918, the suppliants entered into another charterparty for another voyage to England, and the steamship *Amphitrite* was again loaded with an approved cargo of goods. On June 14 she was sent on her second voyage to Hull where she duly discharged her cargo, and then proceeded to the Forth to load another cargo of coal. While she was there, the government withdrew loading facilities and refused clearance, unless application therefor was made through the Swedish Shipping Committee. The suppliants had not placed themselves on the list of vessels to which that committee granted facilities and they were disqualified from applying through the Swedish Shipping Committee. Consequently, the vessel was detained in port, and eventually, the suppliants sold her to avoid further loss. The suppliants presented this petition of right claiming damages for breach of contract. The Crown, in its answer and plea, denied that there was any enforceable contract.

R. A. Wright, *K.C.*, and *R. H. Balloch* for the suppliants.

The Attorney-General (*Sir Gordon Hewart*, *K.C.*) and *H. M. Giveen* for the Crown.

ROWLATT, J.—The suppliants are a Swedish company of shipowners. They sue the Crown by petition of right to recover damages for breach of contract, the alleged breach being that the ship *Amphitrite* was refused a clearance to enable her to leave this country, when she had entered a British port under an arrangement whereby she was promised that that clearance would be given to her. Undoubtedly, the suppliants desired to get the clearest and most binding assurance that was possible. Their vessel was free. They might have employed her elsewhere, and they had had experience of the difficulties encountered by foreign ships in getting away from this country when once they had come here. Accordingly, on Mar. 8, 1918, they wrote to the British legation at Stockholm and asked whether, in the event of the vessel being put in trade between Sweden and England, the legation could give them a guarantee that she would be allowed free passage without being detained in Great Britain. The answer to this by the proper authority was that, in the event of the vessel's being sent to the United Kingdom with a full cargo of approved goods, she would earn her own release and would be given a coal cargo. This letter was followed by another, on Mar. 18, from the British legation which stated:

> "that the steamship *Amphitrite* will earn her own release and be given a coal cargo if she proceed to the United Kingdom with a full cargo consisting of at least 60 per cent. approved goods."

That reply was given by the British legation after consulting the proper authorities in Great Britain, and I must take it that it was given with the highest authority with which it could be given on behalf of His Majesty's government. But the vessel was not chartered by the British government so as to make that a term of the charterparty. By those letters, the British government merely undertook that, if the ship traded to this country, she would not be subjected to the delays which were sometimes imposed. The letters in which that undertaking was contained were written with reference to an earlier voyage which was allowed to go through, the undertaking being on that occasion observed. But the undertaking was renewed with respect to the voyage in connection with which the present complaint arises, by a letter from the British legation, in which it is stated, that "the

steamship *Amphitrite* will be allowed to release herself in her next voyage to the United Kingdom''—that is to say, on the same terms as previously. A

In those circumstances, I have to consider whether there was a contract at all. I have to consider whether the letter which I have just read was a contract at all. I have not to consider whether there was anything of which complaint might be made outside a court, that is to say, whether what the government did was morally wrong or arbitrary. That would be altogether outside my province. B All that I have to decide is whether there was an enforceable contract. I am of opinion that there was not. No doubt, the government can bind itself, through its officers, by a commercial contract, and, if it does so, it must perform it like anybody else or pay damages for the breach. But there was no commercial contract in this case. It was an arrangement whereby the government purported to give an assurance with regard to what its executive action would be in the future C in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. That is, to my mind, not a contract for the breach of which damages can be sued for in a court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the government to fetter its future executive action, which must necessarily be determined by the needs of the community D when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus, in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except on the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of E the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable. Again, suppose that a man accepts an office which he is perfectly at liberty to refuse, and does so on the express terms that he is to have certain leave of absence, and that, when the time arrives, the leave is refused in circumstances of the greatest hardship to his family or business, as the case may be. Is it con- F ceivable that a petition of right would lie for damages? I should think not. I am of opinion that, in the circumstances of this case, there cannot be an action for damages and this petition must fail and there must be judgment for the Crown.

Judgment for the Crown.

Solicitors: *Botterell & Roche*; *Treasury Solicitor.* G

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

Re WEDGWOOD (DECEASED). ALLEN *v.* PUBLIC TRUSTEE

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), November 9, 10, 1920, February 15, 1921]

[Reported [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146]

Estate Duty—Incidence—Settled legacy "free of all death duties"—Death of life tenant.

Legacy Duty—Incidence—Settled legacy "free of all death duties"—Death of life tenant.

By her will, dated June 26, 1913, a testatrix who died on Nov. 26, 1913, bequeathed several pecuniary legacies, including one of £5,000 to a charity, and she directed "that all legacies and annuities given by this my will or any codicil hereto . . . shall be paid free of all death duties." She then devised and bequeathed all the residue of her real and personal estate to her trustees on the usual trusts for sale and conversion, with a direction out of the proceeds "to pay and provide for my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the duties on all legacies and annuities bequeathed free of duties."

The testatrix directed her trustees to invest the remainder and hold it on trust in the first place to pay "free of all death duties" certain annuities, with a direction to appropriate funds for answering them by the income thereof, and then to pay to each of two nephews "free of all death duties" the sum of £6,000 and to her niece "free of all death duties" the sum of £1,000 and subject thereto to hold the residuary estate in trust for a cousin absolutely. The testatrix made a second codicil, dated Nov. 17, 1913, whereby she directed that her will should be read as if a legacy of £2,500 "free of all death duties had been thereby bequeathed" to the charity in lieu of the said legacy of £5,000, and she then bequeathed "free of all death duties" to her trustees £2,500 on trust to invest the same and to pay the income to her sister K. for life and after her death as to both capital and income in trust for the said charity.

The question arose whether the legacy and estate duties which would become payable on the death of K. in respect of the settled legacy of £2,500 were payable out of the corpus of that legacy or out of the ultimate residuary estate of the testatrix.

Held: the legacy duty was payable out of the ultimate residuary estate, but (Younger, L.J., dissenting) the estate duty out of the corpus of the settled legacy.

Re Parker, White v. *Stewart* (1) (1917), 117 L.T. 422, and *Re Palmer, Palmer* v. *Palmer* (2), [1916] 2 Ch. 391, considered.

Notes. Applied: *Re Sutherland, Chaplin* v. *Leveson-Gower*, [1922] 2 Ch. 782; *Re Beecham, Woolley* v. *Beecham* (1923), 130 L.T. 558; *Re Laidlow, Wilkinson* v. *Lyde*, [1930] All E.R.Rep. 252; *Re Trimble, Wilson* v. *Turton*, [1931] 1 Ch. 369. Considered: *Re Howell, Drury* v. *Fletcher*, [1952] 1 All E.R. 363. Referred to: *Re Fenwick, Lloyds Bank* v. *Fenwick*, [1922] 2 Ch. 782; *Re Sarson, Public Trustee* v. *Sarson*, [1925] Ch. 31; *Re Hicks, Bach* v. *Cockburn*, [1933] Ch. 335; *Re Shepherd, Public Trustee* v. *Henderson*, [1948] 2 All E.R. 932; *Re McNeill (deceased), Royal Bank of Scotland* v. *Macpherson*, [1957] 3 All E.R. 508.

As to incidence of estate and legacy duty on death of life tenant, see 16 Halsbury's Laws (3rd Edn.) 384 et seq.; and for cases see 21 Digest 35–37.

Cases referred to:

(1) *Re Parker, White* v. *Stewart* (1917), 86 L.J.Ch. 766; 117 L.T. 422; 33 T.L.R. 501, C.A.; 21 Digest 37, *233*.

(2) *Re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 60 Sol. Jo. 565, C.A.; 21 Digest 35, *220*.

(3) *Re Stoddart, Bird* v. *Grainger*, [1916] 2 Ch. 444; 86 L.J.Ch. 29; 115 L.T. 540; 60 Sol. Jo. 586; 21 Digest 37, *232*.
(4) *Re D'Oyly, Vertue* v. *D'Oyly*, [1917] 1 Ch. 556; 86 L.J.Ch. 373; 116 L.T. 442; 61 Sol. Jo. 336; 21 Digest 35, *225*.
(5) *Re Snape, Elam* v. *Phillips*, [1915] 2 Ch. 179; 84 L.J.Ch. 803; 113 L.T. 439; 59 Sol. Jo. 562; 21 Digest 35, *219*.
(6) *Re Eve, Hall* v. *Eve*, [1917] 1 Ch. 562; 86 L.J.Ch. 396; 116 L.T. 682; 33 T.L.R. 251; 21 Digest 37, *234*.
(7) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 47 W.R. 147; 21 Digest 41, *261*.

Appeal by the National Anti-Vivisection Society from an order of SARGANT, J.

F. J. Wedgwood, by her will dated June 26, 1913, after appointing W. B. Allen and C. Wedgwood executors and trustees thereof, bequeathed a number of pecuniary legacies, amongst them being one of £5,000 to the National Anti-Vivisection Society. The testatrix then bequeathed to her trustees the sum of £1,000 on trust for her niece Olive Wedgwood for life, and after her death on the usual trusts for her children, and if there were no children it was to fall into residue. Then, after giving the use and enjoyment of a freehold house to her niece M. E. Wedgwood, the testatrix directed

"that all legacies and annuities given by this my will or any codicil hereto . . . . shall be paid free of all death duties."

She then devised and bequeathed all the residue of her real and personal estate to her trustees on the usual trusts for sale and conversion, with a direction to them out of the net proceeds to

"pay and provide for my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto and the duties on all legacies and annuities bequeathed free of duties."

She then directed her trustees to invest the residue and hold it on trust in the first place to pay (free of all death duties) certain annuities, with a direction to appropriate funds for answering them by the income thereof with resort to the capital thereof, if necessary, and subject to these annuities to pay to each of her two nephews B. H. Wedgwood and J. I. Wedgwood "free of all death duties" the sum of £6,000, and subject thereto to pay to her niece M. E. Wedgwood "free of all death duties" the sum of £1,000 and subject thereto to hold her residuary estate upon trust for her cousin C. Wedgwood absolutely. The testatrix then declared that the sum of £6,000 before bequeathed to J. I. Wedgwood should not be paid to him, but should be retained and held by her trustees on a discretionary trust for him during his life, and after his death on trust for his children as therein mentioned, and in default of children on trust for the Royal Society for the Prevention of Cruelty to Animals absolutely. The testatrix made a first codicil to her will, dated Nov. 14, 1913, whereby she revoked the directions in her will as to the freehold house, and in lieu thereof devised the same to her niece M. E. Wedgwood absolutely, and directed that her executors should pay the estate duty and all duties in respect thereof, and she bequeathed to another legatee £500 "free of all death duties." She made a second codicil to her will, dated Nov. 17, 1913, and thereby reduced the legacy of £5,000 to the National Anti-Vivisection Society to £2,500, and directed that her will should be read and have effect as if a legacy of £2,500 "free of all death duties had been thereby bequeathed in lieu of the said legacy of £5,000." She then bequeathed "free of all death duties" to her trustees £2,500 on trust to invest the same and to pay the income thereof to her sister Lady Katherine Farrer for life, and after her death as to both capital and income in trust for the National Anti-Vivisection Society. She also bequeathed another legacy "free of all death duties."

Alfred Adams for the National Anti-Vivisection Society.
Austen-Cartmell for the Attorney-General.

Cur. adv. vult.

Feb. 15. The following judgments were read.

LORD STERNDALE, M.R.—This appeal from the decision of Sargant, J., raises a question now of frequent recurrence as to the incidence of legacy and estate duties payable in respect of a settled legacy.

The circumstances of the two duties differ. With regard to the legacy duty the law is the same now as at the date of the will in the present case, whereas with regard to the estate duty a duty has been imposed by legislation subsequent to the date of the will and also to the death of Miss Frances Julia Wedgwood, the testatrix, which was not chargeable in respect of this legacy before that legislation. The judgment of the learned judge in the court below dealt with three settled legacies and decided that in each case the legacy and estate duties were payable out of the corpus of the legacy and not out of testatrix's residuary estate. The legatees interested in two of these legacies have not appealed, and the present case is concerned only with the third, a legacy to the National Anti-Vivisection Society subject to a life interest in favour of the testatrix's sister, Lady Farrer. [His Lordship having stated the facts and read the material portions of the will and codicils, continued:] The three legacies in question before Sargant, J., were those of £1,000 and £6,000 bequeathed by the will for the benefit of Olive Wedgwood and James Ingal Wedgwood and that of £2,500 bequeathed by the second codicil for the benefit of the National Anti-Vivisection Society. Each of these must be considered in relation to the words used in the will or codicil concerning it. But I can see no material difference in the three. In the case of the £1,000 there are no words concerning an exemption from duties in the bequest itself. In the case of the £6,000 when first mentioned as an absolute bequest to be paid at once it is stated to be free of all death duties, but these words are not repeated in the subsequent dispositions of the fund. In the case of the £2,500 the bequest is "free of all death duties to my trustees." The general clause, however, that all legacies given by the will or any codicil thereto shall be paid free of all death duties is applicable to all three legacies unless there is something in the general clause inconsistent with the words of the particular bequests, and I can see no such inconsistency. In order to carry out the bequest of the £2,500 the executors have to pay the sum to the trustees, and it is immaterial that they are themselves the trustees as the appropriation in their own hands of a sufficient sum to meet the legacy has the same effect as if it had been paid to the separate trustees. I think also that the clause directing the trustees in their capacity of executors to pay and provide for the duties on all legacies bequeathed free of duties applies to all three legacies.

There is, however, a difference in the history of the three bequests. In the case of the £2,500 the testatrix divided a sum of £5,000, originally bequeathed to the National Anti-Vivisection Society immediately, into two halves. In the case of the one half she left it subject to the original dispositions. In the case of the other she interposed the life interest of her sister. I shall consider later whether the difference in the history affects the construction to be put on the bequest. I think that it is well to bear in mind that when the settled legacies are satisfied by an appropriation by the executors in their hands as trustees they are just as much paid, to use the words of Sargant, J., "out and out as regards the testatrix's estate" as the unsettled legacies when paid to the beneficiaries, or as if they had been paid into the hands of separate trustees.

The question to be decided is whether the legacy and estate duties or either of them which will become payable on the death of Lady Farrer in respect of the £2,500 will be payable out of the ultimate residuary estate of the testatrix or out of the settled legacy itself. It is, I think, useful to see the nature of these two duties, although legacy duty is not of practical importance in this case, because it has been commuted by the executors under s. 11 of the Customs and Inland Revenue Act, 1880, and they do not in any event ask to have the sum paid as

commutation returned. This legacy duty is payable by the executors and primâ facie would be payable at once. But as the rate payable by the persons ultimately entitled may not be the same as that payable by the tenant for life it is provided by the Legacy Duty Act, 1796, s. 12, that the payment is postponed till the death of the tenant for life, although the liability arises at once. The executors still remain chargeable with the duty, and there is no difficulty in their providing for this payment by retaining, if necessary, duty at the maximum rate and distributing the rest of the estate. There is the bare possibility that the rates of legacy duty may be altered by ex post facto legislation affecting the estates of persons who have died before the legislation and whose estates are already in course of administration. But it is so unlikely as to be negligible.

Estate duty stands in an entirely different position. At the time of the making of this will—June 26, 1913—and also at the time of the testatrix's death—Nov. 26, 1913—if that be material, which I do not think it is, there was no estate duty payable in respect of this legacy. But by the Finance Act, 1914, settlement estate duty, which was previously charged, was abolished, and an estate duty payable on the death of the tenant for life was imposed, and this duty was payable on succession, not to the testatrix, but to the tenant for life. It is quite true that this legislation was passed very shortly after the testatrix's death and before the executors had fully administered the estate, but that is an accident if the appellants be right. In the present case the executors would be liable to pay estate duty or any death duty, whatever its name, imposed by any legislation passed during the life of the tenant for life which might be a period of many years. It is also possible that during that time the amount of estate duty may be increased, and this is not only possible but probable, considering the present state of finance. Then the estate duty is chargeable on persons and in a manner altogether irrespective of the testatrix's estate. The rate of duty is ascertained by aggregating the legacy, not with the testatrix's estate, but with that of the tenant for life, because the succession is to her, and when the rate is ascertained the duty is chargeable by the Finance Act, 1894, s. 8 (4) and s. 9 (1), (4) and (5), on the trustees to whom the legacy is left, on the legacy itself, or on the executors of the tenant for life. It is difficult to see how the executors of the testatrix can provide for such a duty in many cases without delaying the administration of the estate for years. There are two factors which must be unknown—the state of the legislation as to death duties which may exist at the death of the tenant for life, and the amount of the estate of the tenant for life which regulates the rate of the duty.

In *Re Parker, White* v. *Stewart* (1), to which I shall have to refer more particularly later, Swinfen Eady, L.J., said (117 L.T. at p. 424) that

> "the executors and trustees have the means of ascertaining what the maximum amount of duty will be, and provision can be made to retain the maximum amount of duty."

With respect, I think that that was a slip—a most unusual thing in the case of that learned judge—into which he was led by the fact that in that case the Finance Act, 1914, was in existence at the date of the will, though unknown to the draftsman. There was, therefore, when the amount of the tenant for life's estate was ascertained, a figure in existence which was the then maximum, though even in that case it was liable to be altered by subsequent legislation. But where subsequent legislation has to be considered there is no maximum in existence, and the executors must provide against all contingencies.

In a case where, as in this will, the settled legacy is small in proportion to the residue, provision may be made by retaining an amount equal to a large proportion or even the whole of the legacy. But where the settled legacies are large and the ultimate residue small, as is often the fact, the estate duty on the legacies, especially where the estate of the tenants for life is large, may well exceed the residue, and the whole administration of the estate must be delayed till after the death of the tenants for life. A construction, therefore, which throws all death

duties which may be in existence at the death of the tenant for life, whether chargeable on her executors or not, on to the residue gives rise to great difficulties in administration. And while I entirely agree with the statement of Swinfen Eady, L.J., in *Re Parker, White* v. *Stewart* (1) that "inconvenience in administration cannot destroy the clear meaning of a testator's words," such difficulties do require that it should be quite clear that the words do create them. Having now examined the nature of these two duties it is necessary to inquire in what way they are dealt with in the will in the present case.

I think it is settled that the words "free of all death duties," have no general meaning as applied to all wills and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument: (i) "free of all death duties arising in consequence of my death," and (ii) "free of all death duties arising in consequence of the dispositions made by my will." The former meaning would exclude this estate duty; the latter would include it. And it was argued that the latter meaning had been adopted by the Court of Appeal in *Re Parker* (1). It certainly was adopted as the correct meaning in that particular will. But I think it is clear that it was not adopted as the correct meaning to be applied to all wills. Such a decision would have been in direct opposition to *Re Palmer, Palmer* v. *Palmer* (2), and in that case the court would have expressed some disapproval of that decision. But Swinfen Eady, L.J., in giving judgment in *Re Parker* (1), referred to *Re Palmer* (2) without disapproval as distinguishable and proceeding on terms in a will different from those of the will under his consideration. I think, therefore, that it is established by authority that the words must be construed together with the rest of the will to ascertain what duties were meant to be thrown on the residue with the result of exempting the corpus of the settled legacies from them.

Looking at this will, I think that the language points to the same conclusion as that at which the court arrived in *Re Palmer* (2), i.e., that the death duties mentioned in it are those chargeable at the time of the payment or transfer of the legacies whether settled or absolute. I have already read most of the provisions of the will. But I may shortly mention again those relating to the settled legacies. The £1,000 given for the benefit of Olive Wedgwood is in these words: "I bequeath to my trustees upon trust," &c., and the exemption from death duties is derived from the general clause by which all legacies are to be paid free of all death duties. The £6,000 bequeathed for the benefit of James Ingal Wedgwood is dealt with in this way,

> "I declare that the said sum of £6,000 hereinbefore bequeathed to my said nephew James Ingal Wedgwood . . . shall not be paid or transferred to him, but shall be held by my trustees upon trust, . . ."

By that clause a payment to or appropriation by the trustees for the benefit of James Ingal Wedgwood is substituted for the absolute payment to him directed by the earlier part of the will. So far, therefore, as the will is concerned I think that the true construction is as in *Re Palmer* (2), that the time at which the death duties chargeable on the residue is to be ascertained is the time of payment. With regard to the codicil it is equally clear, if not more so. The words are: "I bequeath free of all duties to my trustees . . ." pointing clearly, in my opinion, to the time of payment to the trustees as the time at which the death duties were to be ascertained. And I have already said that in my opinion appropriation in the hands of the executors as trustees is the same as payment to independent trustees. I think also that the general clause as to payment of legacies "free of all death duties" applies to this legacy as well as to the others. In my opinion the natural time to ascertain the meaning of the words "free of all death duties" is when the legacies are paid in the sense of being transferred out and out from the testatrix's estate and this is shown more strongly to be the case when the expression to be paid "free of all death duties" is found as in the present case. If it be intended to postpone this date to that of payment or transference to the

ultimate beneficiary words should have been used clearly expressing that intention. It can, of course, be done. But I think that it should be done by clear words, and I find no such words in this will.

I do not think that this conclusion is in conflict with any of the decisions. The most important from this point of view is *Re Parker* (1). I have already said that I do not think that that case decided that any general rule existed as to the meaning of the words "free of all death duties," and the words of the will were very different. So far as I can gather from the report there were no words such as this will contains referring to payments. And the words charging all death duties upon the residue were much stronger. Whether the reasoning of that case and of *Re Palmer* (2) is quite consistent or not, the decision in *Re Parker* (1) is not, in my opinion, opposed to the conclusion at which I have arrived. Future duties not chargeable by reason of the death of the testator may be charged on the residue to the exoneration of particular settled legacies. Whether they are so charged or not depends on the construction of each particular will, and on the construction of the will in the present case they are not, in my opinion, so charged. The result is that the legacy duty which becomes due at once, although the payment of a part of it is postponed by the will, is payable out of the residue, and to this extent I differ from SARGANT, J., before whom, as before us, not much stress was laid on this point. With regard to the estate duty I agree with the learned judge that it is payable out of the corpus of the settled legacy and not out of the residue.

I wish to deal with a point made in order to show that I have not overlooked it. It was argued with force that the history of this legacy showed that the intention of the testatrix was that when the National Anti-Vivisection Society came into possession of the £2,500 bequeathed subject to the life interest it should be received net like the £2,500 already received, and that therefore, in respect of this legacy at any rate, free "of all death duties" must have a meaning which would ensure this result. I think that it may be a fair inference that this intention existed, though I doubt its being much, if any, stronger in the case of this than in the case of the other settled legacies. The testatrix or, perhaps it should be said, the draftsman of the will thought that this object was attained in the case of all the settled legacies, and so it was as the law then stood on the construction of the will, which I think the correct one. And it was only the subsequent legislation creating a duty which was not one chargeable on the executors or arising as a duty on succession to the testatrix, but to the tenant for life, which made the difference. I think that it is mere speculation as to what the testatrix would have answered if she had been asked whether she meant the legacies to be free of any duties which might be created by any legislation after the payment of the legacies to the trustees and before the death of the tenant for life, and had been informed that if the will so provided the administration of her estate might be delayed for years. I think to enter on such a speculation is to run the risk of confusing the separate questions —i.e., what provision does the court think the testatrix would have made if she had known all the circumstances, and what are her wishes as expressed by the provisions of the will which she did in fact make. I think, therefore, that this appeal should be allowed as to legacy duty and dismissed as to estate duty.

WARRINGTON, L.J.—The question in this case is whether the estate duty which will become leviable on the death of the person entitled for her life to the income of a settled legacy bequeathed by the will of the testatrix will be payable out of the corpus of the legacy or out of the general estate of the testatrix. SARGANT, J., on the construction of the will, has held that the duty will be payable out of the corpus of the legacy. The legatees of the corpus appeal. The order of the learned judge dealt with two other settled legacies, but the legatees interested therein do not appeal.

The persons entitled to the legacy in question in succession to the tenant for life are chargeable at a rate different from that at which the tenant for life is

chargeable. Accordingly, under the well-known provisions of the Legacy Duty Act, 1796, s. 12, the duty on the corpus of the legacy would not be payable until the death of the tenant for life. The learned judge in the court below has held that this duty also is payable out of the legacy and not out of the residue. This last question, however, did not really arise, for it now appears that pursuant to s. 11 of 43 Vict., c. 14, the duty so payable in the future has been commuted for a present payment, and has been paid by the executors out of the general estate, and the residuary legatees make no claim for repayment. Incidentally, however, for the purpose of arriving at the true construction of the will it may be desirable to consider the position of the legacy duty and to determine whether for the purposes of this will it stands on the same footing as the estate duty.

The will and two codicils, by the second of which the legacy in question was bequeathed, were all made in 1913, and the testatrix died in the same year. At that time the legal position as regards estate duty was that, in addition to ordinary estate duty payable in respect of the general estate, settlement estate duty was payable in respect of the settled legacy, and by the operation of the Finance Act, 1894, s. 5 (2), no estate duty would be payable in respect of the settled legacy on the death of the tenant for life. But for this relief the corpus of the legacy would be property passing on the death of the tenant for life, and estate duty would be payable in respect thereof under s. 2 (1) (b) of that Act, and its value would be aggregated with the rest of her estate for the purpose of ascertaining the rate of the duty. By the Finance Act, 1914, s. 14, the relief afforded by s. 5 (2) of the Finance Act, 1894, was abolished in a class of cases of which the present is one, and settlement estate duty ceased to be payable in respect of the settled legacy. The result is therefore, that, on the death of the tenant for life, who is still living, the corpus of the legacy will be included in the property passing on her death, and the rate of duty will depend on the amount or value of her estate, and on the legislation in force at her death. It is, therefore, impossible at the present moment to ascertain or even to estimate with any certainty what sum would be required to meet the duty in question. And if the amount of the settled legacy were large in comparison with the rest of the estate, and if it were necessary for the executors to retain moneys for the purpose of meeting the future duty, the distribution of the residue might quite possibly be held up altogether until the death of the tenant for life, an event which might happen many years after the death of a testator. Moreover, the executors of the testatrix are not accountable for the estate duty in question, and it is no part of their duty in the administration of the estate of their testatrix to pay or provide for it. There are no means by which the estate duty could be compounded for and paid by the executors of the testatrix. In fact, the materials necessary for ascertaining the amount of a composition, even if it were allowed by statute, do not in this case exist. Whether under these circumstances the duty is, as between the persons interested, payable out of the general estate is a matter dependent entirely on the proper construction of the will.

The will is that of Frances Julia Wedgwood, and is dated June 26, 1913. [HIS LORDSHIP read the relevant clauses of the will.] It subsequently appeared that the cousin named as residuary legatee was bound by a secret trust for a charity, and the residue is now represented by the Attorney-General. Among the pecuniary legacies not bequeathed "free of all death duties," but covered, of course, by the general direction in reference thereto, was one of £5,000 to the appellants the National Anti-Vivisection Society. [HIS LORDSHIP then read the codicils and continued:] The question to my mind turns on the true effect of the clause directing that all legacies are to be paid free of all death duties. The fact that in addition to these general words we find that certain legacies, including the £2,500 in question, are bequeathed "free of all death duties" does not in my opinion affect the true construction of the will. Under the direction in question all legacies are on the same footing, and there is nothing in the will or codicils which indicates that some legacies should be in a better or worse position than others in respect

of duties. I regard the general clause as explanatory of the expression "free of all death duties" where she uses it, and extending the same freedom to those legacies in respect of which she does not use it. A

It is now settled, so far as this court is concerned, that the question whether a direction of the nature of that the meaning of which we have to determine extends to cover a duty not in force at the death of the testator cannot be determined by reference to any general principle, but is one of construction depending on the terms of the particular will: see *Re Palmer* (2) and in particular the judgment of PICKFORD, L.J. Are, then, the words in question, coupled, of course, with the correlative direction found in the trusts of the residue (namely, the direction to pay and provide for the duties on all legacies and annuities bequeathed free of duties) sufficient to include the estate duty in question? B

It is important to bear in mind that this duty is not payable by the executors, and, indeed, it is not leviable at all until the death of the tenant for life. The duty then becomes leviable not because the property passes on the death of the testatrix, but because it passes on the death of the tenant for life. It is aggregated with her own property for the purpose of ascertaining the rate. In this respect it differs from the legacy duty which becomes chargeable at once and payable by the executors, though that part of it which is referable to the reversionary interest is payable in future. Moreover, the amount of the estate duty which will be leviable is altogether uncertain, whereas that of the legacy duty is ascertained and could only be altered by ex post facto legislation, which is not likely to be enacted. With all respect to SARGANT, J., I think that I should have held that the legacy duty, including that part of it the payment whereof was postponed, was payable out of the general estate. I see no difficulty in holding that the executors can literally follow the directions of the will and pay the legacy to the trustees free of legacy duty as well that part of it which is chargeable on the reversion as that which is chargeable on the tenancy for life. The amount of both duties is ascertained, and the executors can without inconvenience retain a sum sufficient to meet the proportion payable in future. In fact, logically, if the duty on the reversion ought to be paid out of the general estate, so also ought the instalments payable after the payment of the legacy in respect of the duty on the life interest. But the case is different in respect of the estate duty in question. When the testatrix directs that legacies are to be paid free of all death duties, I think, in the absence of any expression indicating a more liberal intention on her part, she would properly be held to be considering only those duties which are leviable at the time of payment and the amount of which are capable of being then ascertained and are payable by her executors in performance of their duty in the administration of the estate. C D E F G

The question is one of construction, and therefore authorities are in general not of much assistance. But in the present case we have the guidance of the reasoning of the members of the court in *Re Palmer* (2), and I think that we could not adopt the view contended for by the appellants without differing from it. I accept their reasoning as did SARGANT, J., and I think his judgment should on this point be affirmed. H

Neither *Re Stoddart* (3) nor *Re Parker* (1) is in my opinion in conflict with this view. In the former the words were "to be paid and enjoyed," this last word pointing to duties affecting the beneficial enjoyment of the legacy whether in force at the date of payment to the legatees or not. In the latter the words were "shall be free of legacy duty, succession duty, settlement estate duty, and all other death duties." In that case the will was after the Finance Act, 1914, and if the direction did not include the estate duty payable by reason of the provisions of that Act there would be no "other death duty" in respect of a settled legacy except the legacy duty already specially mentioned. Moreover, there was no reference to "payment" of the legacies sufficient to suggest the time of payment as that at which the class of duties referred to was to be ascertained. I

It has been suggested that the legacy in question stands on a special footing and

A that even if in the case of the other settled legacies the future estate duty is not payable out of the general estate of the testatrix it is so payable in the case of the legacy in question. What is said is that the testatrix apparently intended to substitute a net sum of £2,500 in reversion for a like sum in possession, and that this can only be effected by throwing the duty in question on her general estate, and therefore the will and codicil ought to be so construed. But with all respect
B I think that the answer is that this legacy, like the others, is made subject to the direction referred to above, that the legacies are to be paid free of all death duties, and there would seem to be no reason for treating it in a manner different from that in which the other settled legacies are treated. The fact is as the law stood at the date of the death they would all have been net sums. It is the subsequent alteration of the law and not the execution of the codicil which affects the position
C of the legatees. On the whole, I am of opinion that as to the estate duty this appeal fails and must be dismissed, but that it must be allowed as to the legacy duty.

YOUNGER, L.J.—The order in the present case of the learned judge in the court below deals with the incidence of legacy and estate duties payable in respect
D of three settled legacies on the death in each case of the tenant for life. The appeal, however, is concerned with the duties on one only of these legacies. The learned judge has in all three cases decided that the legacy and the estate duties which will be payable on the life tenant's death are payable out of the corpus of the legacy in question and are not to be borne by or chargeable on the ultimate residuary estate of the testatrix. In so deciding he has felt himself at liberty to
E deal with all the three legacies as if on this question of duty the same principle were applicable to each, and he finds that principle in the construction which, on the analogy of *Re Palmer*, *Palmer* v. *Palmer* (2), assisted by other passages in and by the frame of this will, he places upon the general clause therein contained, the clause, namely, that all legacies and annuities given by the will or any codicil to it are to be paid free of death duties. On the view he takes of that clause he has
F held that all duties accruing in respect of a settled legacy after it has been set apart are outside its provisions and are left to be borne by the legacy itself.

There is, as I have said, an appeal only with regard to the duties which will become payable on the death of Lady Farrer in respect of the third of the legacies in question—that is, the settled legacy of £2,500 given by the testatrix's second codicil, and in which Lady Farrer is interested as tenant for life. And a reference
G to the terms on which these legacies are given at once suggests the question whether there may not in relation to the incidence of duties on that legacy be considerations, not applicable to the other two, which have to do with something beyond the general exemption clause above mentioned on which the learned judge in the court below so entirely relied for his decision in all three cases. And a careful examination of the will and codicils indicates very clearly to my mind, as I
H must confess, that, whatever may have been the case with regard to what I may call Miss Olive Wedgwood's settled legacy, and, in a lesser degree, with regard to that of James Ingal Wedgwood—the two other legacies in question—the issue with regard to the duties on that now under appeal depends really on the words of exemption from duty contained in the gift of the legacy itself, and not, as I think, at all on the general clause referred to. That this could not be said of Miss
I Wedgwood's settled legacy is very plain. There is in that case in the gift of the legacy itself no exemption whatever from duty. The general clause contains for that legacy the only exemption from duty to be found in the will. And with reference to James Ingal Wedgwood's settled legacy the distinction between it and that of Lady Farrer, while not so clear nor of the same kind, is nevertheless notable in a relevant respect. In the case of James Ingal Wedgwood's legacy there is, unlike that of Miss Wedgwood, a direction that it is to be paid "free of all death duties," but these words are found in the direction for payment to James himself before the testatrix proceeds, as she subsequently does proceed, to engraft on that

absolute gift limitations both on James' enjoyment of it and his interest in it. Phrasing it otherwise, the expressed exemption from death duties in the case of that legacy, as in that of the equivalent gift to James' brother, with which it is in the first instance coupled, is made in relation to James himself as distinguished from those subsequently introduced in succession to him. The reasoning, therefore, of the learned judge, although based on the general exemption clause only, may possibly in the result be applicable to this particular exemption also as having an effect equivalent to that attributed by the learned judge in the court below to the general clause itself. But so much cannot, as I think, be said of the third legacy with which we are now alone concerned. And holding that opinion as I do, it will be convenient before making any examination into the effect in this will of the general clause on the legacies which have their own words of exemption from duty to trace the history of this settled legacy as disclosed in the will and codicil with special reference to the words of exemption contained in the codicil in relation to it.

The genesis of the legacy as finally bequeathed appears clearly in the will and second codicil. By her will the testatrix gave to the National Anti-Vivisection Society a pecuniary legacy of £5,000 to be paid by virtue of the general clause above referred to "free of all death duties." By her second codicil she reduced the legacy of £5,000 so bequeathed to one of £2,500, and she directed

> "that my said will shall be read and have effect as if a legacy of £2,500 free of all death duties had been thereby bequeathed in lieu of the said legacy of £5,000."

The codicil then immediately proceeded as follows:

> "I bequeath free of all death duties to my trustees the sum of £2,500 upon trust to invest and stand possessed of the said sum or investments and the annual income thereof upon trust to pay the said income to my sister Lady Katherine Euphemia Farrer during her life without power of anticipation during any coverture and after her death as to both capital and income in trust for the said National Anti-Vivisection Society."

It is to my mind on these provisions not doubtful that the main purpose of the testatrix here in this codicil was to interpose with reference to one half of the society's original legacy of £5,000 a life interest in favour of her sister, the original interest in enjoyment by the society of that moiety being postponed until the sister's death. But that was also, as I read these provisions, the testatrix's sole purpose. The language used by her expressly exempting from all death duties not only the second half of it, but also the first, appears to me to import an anxiety on her part to preserve for the society an identical interest in the first half of the original legacy, and after her sister's death an undiminished interest in the second half and in the investments then representing that sum of £2,500. In other words, while under the will the society took its £5,000 immediately undiminished by death duties, it was the testatrix's mind to place it by her codicil in the same ultimate position, but by two instalments instead of one. In my judgment, if the words of exemption from duty with which we have now to do can be fairly read in a sense leading to that result, there is every encouragement from the context to induce a court of construction so to read them.

This aspect of the case is in no way dealt with by the learned judge in the court below. He, as I have said, in deciding as he did with reference to all the three legacies was led to his conclusion as the result of a critical examination of the general clause of the exemption and of that clause only. His view of it was that the word "legacies" there refers to the total amount of a legacy given and does not primâ facie point to the successive interests carried out of it. He alludes also to the absence from the clause of such words as "enjoyment free of duty" as pointing in the same direction. From these indications, coupled with the fact that the residue is not settled, he is led to the conclusion that the principle of *Re Palmer* (2)

A is really applicable to the general clause, and on that ground, and on that ground alone, he decides in the case of Lady Farrer's legacy, as in that of the other two, that the legacy and estate duties in respect of it payable on her death must be borne by the legacy itself. His conclusion, therefore, was reached without his dealing in any way with the special words of exemption applicable to that legacy alone, which at once raises the question whether in so determining this matter the learned B judge has not relied, and that exclusively, on a clause which for this purpose is not the governing clause at all. And very respectfully I think that his judgment in relation to this legacy is open to that criticism.

The testatrix's will is not a very artistic document, but the scheme of it is reasonably plain. It contains before the general clause in question ten separate pecuniary legacies, some of large amount, as well as specific bequests in favour C of her niece. One only of these legacies is expressly given free of all death duties, that of £500 to Charles Harold Herford if he should complete the Life she was herself writing of her great-grandfather, Josiah Wedgwood. Then we have the general clause already quoted, referable, it is true, to all legacies and annuities given by her will or any codicil, and not only to those before mentioned, referable also, I suppose, although it must be agreed very inaptly, to specific legacies. But D it is the fact that every legacy thereafter given, whether in the will or in any codicil, is expressly given free of duties in terms which vary in detail of expression. These legacies include that now in question, and I should accordingly have thought that this was a will so framed as to lead very directly to the conclusion that the primary, if not the sole, function of this general clause was to exempt from duty E according to its terms a legacy or annuity for which no specific or particular provision in that regard is elsewhere made. It may possibly also have the effect of giving to all legacies and annuities its full benefit of exemption if in any case the particular words of exemption are less extensive. But, in my judgment, it cannot be read so as to restrict any special words of exemption in relation to any particular legacy, if, properly construed, these words give greater benefits to the legatee. F To attribute that result to the general clause would be to strike the special words of benefit out of the will or codicil altogether, besides running counter to the well-established principle of construction generalia specialibus non derogant.

In my judgment, therefore, especially where on the analogy of *Re Palmer* (2) as applied to this rather haphazard general clause it is sought to confine the exemption thereby made to duties accrued at a particular moment of time, it is not G permissible to limit by reference to that clause the duties on a legacy whose own words of exemption cannot be restricted by the principle of that decision. I would here observe that *Re Palmer* (2) itself is no authority for so doing. In the will in that case there was nowhere any reference to exemption from duty except in the general clause itself. Taking that view of the matter, it is not necessary for me to express any opinion on the question whether the general clause here is within H the principle of *Re Palmer* (2). I incline myself to the view of SWINFEN EADY, L.J., in *Re Parker* (1) to the effect that *Re Palmer* (2) was a decision on a special clause in a particular will, a will which had not, as will be agreed, many features in common with this will. But on this aspect of the case I confine myself to the observation that the direction to the testatrix's executors to "pay and provide for . . . the duties on all legacies and annuities bequeathed free of duties" hardly I seems consistent with the view that it is in contemplation of this will that no duties are to be payable out of the estate on any settled legacy beyond those due at or before the moment when it is set aside, which is the result of the learned judge's judgment.

I proceed now to ascertain if I can the effect of the special words of exemption attached to this legacy to Lady Farrer. The words of gift and exemption are, "I bequeath free of all death duties to my trustees the sum of £2,500 upon trust . . ." First, it is noticeable that the words "free of all death duties" come before the

words "to my trustees," and not after these words. This is of some importance if the statement of NEVILLE, J., in *Re D'Oyly, Vertue* v. *D'Oyly* (4) be correct, as I conceive everyone will agree that it is. He said ([1917] 1 Ch. at p. 559):

> "If a testator gives a legacy 'free of duty' he means that his legatee is to have paid to him the legacy net, and I do not see in this regard any distinction between a direction to pay the legacy to trustees for the legatee and a direct gift to the legatee. It seems to me that in either case the effect of the words used is identical."

Other portions of that decision have been questioned, but not those words. In this view of the matter the position of the words of exemption is not without some significance. As they stand, if they are on this footing to have any real meaning at all, they are and can be made applicable only to the duties payable by the legatee for life in remainder, and if by one of these then by both. In other words, the phrase if it is to have effect would put the case of this legacy entirely outside the principle of *Re Palmer* (2).

There is another aspect of the expression "free of all death duties" in which the authorities are of some value. What in relation to a settled legacy do they mean? Do they mean "free of all death duties arising only in consequence of my death" or do they mean "free of all duties arising by virtue of the dispositions made by this my will." There has been some conflict of judicial opinion on this matter. NEVILLE, J., in *Re D'Oyly* (4) attached the first meaning to the words; SARGANT, J., in *Re Stoddart* (3) preferred the second. The view of SARGANT, J., was, however, as I think, definitely accepted by the Court of Appeal in *Re Parker* (1). There SWINFEN EADY, L.J., held that such words mean those duties which will become payable in respect of dispositions made by the will. And BANKES, L.J., in terms preferring the view of SARGANT, J., to that of NEVILLE, J., held that the words were the equivalent of "free from all duties arising by virtue of the dispositions made by the will." That, accordingly, is the meaning which the highest available authority would lead us to place on the words here, although I desire, speaking for myself, to say that that is the meaning which I should myself in this will place on them apart from all authority.

This reasoning, if it be so far correct, disposes of the whole case as decided by the learned judge in the court below. It shows that these words are in neither aspect of them capable of bearing the construction placed by him on what I have called the general clause of exemption. And, further, this reasoning, if it be correct, does dispose altogether of any case that can be made in favour of the learned judge's view that the legacy duty payable on Lady Farrer's death was as well as the estate duty chargeable against the legacy. It was not indeed seriously argued on behalf of the Attorney-General that it could be so charged, his position with reference to that duty being that, while not disclaiming the learned judge's decision in his favour with reference to it, he did not seek to retain the benefit of the decision. Speaking for myself, however, I have difficulty in seeing how the learned judge's decision as to legacy duty as much as his decision as to estate duty does not necessarily follow from the principle of construction adopted by him. As the point, however, is now academic I need not further elaborate the many further reasons there are for holding as I do that that duty at least is chargeable against residue.

The incidence of the estate duty which will become payable on Lady Farrer's death raises, however, a totally different set of questions not yet resolved by anything I have said as to the effect and application of the special words of exemption to the duties now in question. The will of the testatrix was made on June 26, 1913; her second codicil on Nov. 17, 1913. She died on the 26th of the same month —all before the passing of the Finance Act, 1914, which, putting it broadly, by s. 14 abolished the settlement estate duty and imposed in lieu thereof as in the present case the death of Lady Farrer, a full estate duty on the £2,500, treating that sum

as property passing not on the death of the testatrix, but on the death of Lady Katherine, the duty being measured, therefore, as to the percentage chargeable by the value of the total property then belonging to Lady Farrer or passing on her death and without any reference to the value of the testatrix's property at her death. The question that remains, therefore, is whether this duty, unknown to the testatrix because not imposed while she had lived, is included in the words "free of all death duties."

First of all it has been held in quite a number of cases that such words or their equivalent are wide enough to include this duty in the case of a testator dying after the Act. And it has been so held by the Court of Appeal where the will of such a testator, although executed after the statute, was made in obvious ignorance that it has been passed. In other words, the fact that the amount of the duty is regulated by the value of an estate which is not the estate of the testatrix does not prevent the duty being covered by an exemption in this form. This was so stated by EVE, J., in *Re Snape* (5). The legacy there was a trust legacy "free of all duty," and EVE, J., said that if the Act of 1914 had been law at the date of the will the words would throw the burden of the duty on the general estate. So also in *Re Stoddart* (3), SARGANT, J., in the case of a testator dying before the Act, held that this death duty, although chargeable in respect of the estate of the tenant for life, was included in the words "free of all death duties," because it was a death duty which arose by virtue of a disposition made by the testator, that, as I have already shown, being the meaning properly attributable to these words. To the same effect in this connection is *Re Eve* (6), before ASTBURY, J. In that case the will in question was made before the Act, and therefore when the testator was in ignorance of it. He died after the Act. It was held that the words "all bequests and legacies shall be free of duty" threw on residue the estate duty chargeable on the cesser of a life interest. In *Re Parker* (1), where the will was made on Oct. 16, 1914, but in obvious ignorance of the passing of the Finance Act—because the testator made provision for payment of settlement estate duty thereby abolished —the Court of Appeal holding that the expression "free of all death duties" has the meaning I have already stated, decided also that the estate duty chargeable on the cesser of a life interest was included in the exemption. It seems to me, therefore, to be clear on authority that the words here would be wide enough to include this duty had its incidence been known to the testatrix, and wide enough in a proper case to include it even where, as here, it was not.

The present question comes down, therefore, to a very short one: Is this duty included here in the words of exemption which the testatrix has used? It is a future duty. But on that point now *Re Palmer* (1) is express. LORD COZENS-HARDY, M.R., said ([1916] 2 Ch. at p. 398):

> "A testator may use language which is sufficient to cover a duty not in force at his death. . . . His intention must be found in the words of his will."

Here the words are sufficient to cover this duty. What was the intention of the testatrix with regard to such a duty when using these words? Her intention, as I have already indicated, can be gathered, as I think, from the history of this legacy as already set forth. That history leads me to the conclusion that this is a case in which the testatrix did not contemplate this duty or that duty. What she did intend was that this £2,500 on the death of Lady Farrer should be received by the Anti-Vivisection Society without any deductions whatever: see *Re Parker-Jervis* (7). Much, of course, was made of the difficulties of administration introduced by this construction. These may easily be exaggerated. They are not very different in character from similar difficulties of administration in relation to making provision of satisfaction of testators' covenants under long leases and the like which constantly have to be solved. These difficulties, moreover, whatever they may be, have not hitherto been allowed to stand in the way of the construction being placed upon an exemption of this kind which the words of themselves are sufficient to

cover: see *Re Parker* (1). Nor has it been shown that in the present case these difficulties are at all serious. For these reasons I am of opinion that both legacy duty and estate duty are covered by the words of exemption, and that there ought to be a decision to that effect.

Appeal allowed as to the legacy duty and dismissed as to the estate duty.

Solicitors: *Gerald & Arthur Marshall*, for *Shield & Mackarness*, Petersfield; *Treasury Solicitor.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re HINCKES. DASHWOOD AND OTHERS *v.* HINCKES AND OTHERS

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), January 19, 20, 1921]

[Reported [1921] 1 Ch. 475; 90 L.J.Ch. 335; 124 L.T. 681; 37 T.L.R. 308; 65 Sol. Jo. 291]

Will—Forfeiture—Forfeiture on becoming entitled to rents and profits of named estate—Beneficiary entitled to rentcharge absorbing whole net rents and profits.

By her will, made in 1872, a testatrix devised the H. estate to the use of H. for life, with remainder to the use (in the events which happened) of G.'s only son R. during his life, with remainders over. In 1874 the testatrix died and in 1895 H. died leaving R. surviving. The will contained a shifting clause which provided that if R. should become "actually entitled to the possession or the receipt of the rents and profits of the [F.] estate . . . or the bulk of the same estate" his interests in the H. estate should determine. At the date of the will of the testatrix G. was tenant for life of the F. estate and it was thereafter limited to G.'s sons successively in tail male. In 1894 G. and R. disentailed the F. estate, and in 1896 a resettlement was executed conferring a power of appointment which was exercised by a deed made in 1900. The appointment provided that the F. estate should be held to the use that R. should as from the death of G. receive a yearly rentcharge of a specified amount but so that it should not in any year exceed nine-tenths of the net rents and profits of the F. estate, and so that the surplus income of the F. estate should be applied for the maintenance and benefit of R.'s wife and income. Provision was made for the trustees to lease to R. the mansion-house, park and grounds at a specified rent if R. so required. It was not disputed that R. was thus placed, as from the death of G., in as good a financial position as if he had then become tenant for life in possession. On the death of G., the question arose whether the shifting clause in the will of the testatrix had come into operation.

Held: R. did not on G.'s death become entitled to the possession or receipt of the rents and profits of the F. estate or any part of it, and, therefore, the shifting clause did not operate and R.'s interest in the H. estate had not determined.

Decision of Astbury, J., 124 L.T. 681, affirmed.

Notes. As to divesting of gift, see 34 Halsbury's Laws (2nd Edn.) 400 et seq.; and for cases see 44 Digest 1114 et seq.

Case referred to:

(1) *Leslie* v. *Earl of Rothes*, [1894] 2 Ch. 499; 63 L.J.Ch. 617; 71 L.T. 134; 38 Sol. Jo. 456; 7 R. 600, C.A.; 44 Digest 912, *7710.*

A Also referred to in argument:

Fazakerley v. *Ford* (1832), 1 Ad. & El. 897; 2 Nev. & M.K.B. 1; 2 L.J.K.B. 111; 110 E.R. 1451; 44 Digest 1116, *9671*.

Shuttleworth v. *Murray*, [1901] 1 Ch. 819; 70 L.J.Ch. 453; 84 L.T. 605; 49 W.R. 388; 45 Sol. Jo. 377, C.A.; affirmed sub nom. *Law Union and Crown Insurance Co.* v. *Hill*, [1902] A.C. 263; 71 L.J.Ch. 602; 86 L.T. 773, H.L.; 44 Digest 1117, *9677*.

B

Hunter v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 44 Digest 545, *3625*.

Lady Langdale v. *Briggs* (1856), 8 De G.M. & G. 391; 26 L.J.Ch. 27; 28 L.T.O.S. 73; 2 Jur.N.S. 982; 4 W.R. 703; 44 E.R. 444, L.JJ.; 44 Digest 544, *3614*.

C **Appeal** by the defendants, the remaindermen, from an order of ASTBURY, J., reported [1920] 2 Ch. 511. The following statement of the facts is taken from the judgment of ASTBURY, J.

The testatrix, by her will dated Oct. 23, 1872, devised her real estate, referred to as the Hinckes Estate, subject to certain earlier uses, to the use of Harry Tichborne Davenport and his assigns for life, with remainder to the use of each of the sons of

D George Horatio Davenport who was the elder brother of Harry Davenport, "who shall be born during my life," with remainders in tail as in the will mentioned. At the date of the will neither George nor Harry Davenport had any issue. The defendant Ralph Tichborne Hinckes was the only son of George, and was born in 1873. The testatrix died in 1874. In 1895 the defendant Ralph Tichborne Hinckes succeeded to the Hinckes estate as tenant for life on the death of his uncle Harry

E Tichborne Davenport, and thereupon, in consequence of certain provisions of the will, he took the name of Hinckes. The will contained a shifting clause as follows:

"Provided always and I hereby declare that if any child or remoter issue of the said George Horatio Davenport or of the said Harry Tichborne Davenport within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession or the receipt of the

F rents and profits of the Foxley Estate in the County of Hereford devised by the will of John Davenport, deceased, the late father of the said George Horatio Davenport and Harry Tichborne Davenport, and thereby directed to be settled or the bulk of the same estate whether consisting of the same particulars as that estate now consists of or in manner altered in the way of addition, substitution, diminution, or otherwise, and so that this proviso shall not be rendered

G inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever then and so often as the same shall happen and thereupon every estate hereinbefore limited for life and in tail male and in tail to the child of the said George Horatio Davenport or of the said Harry Tichborne Davenport who or any of whose issue shall so become entitled and as to any child to whom an estate for life is hereinbefore limited to the first

H and other sons or daughters respectively of such child shall absolutely determine and the said premises hereinbefore devised shall go and remain discharged from all charges created by any such person as tenant of such estate for life under any of the powers of charging herein contained to the uses, upon the trusts, and with and subject to the powers, provisos, agreements, and declarations to, upon, with, and subject to which the same premises would have stood

I limited and settled by virtue of this my will if such child had died and there had been a general failure of his or her issue and if a male without leaving a widow."

Putting that shortly, it provides in effect in the events which have happened that if the defendant Ralph Tichborne Hinckes should become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate, or the bulk of the same, as described in the will, then his life estate, and the estates in remainder in tail male and in tail to his children, in the Hinckes property should determine. Under the will of his father, at the date of the testatrix's will George

Horatio Davenport was tenant for life, with remainder to his sons in tail, of the Foxley Estate. In 1894 the Foxley Estate was disentailed by George and his son. In 1896 the bulk of that estate was re-settled, and by an indenture of May 3, 1900, an appointment was made, under the provisions of the disentailing deed and of the resettlement deed, under which the interest of the defendant Ralph Tichborne Davenport was defined as from the death of his father. George Davenport died in 1919, when his son the defendant Ralph would, but for the appointment of 1900, have become entitled for life or other interest in the Foxley Estate. The question raised by the originating summons was whether, having regard to the limitations and trusts of the Foxley Estate contained in the disentailing assurance, in the settlement, and in the appointment of 1900, the defendant Ralph became on the death of his father entitled to the possession or the receipt of the rents and profits of the Foxley Estate, or the bulk of it within the meaning of the shifting clause.

The indenture of May 3, 1900, was an elaborate conveyancing device framed and executed for the purpose of avoiding the shifting clause in the will of the testatrix. It was made between George Davenport, the defendant Ralph, and trustees. It recites the disentailing deed and the resettlement of 1896, under the joint effect of which the Foxley Estate became split into two portions, one referred to as "the unsettled portion," of which at the date of this document George was tenant for life, and Ralph tenant in fee in remainder, and the settled portion of which George was tenant for life, Ralph tenant for life in remainder, with ultimate remainder in tail to his issue. After further reciting that under the resettlement deed two earlier rentcharges of £600 and £300 were limited in favour of George's wife, and that George and the defendant Ralph were desirous of making the appointment therein contained, the indenture witnessed that, for effectuating such desire, the settlors, that is, George and his son, jointly appointed that the settled portion of the Foxley Estate should, subject to charges existing on it, go remain and be from and after the death of George to the use and subject to the powers and provisions thereinafter declared, and, after making a similar provision as to the unsettled portion, it was agreed and declared that the estate should be held to the use that if the defendant Ralph should survive his father, he should receive a yearly rentcharge of £2,800 during the remainder of his life, and after the death of his mother, a further yearly rentcharge of £900—she predeceased her husband—during the residue of his life, the said rentcharge to be charged upon and to issue out of the whole of the Foxley Estate, and to commence from the death of George in the events which happened, and it was provided that the rentcharge payable to the defendant should not in any year exceed nine tenth-parts of the net rents and profits of the Foxley Estate in that year, after payment of all disbursements and other outgoings, and, subject to the rentcharge, it was declared that after the death of George, and subject as aforesaid, the whole of the Foxley Estate should be held to the use of trustees during the remainder of the life of Ralph on trust that they should enter into possession and receipt of the rents and profits and during the life of Ralph manage the estate with very full powers of management, and, subject to the payments directed to be made and to the charges existing, pay and apply the surplus income of the estates for the maintenance or otherwise for the benefit of all or any one or more, exclusively of the other or others, of any wife or issue, whether children or remoter issue, of Ralph for the time being in existence. Provision was then made as to the balance in the event of the defendant Ralph having no wife and children. Then came a provision that the trustees should, if required by Ralph, demise to him for the term of ninety-nine years, if he should so long live, the mansion-house and the park and grounds occupied therewith at a yearly rent of £300, to be set off against a corresponding amount of the rentcharge or rentcharges for the time being payable to him, such demise to include such sporting rights over the residue of the Foxley Estate or any part thereof as Ralph should require. It was then declared that the settled portion of the Foxley Estate should remain and be to the use that Ralph, during his life, should have the right to exercise the powers of jointuring or charging portions, given to him by the indenture of resettlement, in like manner in

all respects as if his estate for life had not been over-reached and extinguished by those presents, and after further provision it was declared that Ralph should have power to appoint a new trustee or trustees, and that it should be lawful for him at any time, and from time to time, by deed to revoke wholly or partially the uses, trusts, powers and provisions thereinbefore limited and declared, but as regards the settled portion of the Foxley Estate, only so far as the same should not extend beyond his original life interest, and by the same or any other deed to declare any new uses or trusts concerning the premises not to extend beyond his original life estate, and that subject to the limitations therein contained or otherwise to be appointed the Foxley Estate should go and devolve in like manner in all respects as if those presents had never been executed.

It was not denied by the defendant, Ralph Hinckes, that under this document he was placed, as from the death of his father, in as good a financial position in regard to the Foxley Estate as if the document had not been executed, and he had come into possession as tenant for life under the provisions of the previous limitation. But it was said that, notwithstanding that, he did not, on the death of his father, by reason of the deed of appointment, become entitled to the possession or receipt of the rents and profits of the estate within the meaning of the shifting clause.

Astbury, J., declared that the shifting clause has not operated in the events which have taken place.

Upjohn, K.C., and *Ashworth James* for the remaindermen.

Romer, K.C., and *J. Norman Daynes*, for the tenant for life, Ralph Tichborne Hinckes, were not called upon to argue.

P. M. Walters for the plaintiff trustees.

LORD STERNDALE, M.R.—This case raises the question as to the effect of two clauses, one in a will and the other in a deed of appointment. I do not see my way to differ from the conclusion at which the learned judge, Astbury, J., has arrived on the matter.

There are two estates which have to be dealt with, the Foxley Estate, which was the more valuable of the two, and the Hinckes Estate. The Foxley Estate was dealt with by a settlement of 1865 made in pursuance of a will made in 1862 by John Davenport, and that settled the Foxley Estate to the use of the testator's eldest son George, who was then a bachelor, for life with remainder to his sons in tail male, and remainder to the use of his second son, Harry, also a bachelor; there was a similar remainder to his son, remainder to the use of George's daughters and Harry's daughters, and ultimately remainder to the survivor of George and Harry and his heirs. The Hinckes Estate was dealt with by the will of Theodosia Hinckes, the testatrix in this case. She devised the Hinckes Estate to the use of Harry for life, with remainder, in the events which happened, to the use of George's son—George had then married and had a son Ralph—for life, with remainder to the use of Ralph's sons in tail male and other remainders. That will contained a shifting clause [which his Lordship read].

The question is whether in the events that have happened Ralph Tichborne Davenport has become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate or the bulk of the same estate. The testatrix died in May, 1874. George was from that time life tenant of the Foxley Estate, and Ralph, born in January, 1873, was tenant in tail male subject to certain jointures. There was a disentailing deed by which George and Ralph disentailed the Foxley Estate and limited it subject to certain jointures to Ralph and his heirs. Harry, the other son who was mentioned, died in 1895 without issue and Ralph still a bachelor became life tenant at that time entitled to the possession of the Hinckes Estate. Then there was a resettlement of the Foxley Estate in 1896 by George and Ralph, by which they appointed it subject to the jointure to such uses as they should appoint, and in default of appointment to the use of George for life in restoration of his former life estate with remainder to the use of Ralph for life with remainder to the use of Ralph's children if he should so appoint, and in default of

appointment to the use of his sons successively in tail male. On those facts it would be pretty obvious there was at any rate a strong possibility, if not a strong probability, that Ralph might succeed to the Foxley Estate, and might become actually entitled to the possession or the receipt of the rents and profits of that estate or the bulk of it, and as the Hinckes Estate was the much more valuable estate he was anxious to avoid losing the Hinckes Estate by becoming entitled to the rents and profits of the Foxley Estate. In order to effect that, a settlement of May 3, 1900, was effected, and by that George and Ralph, in pursuance of the powers of the resettlement to which I have referred, appointed the Foxley Estate, which was divided for the purpose of description into the settled and unsettled portions. They appointed the settled and unsettled portions of the Foxley Estate subject to these jointures and subject to preserving joint powers in the resettlement to the use that if Ralph survived George he should receive the yearly rentcharge of £2,800 during the residue of his life, and after his mother's death then the further yearly rentcharge of £900 making £3,700 in all during the residue of his life the said rentcharges to be charged on the whole Foxley Estate, the £2,800 rentcharge to commence at George's death and the £900 rentcharge from the death of the survivor of George and Sophia, that is the mother, provided that the rentcharges should not in any year exceed nine-tenths parts of the net rent and profits of the Foxley Estate in that year after paying all annual sums other than those rentcharges and the interest on certain other sums. Subject to those rentcharges it was declared that after George's death and subject as aforesaid, the whole Foxley Estate should thenceforward go to the use of the trustees during the residue of Ralph's life on trust that they should enter into and continue in possession or receipt of the rents and profits of the whole Foxley Estate during the remainder of Ralph's life and manage that estate with all the powers conferred on trustees during minority by the Conveyancing Act, 1881. Then followed the powers to the trustees generally speaking of managing the estate altogether. They were to insure buildings, subscribe to the local charities, and do everything that a person in possession of a large estate might do, and then out of the income of the Foxley Estate including the proceeds from the sale of timber and so on they should keep down all annual sums including the said several rentcharges and the interest on moneys charged on the estate and subject thereto should pay or apply the surplus income for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others of Ralph's wife and issue for the time being in existence as the trustees should think proper; and then there followed this, that during Ralph's life the trustees should have all the powers of selling, leasing, and other powers conferred on a life estate by the Settled Land Acts, 1882 to 1900, and then that they should if so required, and I believe they have been so required, demise to Ralph for a term of ninety-nine years if he should so long live, the mansion-house, park and gardens occupied therewith at a yearly rent of £300 to set off against the corresponding amount of rentcharge for the time being payable to him, the demise to include sporting rights, and contain such covenants as the trustees might think necessary. Subject thereto the other portion of the Foxley Estate was to remain to the use that Ralph should have power of jointuring and charging portions in the same manner as such power was given to him in his life estate which was given to him by the resettlement, but so nevertheless that the said powers of jointuring and charging portions might be over-reached by the exercise by the trustees of their settled Land Acts powers and subject to that to the uses of the resettlement after Ralph's death, and the unsettled portion was to remain to the use of Ralph's right heirs. Ralph was to have power to appoint new trustees and he was also to have this power, that it should be lawful for him at any time by deed revoke the uses thereinbefore limited and declared, but as regards the settled portion of the Foxley Estate only so far as the same did not extend beyond his original life estate under the resettlement and to declare any new uses, but as regards the settled portion of the Foxley Estate not exceeding in extent his original life estate and subject thereto Foxley Estate should go and devolve in like manner as if that appointment had not been executed.

A It is clear that the learned judge, Astbury, J., was quite right in saying that the substantial pecuniary and beneficial effect of the present arrangement so far as Ralph was concerned was the same as if he had retained his original life interest in the Foxley Estate. It was not denied that under this document Ralph was at George's death placed in as good a financial position with regard to the Foxley Estate as if he had come into possession as life tenant under the previous limita-
B tions. But it is argued that that being so he must be considered as having become actually entitled to the possession or receipt of the rents and profits of the Foxley Estate or the bulk of the same estate. I do not think that that is right. In the first place the trustees are said to be trustees for Ralph of the rents and profits. I do not think that they are. They are trustees for his wife and children subject to the rentcharge which is in his favour if that can be considered as a rentcharge and
C not as a sham. They have not to hand to him the actual rents, and he, if that be a rentcharge, and so long as this deed of appointment stands, is not entitled to recover from the tenants any portion of the rent. He is entitled to have from the trustees £3,700 so long as nine-tenths of the rents are equal to that amount. When nine-tenths of the rents do not amount to £3,700 then he is only entitled to have an amount equal to nine-tenths of the rents, for he never got nine-tenths of the rents
D themselves.

It is said that we must consider this deed entirely as a sham. These are not trustees, it is argued, at all. Their powers can be revoked at any moment. That is quite true. But I do not know of any authority for saying that a trust is not a trust because there is a power of revocation in it. I see no reason for saying that so long as these trusts are not revoked these trustees, who have certain duties to
E perform towards Ralph's wife and children as well as towards himself, are not trustees. It is also said that the trustees are mere land agents managing the property for the purpose of handing over to him the net rents and profits. So long as this deed stands, it seems to me impossible to say that. They are constituted trustees and until their power is revoked they remain trustees. In the same way so long as this remains a rentcharge, and I see no reason for saying that a rent-
F charge is not created, Ralph is not entitled to the actual possession and receipt of the rents. Again, if I may take the learned judge's language he expresses what I think is the right conclusion at which we ought to arrive:

> "I think the true meaning of this clause is that the shifting is to take place if the person in question becomes entitled to the possession or receipt of the rents
G and profits of the Foxley Estate, or the bulk of that estate, as an estate."

I have not said anything about the question of whether "the bulk" refers to the bulk of the rents or the bulk of the estate. I have rather taken the word "bulk" as being applicable to the bulk of the rents and profits because that was the argument of the appellants. But I merely assume that. I do not decide it. The learned judge went on thus:

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> "Although Mr. Ralph Hinckes has become entitled to the possession and receipt of something of equivalent or substantially equivalent value, I think he has, by the conveyancing device which he has resorted to, and to which he was entitled to resort, prevented himself from becoming entitled in fact to the possession or receipt of the rents and profits of the Foxley Estate or any part thereof. What
I he has become entitled to is, as I have said, a rentcharge based on nine-tenths of their amount with the legal user in this estate carrying the possession and receipt of the rents and profits limited to trustees. Those trustees are, no doubt trustees, but they are not trustees of the estate or rents for him. He has, no doubt, a power to charge the trusts of this deed, but the difference between a power and property is plain. . . ."

I think that that is the right conclusion. I do not wish to express it in any other words than that. I think, therefore, that this appeal should be dismissed.

WARRINGTON, L.J.—I am of the same opinion. I so entirely agree with the judgment of the learned judge in the court below that I somewhat hesitate to give my reasons for concurring in that opinion. But, as the case has been rather elaborately argued, I had better state what I think about it.

The question is whether the estate of one Ralph Tichborne Hinckes in property which has been conveniently referred to as the Hinckes Estate determined by the operation of a shifting clause contained in the will under which he became entitled to that estate. On the death of Harry, on Mar. 19, 1895, Ralph Tichborne Hinckes succeeded to the Hinckes Estate as tenant for life. But the will of Theodosia Hinckes, under which he so succeeded, contained a provision that if he, among other persons, should by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate devised by one John Davenport, and settled pursuant to his will, then his estate under the testatrix's will should absolutely determine, and the premises should go over as thereby directed. The question is whether, on the true construction of the will of Theodosia Hinckes, and in the events which have happened, the estate for life of Ralph Tichborne Hinckes has so determined.

So far as the construction of the will of Theodosia Hinckes is concerned there seems to me to be no question about it. The will is skilfully drawn, and I do not think that there is any single part of it which gives rise to any difficulty of construction—certainly not the shifting clause. The words of the shifting clause describing the events on which the estate is to shift are these:

> "If by any means whatsoever the person in question shall become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate."

Possession and receipt of rents and profits of an estate is a perfectly well-known technical term. It means possession of so much of the estate as is in hand not let to tenants, and the legal right to receive and give discharges for and to sue for the rents of those parts of the premises as are let to tenants. That is the unquestioned legal meaning of those words. The only difficulty, if there is a difficulty, is caused not by any construction of the will of Theodosia Hinckes, but from the events which have happened which have brought about the forfeiture for which she has provided.

I will state what are the events that have happened. On and prior to May 3, 1900, the Foxley Estate stood limited, speaking generally—I do not propose to state this with extreme accuracy, but sufficiently for the purpose—subject to certain jointure rentcharges to such uses as George Davenport, the father of Ralph, and Ralph should by deed jointly appoint, and in default of appointment as to the greater portion of the estates to the use of George for life in restoration of a previous life estate of his with remainder to Ralph, and as to a small residue of the estate to George for life with remainder to Ralph in fee. It is obvious that under those limitations if that had not been altered on the death of George, Ralph, surviving him, would have become entitled to the possession or the receipt of the rents and profits of that Foxley Estate, and would have lost the Hinckes Estate. He and his father desired, if possible, to avoid that result, and they accordingly executed a deed of May 3, 1900, which gives rise to the question. There is no doubt about it. It was prepared and executed deliberately with a view of getting out of the shifting clause. I do not propose to read it; it is enough perhaps to state the effect of it sufficiently for the purpose. By that deed, in exercise of the joint power, the father and the son limited the estate after the death of the father to the use that the son should receive a rentcharge which, in the event that has happened, amounted to £3,700 per annum, but subject to a proviso that if the net rents and profits of the estate did not amount to £3,700 per annum, then the amount of the rentcharge should be reduced to a sum equal to nine-tenths of the net rents and profits.

Subject to that rentcharge the estate was limited to the use of two trustees and their executors and administrators for the life of Ralph—i.e., they took on an estate

pur autre vie with the nomination of a special occupant—namely, the executors of the survivor, and the trusts on which this estate was thus limited to them were trusts to manage, to receive the rents, to discharge the outgoings including the jointure rentcharges and the rentcharges created by this deed, and to stand possessed of the ultimate surplus rents upon discretionary trusts for the benefit of the wife and issue of Ralph, or some one or more of them. The deed provided that, at the request of Ralph, the trustees should grant him a lease of the mansion-house, park, and grounds at a rent of £300 a year, with a provision that that rent should be set against so much of the rentcharge and the sporting rights, and it contained also a provision that Ralph might be at liberty to revoke the uses or trusts of them, and declare any other uses and trusts.

Generally speaking—speaking popularly and not as a lawyer—that deed obviously put Ralph, for all practical purposes, pecuniary or otherwise, in the same position as if he had been owner for life of the Foxley Estate. I do not think that there is any doubt about it, and I will assume it is so. But that is not the question. The question is, Was he under that provision actually entitled to the possession or the receipt of the rents and profits?

That depends on what is the legal position of the owner of the rentcharge. He is not entitled to the possession of the estate. He is not entitled to the receipt of the rents and profits. If his rentcharge is unpaid he can take steps by which either he or somebody else on his behalf may get hold of the rents and profits and pay him. But he is not entitled to the possession or to the receipt of the rents and profits. If anybody is beneficially entitled to the rents under the provisions of that deed of 1900 it is the wife and issue for the time being in existence collectively of Ralph, because the trustees are to apply the surplus of the net rents for the benefit of those persons or some or one of them. They cannot apply it outside, but they must apply it to the benefit of any one of them. That is why I say that they collectively, if anybody, are beneficially entitled to the receipt of the rents and profits subject of course to the rentcharge. The owner of a rentcharge has certain remedies of recovery, but he could not sue a single tenant for payment of his rent. It is said that we must go behind the form and look at the substance. I say that I do look at the substance. But in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have stated, and the legal effect of that is what I have stated. In my opinion, Ralph has not become entitled to the possession or to the receipt of the rents and profits of the estate or any part of them, and that being so, the shifting clause contained in Theodosia Hinckes' will has never taken effect. I agree with the judgment of the learned judge in the court below, and think that this appeal must be dismissed.

YOUNGER, L.J.—I am of the same opinion. If as a result of the Foxley Estate re-appointment of 1900 Ralph Tichborne Hinckes became, in October, 1919, on the death of his father and while that re-appointment remained unrevoked by him, a cestui que trust and not an incumbrancer in respect of a rentcharge, then subject to the effect in the shifting clause in Miss Hinckes' will here in question and the word "bulk," as to which I express no opinion because we have not heard counsel for the tenant for life, I should, I think (again I express for the same reason the opinion provisionally), be of opinion that Ralph would, within the meaning of the shifting clause, be actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate, or the bulk thereof. I am guided to that conclusion by what I conceive to be the true effect of LINDLEY, L.J.'s judgment in *Leslie* v. *Earl of Rothes* (1). But I cannot myself escape from the conclusion that, while that re-appointment remains unrevoked, Ralph is not a cestui que trust of the rents and profits or any of them, but is an incumbrancer in respect of his rentcharge, and that it is in that latter character that his rights under that re-appointment, if they are not recognised, must be enforced. On that footing, the result is, as I think,

that while the re-appointment of 1900 is admittedly in form successful for the purpose in view, it is also in the result effective to attain its purpose which was to make inoperative while it subsists the shifting clause contained in the will of Miss Hinckes.

Accordingly it appears to me on these short grounds that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Johnson, Raymond-Barker & Co.*; *Peake, Bird, Collins & Co.*; *Bird & Bird.*

[*Reported by* J. B. B. MacMahon, Esq., and E. A. Scratchley, Esq., *Barristers-at-Law.*]

DESSAU *v.* PETERS, RUSHTON & CO., LTD.

[Chancery Division (Sargant, J.), October 20, 1921]

[Reported [1922] 1 Ch. 1; 91 L.J.Ch. 254; 126 L.T. 648; 66 Sol. Jo. (W.R.) 14]

Solicitor—Lien—Partnership action—Change of solicitor—Delivery up of papers to client upon undertakings to preserve lien—Regard to interest of third parties.

In a partnership action the plaintiff obtained the usual order for dissolution and the appointment of a receiver. Thereafter, having changed his solicitors and his former solicitors having been discharged, the plaintiff claimed delivery up from his former solicitors of the papers in the action upon an undertaking protecting their lien. On the question whether the former solicitors were entitled to enforce an absolute lien,

Held: in a partnership action where a receiver has been appointed creditors were interested as third parties and would be embarrassed if an absolute lien was enforced by the former solicitors, who, though entitled to enforce it against their own client, were not entitled to enforce it so as to embarrass third parties; accordingly, the papers in the action must be delivered up by the former solicitors upon an undertaking protecting their lien.

Boden v. *Hensby* (1), [1892] 1 Ch. 101, applied.

Notes. Referred to: *Hughes* v. *Hughes*, [1958] 2 All E.R. 366.

As to lien where there is a change of solicitors, see 31 Halsbury's Laws (2nd Edn.) 244; and for cases see 42 Digest 305 et seq.

Cases referred to:

(1) *Boden* v. *Hensby*, [1892] 1 Ch. 101; 61 L.J.Ch. 174; 65 L.T. 744; 40 W.R. 205; 36 Sol. Jo. 153; 42 Digest 306, *3406*.

(2) *Re Boughton*, *Boughton* v. *Boughton* (1883), 23 Ch.D. 169; 48 L.T. 413; 31 W.R. 517; 42 Digest 306, *3404*.

(3) *Re Capital Fire Insurance Association* (1883), 24 Ch.D. 408; 49 L.T. 697; 32 W.R. 260; 53 L.J.Ch. 71, C.A.; 18 Digest (Repl.) 84, *699*.

Also referred to in argument:

Re Hawkes, *Ackerman* v. *Lockhart*, [1898] 2 Ch. 1; 67 L.J.Ch. 284; 78 L.T. 336; 46 W.R. 445; 42 Sol. Jo. 381, C.A.; 18 W.R. (Repl.) 84, *694*.

Belaney v. *Ffrench* (1873), 8 Ch. App. 918; 43 L.J.Ch. 312; 29 L.T. 706; 22 W.R. 177, L.JJ.; 42 Digest 306, *3407*.

Re Caudery, London Joint Stock Bank v. *Wightman* (1910), 54 Sol. Jo. 444; 18 Digest (Repl.) 84, *695*.

Re Rapid Road Transit Co., [1909] 1 Ch. 96; 78 L.J.Ch. 132; 99 L.T. 774; 53 Sol. Jo. 83; 16 Mans. 289; 10 Digest (Repl.) 1004, *6902*.

Adjourned Summons asking for delivery up by former solicitors of papers to the client on receiving an undertaking as to their lien.

In May, 1920, the plaintiff commenced this action for dissolution of the partnership between himself and the defendants, and duly obtained the usual order for dissolution of the partnership and appointment of a receiver of the partnership assets. In April, 1921, the plaintiff changed his solicitors and claimed delivery up of the papers relating to the action. His former solicitors refused to deliver them up even upon terms preserving their lien for the unpaid costs of the action. In June, 1921, the plaintiff took out this summons asking that upon the undertaking of his new solicitors to hold the papers, without prejudice to the lien of his former solicitors to return them undefaced within fourteen days after the conclusion of the action, to allow the former solicitors access to them for the purpose of making out their costs and to produce them on any taxation of these costs, the former solicitors should forthwith deliver to the plaintiff all papers, books, and documents in their possession or power relating to this action, and to the matters arising thereout.

Farwell for the plaintiff.

A. F. Topham for the solicitors claiming the lien.

SARGANT, J.—This case has been well argued, but I have no doubt as to the decision I ought to give. This summons is taken out by the plaintiff in a partnership action asking that his former solicitors may be ordered to hand over to his present solicitors the papers in the action, subject to the ordinary undertakings given in such orders to preserve the solicitors' lien. The plaintiff began his action on May 5, 1920, and after obtaining the appointment ex parte of an interim receiver procured the usual judgment in a partnership action on May 30, 1920, and the appointment of a receiver. The solicitors against whom the application is now made acted for the plaintiff in this action and in prosecuting certain claims in proceedings outside the action, and were discharged by the plaintiff about Apr. 30, 1921. It is recognised prospectively that the solicitors are going to be discharged in an order in the action dated Apr. 25, 1921.

The only question is whether the solicitors are entitled to assert their lien against the plaintiff in an unqualified way, and hold the papers which came into their possession in the course of the partnership action against the present demand of the plaintiff. It is quite clear that if the action were an action in which the plaintiff alone had a beneficial interest, such as an action against some outside defendant for some remedy against him, the plaintiff's solicitors would be entitled to assert their lien, however much the plaintiff might be embarrassed thereby. It is also clear that the solicitors might do so in respect thereof of a lien that arose before action brought. Are they, as regards proceedings in this action, entitled to enforce an absolute lien against the plaintiff on papers that have come into their possession in the course of this action? Counsel for the solicitors has admitted that, if this application had been made by the receiver or the defendants in the action and not the plaintiff, it would have been impossible to assert an unlimited lien, but he says that as against the plaintiff, who is the person who employed the solicitors and voluntarily discharged them, they are entitled to assert their lien in an unqualified way.

Although this precise question has never been determined in action of a similar character, if the action were an administration action it is settled that the plaintiff would be entitled to have the papers produced on the ordinary terms for preserving the lien, and the reason of this is quite clearly stated in judgments given in cases of the kind. It is that solicitors are not entitled to assert a lien so as to embarrass the proceedings in such an action. Solicitors may assert their lien so as to

embarrass their particular client if he has chosen to incur the costs in question, but they are not entitled to do anything which has the effect of embarrassing not only the particular party, but also other parties interested in the proceedings. As I have said, counsel admitted this limitation in the case of an administration action, but he draws a distinction between a case like that and the present one. It has been decided that the same limitation applies to the solicitors' lien in winding-up petitions and also in actions by a liquidator outside the actual winding-up proceedings. It applies also to actions by executors outside the administration proceedings and to actions for the execution of trusts.

There is one case that is very analogous to the present one, and it seems to me, if I may say so, to have been perfectly properly decided. That was *Boden* v. *Hensby* (1), where NORTH, J., held that the limitation on the lien applied in an action for partition. In that case there were probably only two persons interested in the estate in question, namely, the plaintiff and the defendant, and NORTH, J., after discharging the order of the chief clerk for delivery up of documents which came into the solicitors' possession before the action commenced continued ([1892] 1 Ch. at p. 103):

> "As to the documents come to the hand of the solicitors for the purpose of carrying on the action, *Re Boughton* (2) does apply and the order of the chief clerk in chambers will stand. The rule does not apply merely to actions for the administration of the estate of a deceased person; it is applicable to an action for the administration of the trusts of a deed, and to other proceedings of a representative character. This action, in my opinion, is one which the rule is applicable. It is not so clear, as [counsel] says, that there are only two persons interested in the property. If it were the court would not have directed an inquiry as to incumbrancers [the ordinary inquiry as to incumbrancers in a partition action]. It is quite clear that only two persons are interested under the will, but the court wishes to know who the incumbrancers of both plaintiff and defendant may be. It seems to me that this action is one in which other parties may be interested just as much as in an administration action, and that subject to the distinction drawn in *Re Capital Fire Insurance Association* (3) [the distinction between documents obtained before and documents attained after action brought]. *Re Boughton* (2) applies."

Now as in the present case, the receiver of the partnership assets has been appointed, it seems clear that not only are the defendants directly interested, but that if the action is not proceeded with and carried to a conclusion, it will cause considerable embarrassment to creditors of the partnership. It may be quite true that the creditors of the partnership would be entitled to bring actions against the partners individually in a way creditors of a deceased person could not do against the executors of the deceased's estate after there had been a decree for administration by the court. But on the other hand, if the creditors came to enforce their judgments, they would at once find themselves embarrassed by the existence of a receiver. I am of opinion that a partnership action is one in which not only the plaintiff but other parties are interested in having the determination of the questions to be dealt with in the course of the proceedings. And any solicitor employed in any action knows from the start that, besides his client, other people will be interested in the proceedings. It is therefore no hardship that his lien should be subject to the same limitation as in an administration action, that is one preventing him from asserting an absolute lien. He has a lien on the documents as against his client, but only such a qualified one as is recognised in other cases where the client is not the only person interested. I will make an order in terms of the summons and must give the plaintiff his costs.

Solicitors: *Kenneth Brown, Baker, Baker & Co.*; *Stones, Morris & Stone.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

GOLDEN BREAD CO., LTD. *v.* HEMMINGS

[CHANCERY DIVISION (Sargant, J.), November 17, 18, 23, 24, 1921]

[Reported [1922] 1 Ch. 162; 91 L.J.Ch. 228; 126 L.T. 594; 66 Sol. Jo. 124]

B

Business—Sale as going concern—Business carried on by vendors at loss pending completion—Knowledge of purchaser—Delay by purchaser in completing—Right of vendors to indemnity.

The completion of contracts for the sale of businesses as going concerns was delayed through the fault of the purchaser. The vendors notified the purchaser that the businesses were being carried on at a loss and that they would hold the purchaser accountable for the loss.

C

Held: in addition to decrees of specific performances of the contracts the vendors were entitled to be indemnified in respect of losses properly incurred in carrying on the businesses as going concerns.

Principle in *Shaw* v. *Foster* (1) (1872), L.R. 5 H.L. 321, applied.

D

Dakin v. *Cope* (2) (1827), 2 Russ. 170, distinguished.

Notes. As to rights and duties of parties pending completion of sale, see 34 HALSBURY'S LAWS (3rd Edn.) 290 et seq.; and for cases see 40 DIGEST (Repl.) 191 et seq.

Cases referred to:

E

(1) *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; 42 L.J.Ch. 49; 27 L.T. 281; 20 W.R. 907, H.L.; 40 Digest (Repl.) 192, *1556*.

(2) *Dakin* v. *Cope* (1827), 2 Russ. 170; 38 E.R. 299; 40 Digest (Repl.) 208, *1696*.

Also referred to in argument:

Rayner v. *Preston* (1881), 18 Ch.D. 1; 50 L.J.Ch. 472; 44 L.T. 787; 45 J.P. 829; 29 W.R. 547, C.A.; 40 Digest (Repl.) 191, *1539*.

F

Phillips v. *Silvester* (1872), 8 Ch. App. 173; 42 L.J.Ch. 225; 27 L.T. 840; 21 W.R. 179, L.C.; 40 Digest (Repl.) 197, *1595*.

Royal Bristol Permanent Building Society v. *Bomash* (1887), 35 Ch.D. 390; 56 L.J.Ch. 840; 57 L.T. 179; 40 Digest (Repl.) 200, *1623*.

Earl of Egmont v. *Smith*, *Smith* v. *Earl of Egmont* (1877), 6 Ch.D. 469; 46 L.J.Ch. 356; 40 Digest (Repl.) 197, *1600*.

G

Bennett v. *Stone*, [1903] 1 Ch. 509; 72 L.J.Ch. 240; 88 L.T. 35; 51 W.R. 338; 47 Sol. Jo. 278, C.A.; 40 Digest (Repl.) 214, *1737*.

Bolton Partners v. *Lambert* (1888), 41 Ch.D. 295; 58 L.J.Ch. 425; 60 L.T. 687; on appeal (1889), 41 Ch.D. p. 302, C.A.; 40 Digest (Repl.) 197, *1599*.

Dodson v. *Downey*, [1901] 2 Ch. 620; 70 L.J.Ch. 854; 85 L.T. 273; 50 W.R. 57; 45 Sol. Jo. 739; 36 Digest (Repl.) 549, *1101*.

H

Foster v. *Deacon* (1818), 3 Madd. 394; 56 E.R. 550; 40 Digest (Repl.) 201, *1625*.

Hardoon v. *Belilios*, [1901] A.C. 118; 70 L.J.P.C. 9; 83 L.T. 573; 49 W.R. 209; 17 T.L.R. 126, P.C.; 9 Digest (Repl.) 210, *1328*.

Leggott v. *Metropolitan Rail. Co.* (1870), 5 Ch. App. 716; 35 J.P. 135; 18 W.R. 1060, L.J.; 40 Digest (Repl.) 206, *1682*.

I

Barsht v. *Tagg*, [1900] 1 Ch. 231; 69 L.J.Ch. 91; 81 L.T. 777; 48 W.R. 220; 16 T.L.R. 100; 44 Sol. Jo. 133; 40 Digest (Repl.) 208, *1693*.

Action for specific performance of two contracts and for a declaration that the plaintiffs were entitled to be indemnified by the defendant against all expenditure incurred by them in carrying on and preserving as going concerns for the defendant the businesses comprised in the agreements and consequential accounts.

The plaintiffs carried on business as bakers and confectioners at several addresses. On Jan. 15, 1920, a receiver and manager of the business was appointed in a debenture-holders' action, and on Jan. 27, 1920, the company went into voluntary liquidation. Agreements were entered into with the defendant whereby the

defendant agreed to purchase the various premises and the goodwill of the respective businesses carried on upon them, and the defendant paid a deposit. The contracts were entered into subject to the approval of the court, and it was provided that completion should take place one month after such approval had been obtained. The approval of the court was not obtained till Oct. 26, 1920, and accordingly the date fixed for completion was Nov. 26, 1920. Owing to the default of the purchaser the conveyances were not sent to the vendors until Jan. 6, 1921. The plaintiffs' solicitors kept pressing for completion, and wrote in December to the defendant's solicitors and pointed out to them that the businesses had been carried on at a loss for many months past, and that they had been kept open solely for the benefit of the purchaser, and that the vendors would hold the purchaser "to strict accountability for the loss." This letter and subsequent letters to the same effect were not replied to, and finally the defendant refused to complete except on the footing that he was not liable for these losses.

The material facts of the first agreement were as follows. The receiver and the liquidator were to sell, and the defendant to purchase at the price of £3,800 the leasehold shops and premises, No. 1, Park Parade, Harlesden; No. 1, Chippenham Road, Harrow Road, Paddington; and No. 15, Hazel Road, Willesden, for the residue of the respective terms upon which the same were held, and subject to the respective rents, covenants, and conditions therein mentioned, together with the goodwill of the respective businesses of bakers and confectioners carried on thereon, and the respective tenants' fixtures, trade utensils, and plant, and machinery, except as therein mentioned; and also the freehold shop and premises, No. 91, Barretts Green Road, Willesden. The sum of £380 was paid as a deposit. Clause 2 of the agreement was as follows:

> "The purchase to be completed within one month of the approval by the court of this contract. If not then completed the purchaser to pay interest on the balance of the purchase money at six pounds per cent. or the vendors at their options to take the rents until completion without prejudice to the vendor's other rights. All rents and outgoings . . . shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require."

Clause 7 stated the characters in which the receiver and liquidator contracted, and continued:

> "This agreement is entered into subject to the approval of the court being obtained thereto within twenty-one days from the date hereof. . . . If the approval of the court shall not be given as above the contract shall be void. . . ."

The master's note of what happened on July 29, 1920, when application was made for the approval of these conditional agreements, is so far as material, in these terms:

> "Subject to purchaser attending before the registrar and accepting title by consent of the defendant company order as asked. . . ."

Notwithstanding the pressure brought to bear by the vendors the defendant did not attend and accept the title until Oct. 26, 1920, when an order was drawn up under date July 29, 1921, ordering the premises to be sold with the approbation of the judge. The order then continued:

> "The purchaser by his solicitors expressing himself content with the title to the respective premises comprised in the conditional contracts . . . and consenting to be bound by them notwithstanding that the time thereby limited for obtaining the approval of court thereto has expired and the defendants by their solicitors consenting, it was ordered that the conditional contract should be carried into effect."

No draft conveyance having been received by the vendor's solicitors up to Nov. 22, 1920, they wrote a number of letters pressing for it, and in particular on Dec. 8, 1920, wrote as follows:

"We are sorry we are still without the draft conveyance. We telephoned to-day as our instructions in the matter are peremptory. . . . As your client is well aware the businesses which for months past have been kept open solely for his benefit have been carried on at a loss and, of course, our clients will hold Mr. Hemmings to strict accountability for the loss, certainly as from Aug. 29, by which date the whole matter ought to have been concluded in accordance with the terms of the contract."

Alexander Grant, K.C., and *Farwell* for the plaintiffs.
Galbraith, K.C., and *Norman Daynes* for the defendant.

SARGANT, J.—In this action two points arise on two contracts for the sale of one freehold and four leasehold premises, and the goodwill of the business carried on at three of the leasehold premises. The questions, are, first, from what date interest was on the purchase money, and secondly, whether the vendors are entitled to throw on the purchaser losses incurred by them carrying on the businesses. [HIS LORDSHIP then stated the facts, and after deciding the first question continued:] I think on the evidence it is established that between July 29, 1920, and the end of the following November the purchaser was aware that the businesses were being carried on at a loss. If he did not know it personally his employee Morris had ascertained it on his behalf, and Morris' knowledge must be taken as knowledge by the purchaser himself. I accept on this point the evidence of Mr. Hayland, the manager of the plaintiffs' business, and I rely also on the admissions that were extracted from Morris, who naturally did his best to safeguard his employer's interest. Although there was a binding contract on Oct. 26, the purchaser took no steps to get the conveyances drafted, and his solicitor admitted candidly that the delay was due to the purchaser's instructions not to hurry matters on. I am convinced that but for the plaintiffs' delay after Oct. 26 the sale could have been completed by Nov. 26, which on the view I have taken was the date fixed for completion. It will be noted that the period of one month after the approval of the contract was allowed by the contract for the investigation of the title as well as the preparation of the conveyances. But the title had already been accepted before the date when the contract was approved. Any delay after Nov. 26 was, in my opinion, due to the deliberate desire of the purchaser to put off completion of the contract, partly because he was occupied with other matters, and partly because he was by then anything but enamoured with the business he had purchased. This may have been due to his knowledge that the businesses were being carried on at a loss, though it is fair to say that the purchaser did not attach much importance to their being losing businesses, but rather looked to the volume of business being done, as he thought that with his organisation he would be able to make them pay. I hold that the delay after Nov. 26 was due to the deliberate default of the purchaser.

The vendors found themselves in the position of having businesses which they had sold and which were being carried on at a loss. What were they to do? On Dec. 8, 1920, the vendors' solicitors wrote a most important letter to the defendant in these terms. [HIS LORDSHIP read the letter.] That letter seems to me to be a perfectly clear indication to the defendant that the three businesses not only had been, but were being carried out at a loss, and also that they were being carried on by the vendors for the account of the purchaser and to protect the goodwill of the businesses for him. From that time, therefore, the defendant undoubtedly had clear notice of the state of affairs and was bound, in my view, to tell the vendors if he wished to put an end to it. He might have told them to continue to carry on the businesses or have requested them to shut down the businesses; or he might have arranged that his own manager should take charge of the businesses. As a matter of fact he pursued a policy of masterly inactivity. The matter was again called to the purchaser's attention on Jan. 8, but once again he did nothing. Ultimately on Jan. 18, the present action was commenced. In the course of the action the purchaser at last woke up to the position and made an arrangement by which his own manager was put in charge of the whole businesses on the terms

that from then on he was to take the profits or bear the losses of the businesses. The question, therefore, is whether the losses from Nov. 26 to Dec. 8, and afterwards until May 13, when the plaintiffs' manager went into possession, are to be borne by the purchaser. I ought to point out that in the letter of Dec. 8 it was suggested that the purchaser had been for a long time aware that the businesses were being carried on at a loss. If that had been incorrect, it may be assumed that the purchaser would have written a letter repudiating any such knowledge, and in the witness-box he admitted that it was a letter which ought to have been answered. In view of the construction I have put on the contract, it followed that any losses incurred up to Nov. 26 must necessarily be borne by the vendors. I have to consider only the losses from Nov. 26 to Dec. 8, 1920, and afterwards. The general principle applicable here was stated by LORD CAIRNS in *Shaw* v. *Foster* (1) as being that as between vendor and purchaser, the vendor is as from the date fixed for completion a trustee of a somewhat modified kind. He says:

> "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, and subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

What was the property sold here? As to the three shops in which businesses were being carried on the sale related not only to the bricks and mortar sold, but also to the three businesses sold as going concerns. In those circumstances the vendors were no more entitled to let these businesses lapse than to allow the bricks and mortar to fall into decay. If the vendors had failed to deliver bread on the rounds the whole goodwill would have been destroyed and the purchaser would have been entitled to repudiate the contract on the ground that he was not getting what he had agreed to purchase, namely, these businesses as going concerns. In such circumstances a vendor is entitled primâ facie to continue to carry out the business he has sold at the risk of the purchaser with reasonable promptitude of what he is doing. In the present case there was a delay in giving notice from Nov. 26 to Dec. 8; but in my judgment that was in no degree unreasonable. On the contrary, my view is that the vendors pointed out with considerable promptitude the effect of the purchaser's delay. In view of statements made to the purchaser by the vendors on Dec. 8, which show that the businesses were continuing to be carried on at a loss and that the vendors were looking to the purchaser to indemnify them, I have no doubt that the defendant was, by his silence, acquiescing in the status quo having continued. So that from that time forth at any rate the vendors are entitled to be indemnified by their cestui que trust, the purchaser. But I apply the principle I have referred to not only from Dec. 8 onwards, but also to the short antecedent period from Nov. 26 to Dec. 8, as the vendors made no unreasonable delay in notifying the purchaser as to the position.

Dakin v. *Cope* (2) has been very much pressed on me. But in my judgment that case when carefully considered does not form an exception to the general rule laid down by LORD CAIRNS in *Shaw* v. *Foster* (1) that the vendor is a trustee for the purchaser of the property sold, a general rule which I think applies to the goodwill of a business sold as a going concern. In *Dakin* v. *Cope* (2) there was a delay in the completion of the sale of a business owing to difficulties as to title, and the vendor carried on the business for nearly two and a half years after the date fixed for completion without giving any notice to the purchaser of what he was doing, or giving him any opportunity of deciding the course to be adopted. Further, no

special averment was made in the bill of these facts. The ordinary decree for specific performance was asked for and obtained, but it was drawn up so as to render the purchaser liable for losses incurred in carrying on the business. The question was whether in the circumstances it ought to be drawn up in this form. LORD ELDON called attention to the fact that no such case was raised by the bill. It appeared also that in answer to a question he had asked in the course of the argument he was told that no notice had been given to the purchaser that the trade would be carried on at his risk. LORD ELDON did not, therefore, think it just to impose on the purchaser the loss sustained by the vendor. It was a very different case from the present one, and it stands on its own facts and does not go to the extent of deciding that, when the goodwill of a business has been sold, the vendor is not entitled to throw on the purchaser losses incurred by him in carrying on the business after the date fixed for completion, when he has acted reasonably and told the purchaser of the loss that is being incurred and given him an opportunity of saying what course should be pursued; though I do not say that a direction by the purchaser to close down the business at once must be necessarily complied with as the vendor has to consider his own position in case the purchase does not go through. Here notice was given to the purchaser that the businesses were being carried out at a loss and he kept silent and allowed the state of affairs to continue. In those circumstances he is, in my opinion, liable to indemnify the vendors against these losses from that time, including the losses incurred over the short antecedent period between Nov. 26 and Dec. 8, 1920. There must be an inquiry as to the amount of the losses properly incurred by the plaintiffs in carrying on the businesses between Nov. 26, 1920, and May 13, 1921, when the defendant's receiver and manager went into possession.

Solicitors: *Fairchild, Greig & Co.*; *Sturton & Sturton.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

HALL *v.* MINTER

[CHANCERY DIVISION (Sargant, J.), November 29, 30, 1921]

[Reported [1922] 1 Ch. 191; 91 L.J.Ch. 212; 126 L.T. 655; 66 Sol. Jo. 157]

Solicitor—Costs—Non-contentious business—Compromise of action—Term of compromise mortgage of property—Fee charged for negotiating compromise—Right to further fee for negotiating mortgage—Solicitors Remuneration Act, 1881 (44 & 45 *Vict.*, *c.* 44), *s.* 2—*Solicitors Remuneration Order*, 1883, *r.* 2.

An action for specific performance of a contract for the sale of freehold property was compromised after lengthy negotiations, proceedings being stayed on the terms, inter alia, that the defendant pay to the plaintiff part of the purchase price in cash, the balance to remain secured on a mortgage of the property, and that the defendant pay the plaintiff's taxed costs of the action. Upon a taxation of the costs the defendant objected to an item for £75 charged as a fee for negotiating the mortgage loan on the ground that the costs for negotiating the loan had been charged in the costs of the compromise.

Held: no separate charge could be made for negotiating the mortgage, and, therefore, the charge must be disallowed.

Notes. The Solicitors Remuneration Act, 1881, was repealed. Solicitors' remuneration is now governed by the Solicitors Act, 1932, s. 56 of which re-enacts s. 2 of the Act of 1881. By virtue of s. 82 (2) of the Act of 1932 the Solicitors Remuneration Order, 1883, made under the Act of 1881, is continued in force, and has the effect as if made under s. 56 of the 1932 Act.

As to solicitors' remuneration, see 31 HALSBURY'S LAWS (2nd Edn.) 149 et seq.; and for cases see 42 DIGEST 232 et seq. For the Solicitors Act, 1932, s. 56, see 24 HALSBURY'S STATUTES (2nd Edn.) 49, and for the Solicitors Remuneration Order, 1883, see 20 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *Stanford* v. *Roberts* (1884), 26 Ch.D. 155; 53 L.J.Ch. 338; 50 L.T. 147; 48 J.P. 692; 32 W.R. 404; 42 Digest 232, *2648*.

Also referred to in argument:

Re Merchant Taylors' Co. (1885), 30 Ch.D. 28; 54 L.J.Ch. 867; 52 L.T. 775; 33 W.R. 693, C.A.; 42 Digest 241, *2732*.

Summons to review a taxation of costs.

On Dec. 30, 1919, the plaintiff by a written agreement agreed to sell, and the plaintiff agreed to purchase, certain freehold houses and land in Mornington Crescent, Hampstead Road, for £65,000, the purchase to be completed on June 24, 1920. The London County Council in the meanwhile issued an order prohibiting for the time being the erection of buildings on part of the land. The banks also restricted their lending, and the defendant was unwilling to complete on the fixed date. The plaintiff thereupon commenced an action against him for specific performance. There were negotiations and interviews lasting over a considerable period, and ultimately the action was compromised and all proceedings stayed upon the terms that the defendant should pay about half the purchase-money in cash and the rest should remain secured upon a mortgage of the property. It was also agreed that the defendant should pay the plaintiffs' taxed costs of the action on the footing of affording a complete indemnity. Upon the taxation the defendant objected to an item of £75 charged as a fee for negotiating the loan, contending that the negotiations for the loan had been charged in the costs of the settlement. The plaintiff referred to *Stanford* v. *Roberts* (1) and the general order under the Solicitors Remuneration Act, 1881. The taxing master disallowed the objections.

Alexander Grant, K.C., and *Tyrrell* for the defendant.
Dighton Pollock for the plaintiffs.

SARGANT, J.—This is an application to review a taxation of costs under an order in an action for specific performance of an agreement to sell in a place known as Mornington Crescent, Hampstead Road, London, some houses and a garden in front of the houses. The purchase money was a large sum, £65,000; £6,000 was paid by the vendor as a deposit upon signing the contract, and the purchase was to be completed on June 24, 1920. The vendors were the plaintiffs, Mrs. Hall and Mr. Casson, and the purchaser was the defendant, Mr. Minter. The purchase price was not paid on the date fixed for completion, and after considerable delay on Aug. 7, 1920, a writ was issued by the plaintiffs in an ordinary vendor's action for specific performance. The statement of claim was delivered on Nov. 4, 1920. Negotiations then took place between the plaintiffs and the defendant for some adjustment or compromise of the respective rights of the parties; and it is pretty clear that the position of the plaintiffs was an extremely strong one. They were entitled, if the action had gone to trial, to an order for payment of the £59,000, which was the balance of the purchase-money, with a declaration of lien by way of foreclosing, but they entered into a discussion with the purchaser as to whether he could not give them something that would reasonably satisfy them, something less than their strict legal rights; and ultimately, as a result of negotiations that took place between the parties and their solicitors, a very reasonable arrangement

A was arrived at. According to the final letter in Jan. 19, 1921, which is a letter from the vendors' solicitors to the purchaser's solicitor, the terms were to be as follows: First, £27,000 was to be paid by Jan. 21, which would leave a sum of £32,000 still payable. Secondly, £32,000 was to be left on mortgage for a term of two years at 6 per cent. interest, with power to the mortgagor to pay off at any earlier date upon giving three months' previous notice. Thirdly, the mortgage B was to contain a provision that no work in the way of building development or otherwise was to take place except subject to the reasonable approval of the vendor's surveyors. Fourthly, the completion was to be as on June 24, 1920—that was the date originally fixed by the agreement of purchase—the defendant paying 6 per cent. interest on the £65,000 purchase money, and taking the rents and interest earned by the £6,000 while on deposit. Then fifthly, the purchaser was C to pay the costs of the vendor's solicitors occasioned by the failure to complete on the footing of affording a complete indemnity to the vendors. So that the solicitors would get considerably more than solicitor's or client costs, that were to have a complete indemnity in the matter of costs, and as to costs the order is as follows:

> "And it is ordered that the costs of the plaintiffs occasioned by the failure D of the defendant to complete the purchase on June 24, 1920, one of the premises comprised in the agreement the subject of this action be taxed by the taxing master on the footing of affording to the plaintiffs a complete indemnity."

When the bill of costs was brought in, there were a considerable number of items from Jan. 6, 1921, onwards relating to the negotiations which had taken place between the vendors and the purchaser and including attendances of the E vendors themselves, and generally including all the costs which had been incurred by the vendors' solicitors for the purpose of arriving at the terms of settlement ultimately embodied in the letter I have read of Jan. 19. It is quite clear that between Jan. 6 and Jan. 28 the whole costs of the vendors of the negotiations were charged for in the bill, and it is also clear from the entries in the bill of costs and from the correspondence that passed between the vendors' solicitors and the F purchaser's solicitor, that an important part of the terms of settlement ultimately arrived at was concerned with the conditions of the mortgage in question. For instance, there was a discussion whether the mortgage should be for three or five years; a discussion as to the rate of interest on the mortgage—7 per cent. was suggested at one time; and a discussion as to whether the mortgagees were to be entitled to prevent building developments being carried out without their consent G and as to the amount of control that was to be left to the mortgagor. There were other terms also, but there is no doubt whatever to my mind that a very important part of the terms of settlement was the position of the vendors under this mortgage; and when Jan. 28 had arrived, it seems to me that the whole terms of settlement had been agreed on, including the terms of the mortgage which has to secure the balance of the purchase-money.

H Those charges having been made on Feb. 1, this charge is put in—it is as presented by the solicitors' remuneration order, "for negotiating loan of £32,000 —£75," and the question here is whether this was within the meaning of the Solicitors Remuneration Act, a negotiation for the mortgage in addition to the negotiation for the terms of compromise which are fully provided for by the terms of this order. Or to put it in another way, were the vendors' solicitors entitled I to charge their client not only for negotiating the terms of compromise but also for negotiating the mortgage for £32,000? If they were this charge is a proper charge, because the arrangement was that the defendant was to indemnify the plaintiffs. If the charge could not be made against the plaintiffs, then the fee is not allowable in the bill, because it is not something against which the defendant has to indemnify the plaintiffs. Of course I except the decision of KAY, J., in *Stanford* v. *Roberts* (1), as to this business, if it was actually done, if there was a true negotiation, not being exempted from the order and the Act by reason of its being incidental to an action. But it seems to me that it is impossible to separate

the terms of negotiation for the compromise of this action and to say that there was outside and apart from those terms separate negotiation for a mortgage. The position, as I have said, of the parties was this, that the plaintiffs were entitled to enforce a lien for £59,000 practically immediately. And this being so, the parties came together and agreed, that the position of the plaintiffs and of the defendant should be altered, and that these terms of compromise should be carried out. The negotiation for the terms of compromise and the ultimate settlement that was arrived at seems to me to have been exhaustive and to leave nothing further for negotiation at all, and therefore I think there was no separate negotiation for the mortgage which could properly be charged for under the Solicitors Remuneration Act, 1881. The mortgage was involved in the terms of compromise in respect of which detailed charges have been made and quite properly made in the bill of costs. No doubt as regards the carrying out of the mere conveyancing part of the mortgage, the solicitors for the vendors are entitled to charge, and they have charged in the ordinary way. They have not as a matter of fact purported to charge scale B, no doubt because they have not investigated the title, as it was the title of their clients, the vendors. They have made detailed charges in respect of the work of drafting the mortgage and so on, therefore they do not go unremunerated in that respect, nor of course for their trouble in respect of negotiating a compromise of the rights of the parties in the action. All I decide is that, having negotiated that compromise, they are not entitled to charge a separate negotiation for mortgage. For in my view there was no such separate negotiation, and the terms of the mortgage were entirely involved in the negotiation already effected for the compromise of the rights in the action. In my opinion, therefore, this charge ought to be disallowed, the purchaser to have the costs of the application.

Solicitors: *H. W. Clarkson*; *Chester, Broome & Griffithes.*

[*Reported by* L. Morgan May, Esq., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* WETTMAN

[King's Bench Division (Lord Trevethin, C.J., Sankey and Acton, JJ.), October 27, November 4, 1921]

[Reported [1922] 1 K.B. 153; 91 L.J.K.B. 77; 126 L.T. 336; 86 J.P. 4; 38 T.L.R. 67; 66 Sol. Jo. (W.R.) 19; 19 L.G.R. 781; 27 Cox, C.C. 148]

Shop—Weekly half-holiday—Employment "about the business of a shop"—Assistant at shop employed on half-holiday at another shop of same employer—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *s.* 1 (1).

By s. 1 (1) of the Shops Act, 1912: "On at least one week day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon." The respondent, the occupier of two confectioner's shops, on the afternoon of the weekly half holiday of an assistant at one of the shops employed her in dressing the window of the other shop. On being charged with contravening the section the respondent pleaded that he had committed no offence since the words "about the business of a shop" meant about the business of the particular shop where the assistant was employed.

Held: the words "employed about the business of a shop" were capable of

very wide application; in the present case the respondent carried on his business partly in one shop and partly in the other; and, therefore, a person employed in one of the shops was employed about the business of the other, and the respondent was guilty of an offence against s. 1 (1).

Principle stated in *George* v. *James* (1), [1914] 1 K.B. 278, applied.

Notes. The Shops Act, 1912, was repealed by the Shops Act, 1950, s. 17 (1) of which replaces s. 1 (1) of the Act of 1912.

As to shop hours, see 17 HALSBURY'S LAWS (3rd Edn.) 179–181; and for cases see 24 DIGEST (Repl.) 1107 et seq. For the Shops Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 186.

Cases referred to:

(1) *George* v. *James*, [1914] 1 K.B. 278; 83 L.J.K.B. 303; 110 L.T. 316; 78 J.P. 156; 30 T.L.R. 230; 12 L.G.R. 403; 24 Cox, C.C. 48, D.C.; 24 Digest (Repl.) 1108, *527*.

(2) *Ward* v. *W. H. Smith & Son*, [1913] 3 K.B. 154; 82 L.J.K.B. 941; 109 L.T. 439; 77 J.P. 370; 29 T.L.R. 536; 11 L.G.R. 741; 23 Cox, C.C. 562, D.C.; 24 Digest (Repl.) 1112, *544*.

Case Stated by a metropolitan magistrate.

On Jan. 26, 1921, the respondent, Mark Wettman, appeared at Old Street Police Court to answer an information laid by John James Greenwood, on behalf of the appellants, which charged that the respondent unlawfully failed to comply with the provisions of s. 1 of the Shops Act, 1912, in that on Wednesday, Dec. 8, 1920, he employed in his shop at 263, Old Street, London, after 1.30 in the afternoon, a shop assistant, named Wilson, that day being specified in a notice affixed in the respondent's shop at 30, Goodge Street, W.C., in pursuance of the said section and the regulations made by the Secretary of State under the Act, as the day on which the said shop assistant was not to be employed about the business of a shop after 1.30 in the afternoon.

The following facts were proved or admitted at the hearing of the information. (a) The respondent was the occupier of two confectioner's shops in London, one at 263, Old Street, E.C., and one at 30, Goodge Street, W.C.; (b) the shop assistant, Miss Wilson, to whom the proceedings referred, was employed by the respondent in his shop at 30, Goodge Street; (c) Wednesday was the day of the week fixed by the respondent for the weekly half-holiday of Miss Wilson, pursuant to the Shops Act, 1912; (d) on Wednesday, Dec. 8, 1920, an inspector under the Act visited 30, Goodge Street, and seeing the respondent there asked where Miss Wilson was. The respondent replied: "She is having a day's holiday. As a rule she only has half a day, but she is having a day's holiday." The inspector forthwith proceeded to 263, Old Street, the respondent's other shop, where he found Miss Wilson employed about the business of that shop, dressing the shop window, between the hours of 5.30 and 6 p.m.

It was contended for the respondent that no offence had been committed by him, and that the meaning of the words "about the business of a shop" in s. 1 (1) of the Act was the business of the particular shop where the assistant was generally employed. It was contended for the appellants that the words "about the business of a shop" in s. 1 (1) of the Act meant about the business of any shop belonging to the same employer. The magistrate was of opinion that the respondent's contention was right, and, therefore, dismissed the information.

The Shops Act, 1912, provided:

"Section 1 (1). On at least one week day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon: Provided that this provision shall not apply to the week preceding a bank holiday if the shop assistant is not employed on the bank holiday, and if on one week day in the following week in addition to the bank

holiday the employment of the shop assistant ceases not later than half-past one o'clock in the afternoon." A

H. D. Roome for the appellants.
The respondent was not represented.

Cur. adv. vult. B

Nov. 4. **LORD TREVETHIN, C.J.,** read the following judgment of the court.— We assume from the findings in this case that the assistant was employed at Old Street with the knowledge and consent of her employer. It is, therefore, unnecessary to consider *Ward* v. *W. H. Smith & Son* (2). On the point of law raised by this Case the magistrate held that he was bound by the words of CHANNELL, J., in *George* v. *James* (1), namely: C

> "The words 'a shop assistant shall not be employed about the business of a shop' mean 'about the business of the particular shop in which he is an assistant.' "

He then appears to have assumed that, upon the facts found by him in this case, a shop assistant employed in dressing the window of the shop at 263, Old Street, D was not employed about the business of the shop at 30, Goodge Street. It is here that we do not quite follow him. In our opinion, it is open to the court to accept the words of CHANNELL, J., as they stand in relation to the facts of the present case (very different by the way from those in *George* v. *James* (1)) and yet decide, with all respect to the magistrate, that the conclusion arrived at was wrong.

The words "employed about the business of a shop" clearly are, and are intended E to be, capable of very wide application. They may readily be contrasted, for example, with such words as "employed in a shop" or "in or about a shop," which are the words found in s. 2 (1) of the Act. With regard to the words "the business of a shop," stricting speaking, a shop cannot be said to have a business. "The business of a shop" or "a shop's business" is, indeed, to the logical mind a figurative expression. It may, we think, be fairly paraphrased for the purposes of F this case as the business carried on in that shop by the shopkeeper. Here the business carried on by the respondent at the shop in Goodge Street was that of the retail sale of confectionery. But he did not carry on that business at Goodge Street exclusively. He also carried on that business at 263, Old Street. He carried on that business partly in one shop and partly in the other. Upon these facts it seems to us to be no straining of language to say that a person employed G by the respondent in window-dressing at 263, Old Street, was "employed about the business" carried on at 30, Goodge Street, or, in other words, about the business "of" the shop at 30, Goodge Street, though, of course, not "in" nor "in or about" that shop. On the contrary, to say so appears to us to be in accordance alike with strict reasoning and common sense. In the sense which we have sought to make clear, the business "of" the shop at 263, Old Street, was also the business H "of" the shop at 30, Goodge Street, and for the purposes of this decision there is no valid distinction to be made between them. And certainly to hold otherwise would (in the words of CHANNELL, J., in *George* v. *James* (1)) "be opening a wide door to evasion of the Act."

In our view, indeed, the true principle is established and illustrated by the decision in *George* v. *James* (1). There a shop assistant engaged at a particular I shop which was one of a series of multiple shops was employed at a distance from that particular shop in distributing advertisements of the wares dealt in at the whole series of multiple shops generally, his own included. It was held that he was employed about the business of the particular shop in which he was an assistant. It is clear that he was in fact employed not about a business which was limited to the particular shop in which he was an assistant, but about a business which extended far beyond any such limitation. In our opinion, a sound basis for the decision in *George* v. *James* (1) is that, for the purposes of that decision,

A the "business of the shop" at Bargoed is to be regarded as a business of which a part only is carried on in that shop. We think, therefore, that the learned magistrate was wrong in dismissing the information, and that this appeal must be allowed.

Appeal allowed and Case remitted.

Solicitor: *D. P. Andrews.*

B

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

C

MORGAN *v.* PARR

[King's Bench Division (Darling, Avory and Salter, JJ.), March 22, 23, 1921]

D [Reported [1921] 2 K.B. 379; 90 L.J.K.B. 1199; 125 L.T. 307; 85 J.P. 165; 37 T.L.R. 587; 19 L.G.R. 277; 25 Cox, C.C. 739]

Street Trading—Child—"Employment"—Child acting as agent to sell for principal—Employment of Children Act, 1903 (3 *Edw.* 7, *c.* 45), *s.* 3 (2).

By s. 3 (2) of the Employment of Children Act, 1903, as amended by s. 13 (1) (ii), s. 8 (1) and s. 48 (1) of the Education Act, 1918, it was provided E that a child under the age of fourteen years should not be employed in street trading. The respondent, a wholesale and retail newsagent, handed a boy under the age of fourteen years a parcel of newspapers, and the boy sold them in the street, the respondent receiving 9d. per dozen for the newspapers and the boy retaining 3d. per dozen, and the unsold copies being returned to the respondent. The respondent exercised no control over the boy except that he F would have prevented him from destroying the newspapers.

Held: it was not necessary in order that the offence of employing a child in street trading be committed that the relation between the employer and the child be that of master and servant; it was sufficient that the relation be one of principal and agent; that was the relation of the boy and the respondent in the present case; and, therefore, the respondent was guilty of an offence.

G **Quære** if it had been proved that the relation was that of vendor and purchaser, whether the respondent would have been guilty of the offence.

Notes. Section 3 (2) of the Employment of Children Act, 1903, as amended, has been replaced by s. 20 (1) of the Children and Young Persons Act, 1933, which provides that "no person under the age of 16 years shall engage or be H employed in street trading."

Applied: *Sweet* v. *Williams*, [1922] All E.R.Rep. 111.

As to employment of children in street trading, see 21 Halsbury's Laws (3rd Edn.) 304; and for cases see 28 Digest (Repl.) 719, 720.

Cases referred to in argument:

I *R.* v. *Reason* (1853), Dears.C.C. 226; 2 C.L.R. 120; 23 L.J.M.C. 11; 22 L.T.O.S. 107; 17 J.P. 743; 17 Jur. 1014; 2 W.R. 54; 6 Cox, C.C. 227; 169 E.R. 705, C.C.R.; 37 Digest 374, *51.*

Collman v. *Roberts*, [1896] 1 Q.B. 457; 65 L.J.M.C. 63; 74 L.T. 198; 60 J.P. 184; 44 W.R. 445; 12 T.L.R. 202; 18 Cox, C.C. 273, D.C.; 24 Digest (Repl.) 1107, *525.*

Robinson v. *Hill*, [1910] 1 K.B. 94; 79 L.J.K.B. 189; 101 L.T. 573; 73 J.P. 514; 26 T.L.R. 17; 7 L.G.R. 1065, D.C.; 28 Digest (Repl.) 719, *2316.*

Canada Sugar Refining Co. v. *R.*, [1898] A.C. 735; 67 L.J.P.C. 126; 79 L.T. 146, P.C.; 39 Digest 227, *b.*

Smith v. *General Motor Cab Co., Ltd.*, [1911] A.C. 188; 80 L.J.K.B. 839; 105 L.T. 113; 27 T.L.R. 370; 55 Sol. Jo. 439; 4 B.W.C.C. 249, H.L.; 34 Digest 35, *115*.

Stokes v. *Mitchinson*, [1902] 1 K.B. 857; 71 L.J.K.B. 677; 86 L.T. 767; 66 J.P. 615; 50 W.R. 553; 18 T.L.R. 543; 20 Cox, C.C. 254, D.C.; 34 Digest 739, *1159*.

Case Stated by the stipendiary magistrate at Aberdare.

An information was preferred by the appellant, W. H. Morgan, clerk of the urban district council of Aberdare, under the Employment of Children Act, 1903, as amended by the Education Act, 1918, for that the respondent, Edward Parr, on Saturday, Sept. 18, 1920, at the parish of Aberdare, did unlawfully employ a child, named William Richard Rees, in street trading.

Upon the hearing the following facts were proved or admitted. The respondent was a wholesale and retail newsagent, carrying on business at Aberdare. On Saturday, Sept. 18, 1920, at about 7 p.m., the respondent handed to the boy a parcel of newspapers. The boy was later the same evening seen selling newspapers in the street. A certificate of birth of the said boy, William Richard Rees, was produced, and it showed that he was born on Feb. 3, 1910. The respondent received 9d. per dozen from the said William Richard Rees on the newspapers sold by him, and the unsold copies of the newspapers were returned to the respondent. The boy made a profit of 3d. per dozen newspapers sold. The respondent made a profit by way of discount upon the net sales of such newspapers. The respondent exercised no power of control over the boy, and if the boy sold no newspapers he derived no gain. The boy was free to come and go as he thought fit, and the respondent would not know until the boy turned up at the station upon the arrival of the papers whether he would be purchasing any papers for sale on any particular evening.

On the part of the appellant it was contended that the respondent had employed the boy, William Richard Rees, within the definition of "employ" and "employment" as set out in s. 13 of the Employment of Children Act, 1903, as the boy was employed in labour exercised by way of the trade of the respondent, or for the purpose of gain, whether the gain was to the child or any other person. On the part of the respondent it was contended that upon the facts as disclosed at the hearing no breach of the said statute had been committed by the respondent upon the following grounds: (i) That the true relationship which existed between the respondent and the boy, William Richard Rees, in respect of the transaction in question, was that of vendor and purchaser upon a wholesale basis. (ii) That no contract of service existed between the parties so as to constitute the relationship of master and servant between them, and that consequently there was no employment of the boy by the respondent within the meaning of the said statute. The magistrate, being of opinion that the relationship of master and servant did not exist between the respondent and the boy, William Richard Rees, and that the papers were supplied to the boy on the ordinary trade terms, held that this was not a case of employing a child within the meaning of the Employment of Children Act, 1903, and dismissed the information and the appellant appealed to the Divisional Court. The question was whether, upon the above statement of facts, the magistrate came to a correct determination and decision in point of law, and what should be done in the premises.

A copy of the depositions of witnesses taken before the stipendiary magistrate was appended to the case, and the truth of the following passages from the evidence of Parr, the respondent, was admitted by his counsel: "I was on the station on the Saturday night." . . . "I am there every night, handing newspapers to boys in my employ. . . . They give me 9d. for every dozen copies sold and return copies unsold. . . . If I saw a boy tearing up papers I should stop him, if possible. . . ."

Kirkhouse Jenkins for the appellant.

Harold Morris, K.C., for the respondent.

DARLING, J.—In my opinion this is a difficult case. I think it is necessary to begin by considering what was the obvious intention of the legislature when it passed the Employment of Children Act, 1903, entitled "An Act to make better provision for regulating the employment of children." I think it is plain that the intention of the legislature was to give a very wide protection to children, and it did not mean to be specially technical in its use of the words "employ" and "employment." That is shown by what is called the interpretation clause, and by the way in which those words are used in various parts of the statute. Having stated that, we must consider what was in evidence before the learned magistrate, and whether there was sufficient evidence to justify the conclusion to which he came. I will not state the facts; they are carefully stated in the Case. Counsel for the respondent has very properly admitted that the respondent referred in evidence to this boy in question, and others similarly employed, as being in his employ, and that he also said that if he had seen a boy destroying newspapers which he had handed to him he would, if possible, have stopped him from doing so. The magistrate decided that this was not a case of master and servant, and it appears to me that it was because he so decided that he came to the conclusion that no offence had been committed by the respondent in allowing this boy to do what he did. I do not think, however, that the finding is exhaustive. The argument before the magistrate was that this case was one of vendor and purchaser, although that was not said in so many words. It was said that the papers were supplied to the boy on the ordinary trade terms. The magistrate does not decide as a matter of law or as a matter of fact that this was a case of vendor and purchaser, although he does decide that the respondent did employ the boy to act as his agent. That being so, as the boy was of an age at which the statute protects him, an offence was committed by the respondent against the statute. I think, therefore, that the decision of the magistrate was wrong, and the appeal must be allowed.

AVORY, J.—I agree. In view of the admission as to the further facts, which has saved us the necessity of sending the case back to the magistrate, I am of opinion that this boy was in fact employed by the respondent as an agent within the meaning of the statute. I think the magistrate was right in holding that the relationship of master and servant did not exist; but, when he found further that the papers were supplied to the boy on the ordinary trade terms, and for that reason held that it was not a case of employing a child, I confess I am not able to understand what he meant. I do not understand what he meant by saying that the papers were supplied to the boy on the ordinary trade terms. As my Lord has pointed out, he does not say that he was satisfied that the relationship of vendor and purchaser existed between them—if he had said so I think he would have been clearly wrong on the facts. I do not know what he meant by saying that the papers were supplied to the boy on the ordinary trade terms. We have in the findings of fact a clear statement of the terms on which the newspapers were supplied to the boy. In my opinion the boy was, in the circumstances, selling the newspapers as agent for the respondent, and therefore the respondent was in fact "employing" him within the meaning of s. 5 of the Act. I agree that the appeal should be allowed, and the case must be remitted to the magistrate for a conviction.

SALTER, J.—I agree. There is no question in this case of the exercise of parental authority. The relationship between Parr and Rees was undoubtedly brought about as the result of a contract. Now that contract was either a contract of service, a contract of agency, or a contract of sale. If it were a contract of service, then undoubtedly there would be "employment." If it was found that the contract was one of sale, then in my opinion a very doubtful and difficult question would arise as to whether that could be said to be "employment" within the meaning and intention of the Act. The magistrate does not appear to have found that the relationship of vendor and purchaser existed between Parr and Rees. He says that the papers were supplied to the boy on the ordinary trade terms. I do not understand that, having regard to the case as a whole, a relationship of vendor and

purchaser existed between them. If the relationship were that of principal and agent, I have no doubt that there was "employment" within the meaning of the Act. I think we ought to infer from the case and from the facts admitted by counsel for the respondent that the relationship between Parr and Rees was that of principal and agent. That being so, I think there should have been a conviction in this case.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co.*, for *W. R. Morgan*, Aberdare; *Bell, Brodrick & Gray*, for *Kensholes & Prosser*, Aberdare.

[*Reported by* J. F. Walker, Esq., *Barrister-at-Law.*]

WATERMAN *v.* FRYER

[King's Bench Division (Horridge and Shearman, JJ.), November 8, 9, 1921]

[Reported [1922] 1 K.B. 499; 91 L.J.K.B. 315; 126 L.T. 316; 38 T.L.R. 87; 66 Sol. Jo. 108; 20 L.G.R. 691]

Master and Servant—Apprentice—Infant apprentice—Ability to repudiate apprenticeship agreement.

An infant apprentice brought an action against his master for wrongful dismissal. The county court judge found that the apprentice conducted himself in a manner which was incompatible with satisfactory relations between master and apprentice and amounted to a repudiation of the apprenticeship contract.

Held: an infant apprentice could not repudiate the contract of apprenticeship, even if the master accepted the repudiation, unless the rescission was for the infant's benefit.

Notes. Referred to: *McDonald* v. *John Twiname, Ltd.*, [1953] 2 All E.R. 589.

As to apprenticeship, see 25 Halsbury's Laws (3rd Edn.) 491 et seq.; and for cases see 34 Digest 502 et seq.

Cases referred to:

(1) *Winstone* v. *Linn* (1823), 1 B. & C. 460; 2 Dow. & Ry.K.B. 465; 1 Dow. & Ry.M.C. 327; 1 L.J.O.S.K.B. 126; 107 E.R. 171; 34 Digest 512, *4267*.

(2) *Phillips* v. *Clift* (1859), 4 H. & N. 168; 28 L.J.Ex. 153; 32 L.T.O.S. 282; 23 J.P. 120; 5 Jur.N.S. 74; 7 W.R. 295; 157 E.R. 801; 34 Digest 519, *4366*.

(3) *R.* v. *Great Wigston, Leicester (Inhabitants)* (1824), 3 B. & C. 484; 5 Dow. & Ry.K.B. 339; 2 Dow. & Ry.M.C. 445; 3 L.J.O.S.K.B. 85; 107 E.R. 813; 34 Digest 507, *4204*.

(4) *Learoyd* v. *Brook*, [1891] 1 Q.B. 431; 60 L.J.Q.B. 373; 64 L.T. 458; 55 J.P. 265; 39 W.R. 480; 7 T.L.R. 236; 34 Digest 514, *4296*.

(5) *Hughes* v. *Humphreys* (1827), 6 B. & C. 680; 9 Dow. & Ry.K.B. 715; 4 Dow. & Ry.M.C. 484; 5 L.J.O.S.K.B. 270; 108 E.R. 601; 34 Digest 509, *4232*.

(6) *Raymond* v. *Minton* (1866), L.R. 1 Exch. 244; 4 H. & C. 371; 35 L.J.Ex. 153; 14 L.T. 367; 30 J.P. 424; 12 Jur.N.S. 435; 14 W.R. 675; 34 Digest 510, *4242*.

Appeal from Portsmouth County Court.

The plaintiff, an infant, was apprenticed to the defendant, trading as Fryer & Co., in September, 1919, and in May, 1921, before the term of his apprenticeship was up, the defendant sent him home owing to his conduct. The plaintiff brought

A an action by his father, as next friend, against the defendant claiming damages for wrongful dismissal and for breach of the contract to teach him his trade. The county court judge found as facts that the plaintiff and his father thought that they had made a bad bargain. They wanted more money and the plaintiff had made up his mind not to serve his full term and did not mean the contract of apprenticeship to be carried out, and, by conducting himself in a manner altogether B incompatible with satisfactory relations between master and apprentice, he wished to force the defendant so to act as to give rise to a cause of action. He was rude and disobedient and was habitually determined to act in such a manner that he might get dismissed. The plaintiff's conduct became such as no employer in the defendant's position could be expected to tolerate. The judge accordingly found for the defendant, holding that the plaintiff's conduct amounted to deliberate and C advised repudiation by the plaintiff of the apprenticeship contract.

The plaintiff appealed.

Stuart Bevan, *K.C.*, and *H. H. Slesser* for the plaintiff.
Harold Morris, *K.C.*, and *W. Blake-Odgers* for the defendant.

D **HORRIDGE, J.**—This was an action brought by an apprentice against his master, and I think it is one of those cases in which it is, perhaps, better to lay down what I think the law is, before I deal with the facts as found by the learned judge.

The plaintiff was an infant suing by his father. I think that the cases, of which *Winstone* v. *Linn* (1) and *Phillips* v. *Clift* (2) are examples, lay down this proposition: that in the case of an indenture of apprenticeship the covenants are not E dependent on one another, and that misconduct which is a breach of the covenant entered into by the infant does not entitle the master to dismiss him. I think *R.* v. *Great Wigston, Leicester* (*Inhabitants*) (3) lays down the proposition that an infant cannot assent to a revocation of a contract unless such revocation is for the benefit of the infant. I think that is clear from the language of ABBOTT, C.J. (3 B. & C. at p. 486):

F "It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract. If then it is for the benefit of the infant to bind himself an apprentice, it is impossible to say generally, that it is for his benefit to dissolve such a connection; such a position involves a contra- G diction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship."

I think that *Learoyd* v. *Brook* (4), before A. L. SMITH, J., as I read it, established that there may be such conduct on the part of an infant as goes to the purpose of H the employment in such a way as to render the carrying out of the contract by the master impossible. What he says is this ([1891] 1 Q.B. at p. 433):

"The master has contracted to teach the apprentice how to carry on a pawnbroker's trade honestly. That must be the contract by the master. The apprentice, by becoming an habitual thief, has rendered that impossible."

That case has gone further in relieving the master than any case that has been cited I to us, and I do not propose myself to extend it beyond the proposition which I have tried to express. There is another class of case, which is represented by *Hughes* v. *Humphreys* (5), which shows that, if an apprentice absents himself from the service, the master cannot be sued for not teaching him during the period when he so absents himself. That goes on the principle that the master commits no breach of his covenant if the infant has put it out of his power to perform that covenant.

Having dealt with these propositions, let me come to the actual facts of the case. The learned county court judge has found that the plaintiff made up his mind not

to serve the full term and conducted himself in a manner incompatible with satisfactory relations as between master and apprentice.

"He was careless and indifferent about his work, neglectful of orders, disobedient and frequently insolent. The defendant realised that the boy was doing no good with him and that a continuance of the relations, while of no benefit to the plaintiff, would be injurious to his own business, and after complaining several times to plaintiff and his father to no purpose he offered to release the plaintiff altogether. This at any rate showed that he was not anxious to secure a servant at inadequate pay (as was suggested in the correspondence and at the trial); but the offer was declined. This refusal is not to be taken as any indication that plaintiff desired the contract to be carried out, for I am satisfied that he did not mean it should be, but wished to force the defendant so to act as to give rise to a cause of action against him. I have no doubt that in adopting this attitude he was acting under the advice of other persons. In the end his conduct not only prevented the defendant carrying out the contract to teach, but became such as no employer in defendant's position could be expected to tolerate. He had workmen and other apprentices in his employ, and to my mind, it was, in a business sense, impossible to have about the premises for several years to come an apprentice behaving as this apprentice was behaving."

At the end of his judgment he adds to that finding:

"On the facts as I find them here the plaintiff's conduct amounts to deliberate and advised repudiation. I dismiss the action with costs to be paid by the next friend."

The action was brought first for not teaching him, and the judge found there was no ground for that cause of action, and there has been no appeal to his finding. The second ground on which the action was brought was for wrongful dismissal. Did the conduct of the plaintiff amount, first, to anything more than breach of agreement with the employer? I do not think it did, and, if so, it is within the cases I have referred to, where the covenants are independent of each other; therefore, the plaintiff's conduct was no answer to the claim against the defendant who justified his wrongful dismissal by saying that the plaintiff had so conducted himself that he was entitled to dismiss him.

Then can it be said that it came within the principle laid down by A. L. Smith, J., in *Learoyd* v. *Brook* (4)? I do not think that there is any finding of the judge, or any evidence, that the plaintiff's conduct was of such a character that the master was not bound to keep in his employ an apprentice who had behaved as he had behaved. It is very different to the conduct which A. L. Smith, J., had to deal with. What the learned county court judge in this case had really put the case on is this: he said those things which I have mentioned amounted, in his judgment, to an indication by the plaintiff that he had no intention of continuing to be bound by the contract. It is first said that there was no evidence on which the learned judge could come to that conclusion. I think that there was. But what did that inference amount to when drawn? On the authority of *R.* v. *Great Wigston, Leicester* (*Inhabitants*) (3), the plaintiff could not, as an infant, have made an agreement to cancel unless that agreement was for the benefit of the infant. The principle on which the learned judge decided this case is that a party may either by acts or words so conduct himself that he says in effect to the other party, "I am not going to carry out this contract," and the other party may then say: "Well, I will accept your breach, and I will sue you for damages." That means that the infant was endeavouring to do indirectly what he could not have done directly—cause the contract to be rescinded. An infant cannot do that any more than he can actually rescind a contract unless such rescission is for the benefit of the infant. This point never seems to have come to the mind of the learned county court judge. There is evidence on which he might find that it was, or was not, for the benefit of the infant. I prefer not to go into its character now

because, as he has to consider the matter again, he had better consider it untrammelled by any remarks from us. This case must be sent back to the learned county court judge to find whether the repudiation by the apprentice of the contract if it was accepted, as it was in this case, by the defendant, would or would not be for the benefit of the infant. If he decides that it would be for the benefit of the infant then I think the defendant has established his case; if he finds it was not for the benefit of the infant then I think the infant is entitled to succeed in the action. There has been no question raised before us as to the amount of the damages, and, therefore, I have nothing to say on that point.

SHEARMAN, J.—I am of the same opinion. I arrive at the same conclusion, though not by the same process of thought. To my mind, this case raises some very difficult questions which have been fully argued, but it seems to me that, as to one of the most important of the points argued, the learned county court judge did not give any real decision.

The action was brought, first of all, for a breach of contract by the defendant to teach. The learned judge negatived that on the facts, and he also said there was another answer, although it became unnecessary, that the conduct of the plaintiff under well-decided cases was such as to be putting out of his power any desire to learn. What remained in the action was for putting an end to the agreement altogether. As to that, the defence was that the conduct of the plaintiff was such that the defendant was entitled to put an end to the agreement. I think the authorities, taken in historical order, show this, that, in the early days, there was the greatest reluctance to break any contract of apprenticeship at all. In that state of society, when it was considered of very great importance that children should be taught a trade, and not merely set to earn money, the courts held, and I have no doubt rightly, considering all the power which the master, who had the apprentices resident with him, had over them, that the obligation of the apprentice to serve and the obligation of the master to teach were not interdependent, but quite independent covenants. It was at the bottom of the reasoning that, if the apprentice did not choose to serve, the master could make him serve. That is practically impossible nowadays, but in those days it was not impossible; the apprentice lived in the house, he could be locked up, he could be given no dinner or he could be chastised; and society tolerated that method of conduct. The master was in the position of a schoolmaster and he could be made to teach; thus, a master could not defend an action, still less could he put an end to an apprenticeship deed, because he had it in his power to make the apprentice do all that the apprentice bound himself to do.

When we come to the later cases, one finds, as not infrequently happens with regard to the history of cases, that the courts, when society had altered, found themselves able to distinguish when they were not absolutely bound by authority; and we find that, in later cases, it was held that, when an action was brought for failing to maintain and teach, it was an answer to that action (as in *Hughes* v. *Humphreys* (5)), to say that, when the apprentice had absented himself for good that was an answer to the action because, as I understand it, there was no breach, since, there being nobody to teach, the master could not teach and there was no longer any power to enforce the duties on him. There are a number of cases which confirm the earlier cases about these being independent covenants and that the master had no right to dismiss for mere disobedience to orders, as happens in the ordinary case of master and servant. Then came *Raymond* v. *Minton* (6), where it was held in so many words that to an action on covenant against the master for not teaching his apprentice it is a good plea that the apprentice would not be taught and by his own acts prevented the master from teaching him. In 1891, *Learoyd* v. *Brook* (4) came before the court, and A. L. SMITH, J., in a considered judgment, extended the principle of *Hughes* v. *Humphreys* (5)—though I do not think he mentioned it—and *Raymond* v. *Minton* (6) and said that, where there is habitual and systematic conduct, being a part of the

character of the apprentice, which renders it impossible that the work of service and of teaching should continue, the master is at liberty to put an end to the contract. That case was one not of habitual declining to do work, but of habitual dishonesty. I think the principle he laid down was that, if there has been a course of conduct which renders it impossible in the interests of the master or the community or anybody else, and, it may be said, of the apprentice himself, that the relationship should continue, the master is entitled to put an end to the contract.

Did the facts in this case come under that principle? The facts found were that the plaintiff and his father wanted to get more money and the plaintiff not only declined now and then to push a barrow, or was rude now and then, but was habitually determined to so act in order that he might get dismissed. The learned county court judge says no self-respecting master could have continued to tolerate it; but then he does not go on to find as a fact that he was justified in putting an end to the contract and that the case came within the principle of *Learoyd* v. *Brook* (4); he grounds his judgment on an entirely different decision. The decision he gave was that this was an offer of repudiation by conduct and an acceptance of that offer by the defendant. That being in fact the making of a new contract between the parties, one of whom was an infant, it is not effective unless the court, before whom it comes, holds that it was for the benefit of the infant, but the judge did not decide that. There is evidence on which he might decide.

I think the case should go back to the judge to decide whether the rescission of the contract effectuated in that way, or purported to be effected in that way, was, or was not, for the benefit of the infant. If it was not, it will not be effective and the contract must go on.

Case remitted.

Solicitors: *Mills, Lockyer, Church & Evill*; *Joynson-Hicks & Co.*, for *Lyndurst G. Groves*, Portsmouth.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

Re TOWNLEY. PUBLIC TRUSTEE *v.* ALLDER AND OTHERS

[Chancery Division (Sargant, J.), November 10, 11, 24, 1921]

[Reported [1922] 1 Ch. 154; 91 L.J.Ch. 258; 126 L.T. 591; 66 Sol. Jo. 157]

Equity—Marshalling—Will—Special fund for payment of debts, testamentary expenses and duties—Insufficiency of special fund—Marshalling as against residue—Payment of liabilities rateably.

By his will and codicil the testator created a special fund to discharge both general liabilities and particular liabilities, and there was no indication that these two sets of liabilities were to be discharged otherwise than concurrently and pari passu. On an insufficiency in the special fund to discharge both sets of liabilities the specific legatees claimed to marshal as against the residuary legatees so that the deficiency should be paid out of residue.

Held: both the general liabilities and the particular liabilities were to be discharged rateably out of the special fund, and the particular liabilities could not by the process of marshalling be paid in full so as to throw the deficiency on residue.

Notes. As to the application of marshalling, see 14 Halsbury's Laws (3rd Edn.) 612; and for cases see 23 Digest (Repl.) 491 et seq.

Cases referred to:

(1) *Dolphin* v. *Aylward* (1870), L.R. 4 H.L. 486; 23 L.T. 636; 19 W.R. 49, H.L.; 20 Digest 499, *2306.*

(2) *Re Grainger, Dawson* v. *Higgins*, [1900] 2 Ch. 756; 69 L.J.Ch. 789; 83 L.T. 209; 23 Digest (Repl.) 481, *5488.*

(3) *Boazman* v. *Johnston* (1830), 3 Sim. 377; 57 E.R. 1039; 20 Digest 500, *2313.*

Also referred to in argument:

Aldrich v. *Cooper* (1803), 8 Ves. 382; 23 Digest (Repl.) 539, *6042.*

Re Roberts, Roberts v. *Roberts*, [1902] 2 Ch. 834; 72 L.J.Ch. 38; 87 L.T. 523; 51 W.R. 89; 47 Sol. Jo. 30; 23 Digest (Repl.) 537, *6026.*

Re Stokes, Parsons v. *Miller* (1892), 67 L.T. 223; 23 Digest (Repl.) 537, *6024.*

Re Bate, Bate v. *Bate* (1890), 43 Ch.D. 600; 59 L.J.Ch. 277; 62 L.T. 559; 23 Digest (Repl.) 537, *6023.*

Adjourned Summons to determine whether, in the event of a certain specific fund proving insufficient to pay the funeral and testamentary expenses and debts, and the duties in full, the funeral and testamentary expenses and debts ought to the extent of the deficiency to be paid out of the residue.

The testator, by his will made on Feb. 14, 1919, gave certain specific bequests and devises, and continued as follows:

"I direct that after payment thereof of all debts, funeral, and testamentary expenses and all death duties attracted and payable under the provisions contained in this my will, any money I may have or money lying in the bank or otherwise or represented by war stock or war bonds may be divided and one half part thereof paid to . . . W. G. Allder and the other half part thereof to C. Lawrence and F. E. Lawrence as joint tenants."

The testator directed the sale, conversion, and investment of his residue, and, after making provision for certain small annuities of a terminable nature, gave the income of the investments representing residue as to one half to W. G. Allder and as to the other half to C. Lawrence and F. E. Lawrence for their lives, and the life of the survivor with provision for the accruer of the income of each half in favour of the beneficiary or beneficiaries of the other half, and an ultimate gift over on the death of the survivor of the three beneficiaries to a hospital. The testator made on Oct. 14, 1919, a codicil to his will which in effect interposed in the gift of residue immediately before the ultimate gift of capital life interests in favour of eight named persons and the survivors or survivor of them. The testator died on Dec. 14, 1919. It had already been decided that the duties referred to in the will included estate, legacy, and succession duties on the specific and pecuniary legacies and on the annuities and on the residue, and that these duties were all payable primarily out of the special fund in exoneration of the residue. The special fund proved insufficient for this purpose.

Crossman for the Public Trustee.

J. V. Nesbitt for an annuitant.

Farwell for the defendants, C. Lawrence and F. E. Lawrence.

C. R. R. Romer for the defendant W. G. Allder, and *Whitfield-Hayes* for one of the eight tenants for life.

Ramsbotham for the hospital.

Cur. adv. vult.

Nov. 24. **SARGANT, J.,** read the following judgment in which after stating the terms of the will, he continued: I have already decided what are the funds and property comprised in the special fund, and I have also decided that the death duties referred to in the specific gift include the estate duties and legacy and succession duties payable on the testator's death on the specific and pecuniary legacies and the annuities given by the will and also on the residue of the proceeds of his real and personal estate; but they do not include any estate duty payable on the death of any annuitant or tenant for life under the will and codicil; and further

that these death duties are payable primarily out of the special fund in exoneration of the other portions of the testator's estate. A

A further question arises in the probable event of the special fund proving insufficient to pay the debts, funeral and testamentary expenses and death duties charged upon it. Of these charges the debts, funeral and testamentary expenses, and some of the death duties, namely, those on the residuary personalty, and probably the legacy duty on a £100 legacy given free of duty, will be payable out of general residue should the special fund be insufficient to satisfy them. On the other hand some of the death duties, such as those on real estate and on specific legacies and annuities not given free of duty, would not be payable out of general residue, should the special fund be insufficient to pay them, but would, as to any deficiency, be left to be borne by the devises and legacies themselves. The former class of debts, expenses and death duties may be shortly called "general liabilities" and the latter class "particular liabilities." It is suggested that, in case of the special fund proving insufficient to discharge both the general liabilities and the particular liabilities, a process of marshalling should be resorted to, and that the special fund should be applied first in payment of the particular liabilities in full, and as to the residue only in payment of the general liabilities, so as to leave the balance of the general liabilities to be discharged out of the general residue. B C D

This marshalling in favour of the specific and pecuniary legacies and to the prejudice of residue is, of course, entirely distinct from the ordinary principle of marshalling in the administration of assets, which is a mere process of adjustment directed to ensuring that assets shall ultimately be applied in accordance with their proper order of liability, notwithstanding that in the actual course of administration assets more remotely liable have been used in priority to those more immediately liable. Nor is it sought to be identified with or justified by the well-established rules as to marshalling in the case of mortgages, though its results here would be similar to the results in those cases. The claim is rested on, and said to be justified by, a broad general principle in the administration of assets which is stated in the following sweeping terms in JARMAN ON WILLS (6th Edn.), p. 2095 [see now (8th Edn.), p. 1958], namely, E F

> "The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of the persons, of the order of applying the assets, do not completely exemplify an important principle by which the courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim, or, in other words, the court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself, and the person having no other fund, the court will place that person in his room to the extent to which the common fund has been so applied. This principle is applied in favour of both creditors and legatees." G H

It is unnecessary for me to consider whether this broad general statement of principle is completely justified by the cases referred to by the learned author. But it cannot, in my judgment, apply either necessarily or even primâ facie to cases like this where the two classes of claims and the two sets of funds are alike created under the same instrument or set of instruments. In such cases it seems to me that the relative rights of the two sets of claimants against the two sets of funds must depend on the intention of the instrument, as expressed or sufficiently indicated by its terms, and on that intention only. Here under the will and codicil the special fund has been formed for the purpose of discharging both the general liabilities and the particular liabilities alike, and no indication is given that these two sets of liabilities are to be discharged otherwise than concurrently and pari passu. Under other provisions of the will and codicil one set of persons are given specific I

bequests and annuities which would, but for the exoneration afforded by the special fund, be subject to the payment of the whole of the death duties thereon, i.e., the particular liabilities; and another set of persons are given the residue of the estate, which would but for the like exoneration, be subject to the payment of the whole of the debts and of part of the death duties, i.e., the general liabilities. That is the scheme of the testator's bounty. The relations of the special fund and the general residue (both of which form part of the whole estate out of which the general liabilities are payable) are entirely the creation of the will itself. And a process which should, on the special fund proving insufficient to discharge both the special liabilities and the general liabilities, apply the special fund primarily in the payment of the special liabilities, and so benefit the specific legatees and annuitants at the cost of the residuary legatee, would, in my opinion, result in an alteration as between the two sets of beneficiaries of the benefits conferred on them respectively. Indeed, the fact that any part of the general liabilities undischarged out of the special fund will naturally fall on general residue is, for the purposes of the apparent scheme of the will and codicil, no more important than the corresponding fact that any parts of the particular liabilities which are also undischarged out of the special fund will fall on the specific bequests and annuities. And the claim of the specific legatees to marshal as against the residuary legatees seems to me little, if at all, more meritorious than would be a corresponding claim by the residuary legatees to effect a similar process of marshalling as against the specific legatees and annuitants.

In my judgment this view is entirely in accordance with the views expressed on this point in *Dolphin* v. *Aylward* (1), and with the second decision of the Court of Appeal in *Re Grainger* (2). Indeed, this second case is a stronger one than the present, since there such a process of adjustment was not allowed even against those taking on an intestacy whose position is perhaps hardly as strong as that of residuary legatees. *Boazman* v. *Johnston* (3) is also a stronger case than the present in the same direction. Accordingly I decide on the point, that there is no case for marshalling as suggested and that the whole of both the general liabilities and the particular liabilities are to be discharged rateably out of the special fund.

Solicitors: *Warwick Williams & Marchant*; *H. Anderson* for *A. F. Eaton*, Bournemouth; *Russell, Son & Fisher*; *Monier-Williams, Robinson & Milroy*.

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law*.]

A

BAKER *v.* JAMES BROS. & SONS, LTD.

[KING'S BENCH DIVISION (McCardie, J.), March 22, 23, 1921]

[Reported [1921] 2 K.B. 674; 90 L.J.K.B. 1190; 125 L.T. 414; 37 T.L.R. 591; 19 L.G.R. 551] B

Master and Servant—Duty of master—Provision of safe plant—Motor car—Knowledge by servant of defect—Complaint to master—Defect not remedied—Injury to servant—Volenti non fit injuria.

The plaintiff was employed by the defendants as a commercial traveller in the grocery trade. He was supplied with a motor car for the purpose of his rounds, showing samples, taking orders and delivering goods. Finding that the starting gear was defective, he complained on several occasions to the defendants of the defect, but it was not remedied. While the plaintiff was on one of his journeys, the car stopped, and the plaintiff, in trying to re-start it, was injured, and in consequence was unable to return to his employment. In an action brought by the plaintiff to recover damages for personal injuries owing to the defendants' negligence, the judge found that the plaintiff's injury resulted from the defendants' negligence. C D

Held: knowledge of a defect was only evidence, not conclusive evidence, of an agreement by a servant to take the risk on himself and so did not of itself debar him from a remedy; the question whether the servant had voluntarily undertaken to accept the risk for himself was one of fact; in the present case, the plaintiff never undertook or consented to take on himself the risks caused by the defective car, and, therefore, he was entitled to damages. E

Griffiths v. *London and St. Katherine Docks Co.* (1), (1884) 13 Q.B.D. 259, not followed.

Notes. Considered: *Fanton* v. *Denville*, [1932] All E.R.Rep. 360. Referred to: *Knott* v. *L.C.C.*, [1933] All E.R.Rep. 172; *Read* v. *J. Lyons & Co.*, [1944] 2 All E.R. 98. F

As to safety of employment, see 25 HALSBURY'S LAWS (3rd Edn.) 505 et seq.; and for cases see 34 DIGEST 194 et seq.

Cases referred to:

(1) *Griffiths* v. *London and St. Katherine Docks Co.* (1884), 13 Q.B.D. 259; 53 L.J.Q.B. 504; 51 L.T. 533; 49 J.P. 100; 33 W.R. 35, C.A.; 34 Digest 204, *1665.* G

(2) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 202, *1647.*

(3) *Watling* v. *Oastler* (1871), L.R. 6 Exch. 73; 40 L.J.Ex. 43; 23 L.T. 815; 19 W.R. 388; 34 Digest 204, *1675.* H

(4) *Williams* v. *Clough* (1858), 3 H. & N. 258; 27 L.J.Ex. 325; 31 L.T.O.S. 89; 157 E.R. 468; 34 Digest 206, *1688.*

(5) *Smith* v. *Baker*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 34 Digest 202, *1657.*

(6) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338; 68 L.J.Q.B. 918; 81 L.T. 62; 47 W.R. 680; 15 T.L.R. 468, C.A.; 34 Digest 195, *1590.* I

(7) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Masq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; 6 W.R. 664, H.L.; 34 Digest 126, *971.*

(8) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709, C.A.; 34 Digest 192, *1570.*

(9) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, *1.*

(10) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. Gould, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

(11) *Webb* v. *Rennie* (1865), 4 F. & F. 608; 34 Digest 200, *1635*.

(12) *Murphy* v. *Phillips* (1876), 35 L.T. 477; 24 W.R. 647; 34 Digest 197, *1619*.

(13) *Paterson* v. *Wallace* (1854), 1 Macq. 748; 23 L.T.O.S. 249, H.L.; 34 Digest 194, *1586*.

(14) *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 34 Digest 157, *1231*.

(15) *Lloyd* v. *Woolland Bros.* (1902), 87 L.T. 73; 18 T.L.R. 578; reversed 19 T.L.R. 32, C.A.; 34 Digest 204, *1667*.

(16) *Cole* v. *De Trafford* (*No. 2*), [1918] 2 K.B. 523; 87 L.J.K.B. 1254; 119 L.T. 476; 62 Sol. Jo. 635, C.A.; 34 Digest 198, *1621*.

(17) *Abbott* v. *Isham* (1920), 90 L.J.K.B. 309; 124 L.T. 734; 85 J.P. 30; 37 T.L.R. 7; 18 L.G.R. 719; 34 Digest 197, *1617*.

(18) *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, D.C.; 34 Digest 225, *1884*.

(19) *Monaghan* v. *Rhodes*, [1920] 1 K.B. 487; 89 L.J.K.B. 379; 122 L.T. 537; 34 Digest 205, *1682*.

(20) *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283, H.L.; 41 Digest 418, *2616*.

Also referred to in argument:

Toronto Power Co., Ltd. v. *Paskwan*, [1915] A.C. 734; 84 L.J.P.C. 148; 113 L.T. 353, P.C.; 34 Digest 196, *1611*.

Further Consideration after trial of an action by McCardie, J., at Northampton Assizes.

The action was brought by the plaintiff to recover from the defendants damages for personal injuries and loss sustained in consequence of the negligence of the defendants. The facts are set out in the judgment of McCardie, J.

Bernard Campion for plaintiff.

Norman Birkett for defendants.

Cur. adv. vult.

Mar. 23. **McCARDIE, J.**, read the following judgment: This action is brought by the plaintiff to recover damages for personal injury and loss resulting from the negligence of the defendants, who were his employers. The material facts, as I find them, can be briefly stated. The defendants (a private limited company) are wholesale grocers at Northampton. The plaintiff was in their employ for over twenty years as a commercial traveller. The defendants supplied various dealers in and about Northampton with groceries. It was the plaintiff's duty to travel around, to show samples, take orders, and deliver goods. For this purpose he was supplied with a motor car. The car in question was a two-seater Calcott. He first began to use it regularly in March, 1920. He found that the starting gear was defective. He complained to Mr. T. James and Mr. J. James, who were the two managing directors and also the principal shareholders of the defendant company. He also complained to Bates, who was a mechanic employed by the defendants to keep in order the cars and lorries used in the defendants' business. The defect was not remedied. On April 12, 1920, he again complained to Mr. T. James, who admitted that the car was defective and who referred him to Bates. The plaintiff saw Bates, who said that he was overworked, that all the cars needed overhauling, and that the plaintiff must do the best he could with the Calcott car. The defect remained. The plaintiff again complained to the two managing directors, but nothing was done to remedy the fault. On April 19, 1920, the plaintiff again saw both the managing directors and told them that the defect still existed. Mr. T. James told the plaintiff that he was a nuisance. The plaintiff replied that, if he

was laid up by personal injury, he would be an expense to the defendants. Mr. James replied: A

"Well, we do not want you to be laid up. Use the car this week as no other car is available. I will then have it seen to when you get back, and you can go your next round by rail."

So the plaintiff started on his journey in the Calcott car with the starting gear still defective. Some distance out the car stopped dead. The plaintiff tried to re-start it. He kept turning the handle for five minutes, but no spark came. The handle was low. The clearance was small. As the plaintiff was vainly endeavouring to start the car he twisted an abdominal muscle and suffered a severe abdominal strain. He became ill. He got home, was in bed for a month, saw several doctors, and it is clear that he suffered from serious neurasthenia consequent on the accident. He was not able to return to his employment. The defendants paid him no salary during his illness, and, in July, 1920, they terminated his employment. It is clear that the starting gear of the car was seriously defective. The defendants knew that fact perfectly well. I am satisfied that the defendants were guilty of negligence in not causing the defect to be remedied and in causing or allowing the plaintiff to use the defective vehicle. I hold that the defendant company, the two managing directors, and Bates were alike guilty of negligence. The serious injury to the plaintiff resulted from that negligence. Primâ facie, therefore, I think that he is entitled to substantial damages. I accept without hesitation the evidence of the plaintiff. He was a most frank and truthful witness.

Counsel for the defendants, however, contends that the defendants are entitled to judgment on the ground that the plaintiff, with knowledge of the defect, continued to use the car. That the plaintiff had that knowledge is clear. Hence counsel relies on *Griffiths* v. *London and St. Katherine Docks Co.* (1). This decision has led to much confusion and ever-recurring doubt. The real question before me is whether or not that case is still good law. If yes, the plaintiff will fail. If no, the plaintiff succeeds. *Griffiths* v. *London and St. Katherine Docks Co.* (1) is (as counsel for the plaintiff points out) so often cited both at nisi prius and in the county courts that the time has come to test the validity of that decision. Here the point directly arises and I am bound to deal with the able arguments of counsel on both sides.

What, then, did *Griffiths' Case* (1) decide? The headnote is clear. It correctly states the effect of the judgments. It is this (13 Q.B.D. 259):

"In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger."

In the course of his judgment BRETT, M.R., said (ibid. at p. 260):

"Now where it is an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shows the cause of action. That was decided many years ago by *Priestley* v. *Fowler* (2). If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a primâ facie cause of action, it is necessary that they should be shown to exist in the statement of claim."

So, too, BOWEN, L.J., said (ibid. at p. 261):

"The old form of declaration used to show that the danger which caused the accident was known to the master and unknown to the servant. Both

these allegations are material, because without them there is no cause of action."

So, too, Fry, L.J., said (ibid.):

"It appears to me to be plain that the knowledge of the master and the ignorance of the servant are necessary to form the cause of action."

These are strong opinions. They were given by distinguished judges. Are they still binding? In my opinion, the answer is no. I think that the judgments in *Griffiths' Case* (1) are inconsistent with both earlier and later cases, and that they conflict with the actual decisions of the House of Lords. It will be found, I believe, that *Griffiths' Case* (1) has never been cited with direct approval. It has been mentioned in order to be distinguished. It has become an anomaly rather than an authority.

Three decisions were cited by Brett, M.R., in support of his view. The first was *Priestley* v. *Fowler* (2). I venture most respectfully to think that this decision was not relevant. It did not purport to deal with the personal negligence of the master. It dealt with the negligence of a fellow-servant. *Priestley* v. *Fowler* (2) is the originating decision on the doctrine of common employment [the doctrine of common employment was abolished by the Law Reform (Personal Injuries) Act, 1948] : see Sir Frederick Pollock's lucid work on Torts (11th Edn.) p. 100. The other decisions cited by Brett, M.R., were *Watling* v. *Oastler* (3) and *Williams* v. *Clough* (4). These two decisions tended to show that knowledge by a servant of the defect would preclude him from recovering. It is clear, however, that these two cases are now wholly inconsistent with the decision of the House of Lords in *Smith* v. *Baker* (5). I deal with this point later.

It is essential, in order to avoid confusion, to distinguish cases of common employment, i.e., where one servant of a master negligently causes injury to another servant, from cases where the master is charged with his own negligence, as, e.g., where he fails to provide proper and suitable plant: see *Williams* v. *Birmingham Battery and Metal Co.* (6), or fails to select proper and competent servants: see *Bartonshill Coal Co.* v. *Reid* (7), or is otherwise himself personally guilty of negligent conduct. Bearing this in mind, I feel that the best way to test *Griffiths' Case* (1) is to observe that, on the facts there stated, the court laid down two distinct things in their proposition as being essential to success by the plaintiff: (i) Proof that the master knew of the danger. (ii) Proof that the servant was ignorant of the danger. In my humble opinion, both these branches of the propositions are erroneous. If so, *Griffiths' Case* (1) cannot be an authority on any point.

I take the two heads separately. First, I do not think it was ever essential, nor is it now essential, to show that the master had actual knowledge of the danger or defect. The action against the master by a servant for negligence was based, as it purported to be based, on negligence and not on knowledge. It may well be that negligence could not in certain cases be shown without proof of knowledge. It may also be that, once knowledge was shown, the inference of negligence would be drawn. But proof of knowledge was only a useful method of proving negligence. Negligence could exist and can exist without actual knowledge by the master of the danger or defect. Indeed, the absence of knowledge may itself be the basis of the charge of negligence. The relationship between master and servant normally places upon the master the duty of care towards his servant. He falls within the broad sphere of duty indicated by *Heaven* v. *Pender* (8) and similar cases. His duty can scarcely be less than that of a stranger. It may indeed be greater. Now what does the duty of care involve? The answer is supplied by the well-known words of Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* (9), (11 Exch. at p. 784), where he defines negligence as

"the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Subject to the observations in *Le Lievre* v. *Gould* (10), the words of ALDERSON, B., are still a useful guiding rule. It follows, therefore, that a master may be liable for a danger or defect (causing hurt to his servant) not only where he knew, but where he ought to have known of it. The negligence may be either (a) where he knows and negligently fails to remedy, or (b) where he ought to have known, but negligently fails in acquiring knowledge, and, therefore, negligently fails to remove the danger or defect.

This view, I think, is amply supported by authority. Thus, in *Webb* v. *Rennie* (11) it was held by COCKBURN, C.J., that an employer was liable because he failed to have a defective scaffold pole inspected. So, too, in *Murphy* v. *Phillips* (12), an employer was held liable (per KELLY, C.B., and CLEASBY and POLLOCK, BB.) for not having a defective chain periodically inspected, although it was found that he had no actual knowledge of the defect. In *Paterson* v. *Wallace* (13) LORD CRANWORTH said (after pointing out that Scottish and English law were alike on the point) (1 Macq. at p. 751):

> "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arises, the master is responsible."

This observation is, I conceive, an illustration of the broad rule laid down in *Mersey Docks Trustees* v. *Gibbs* (14). In *Lloyd* v. *Woolland Bros.* (15), BRUCE, J., after referring to the criticism on *Griffiths' Case* (1) in CLERK AND LINDSELL ON TORTS (see (6th Edn.) p. 100), clearly thought that it was not essential for the servant to aver the knowledge of the master. He thus adopted the words of LORD WATSON in *Smith* v. *Baker* (5) where he said ([1891] A.C. at p. 356):

> "At common law his ignorance [i.e., the master's] would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect."

In *Cole* v. *De Trafford* (*No. 2*) (16) the view of the Court of Appeal was clearly against the view of the court in *Griffiths' Case* (1). Thus, PICKFORD, L.J., said ([1918] 2 K.B. at p. 528):

> "I quite agree with the form of statement of the duty [i.e., of the master] by the learned judges in the Divisional Court, i.e., to take reasonable care to maintain the premises free from any concealed danger of which she was aware, or ought to have been aware, but in order to apply it to any particular case the expression 'ought to have been aware' must be explained, and after explanation it seems to me to mean 'would have known' but for the failure to exercise reasonable care and skill, i.e., but for negligence."

BANKES, L.J., apparently accepted the same principle. So, too, SCRUTTON, L.J., said (ibid. at p. 537):

> "He [the plaintiff] must show that the master did not take reasonable care to remedy the defect, either because he knew of it and did nothing, or because he ought to have known of it and so was negligently ignorant."

(See, too, per HORRIDGE, J., in *Abbott* v. *Isham* (17).) I come to the conclusion on the authorities that the first branch of the proposition in *Griffiths' Case* (1) is not now law. A servant need not aver the actual knowledge of the danger or defect by his master. It suffices to allege that he knew or ought to have known.

I also think that the second branch of the proposition in *Griffiths' Case* (1) is to be treated as erroneous at the present day. It is, I feel, opposed to principle to say that, because a servant knows of the defect or danger, he is, therefore, debarred from recovering damages for injury through his master's negligence. To so suggest seems to me to transpose the maxim volenti non fit injuria, which is sound doctrine, with a wholly different maxim, viz., scienti non fit injuria: see the cogent observations in POLLOCK ON TORTS (11th Edn.), p. 166, and SALMOND ON TORTS (4th Edn.), p. 51. This was clearly pointed out by LORD ESHER himself in *Yarmouth* v.

France (18) when he said (19 Q.B.D. at p. 657): "The maxim, be it observed, is not 'scienti non fit injuria,' but 'volenti.' "

The matter is now beyond argument, for in *Smith* v. *Baker* (5) the House of Lords held that knowledge of a danger or defect is evidence, but only evidence, of an agreement by a servant to take the risk on himself. It does not of itself debar him from remedy. The question is ever one of fact, viz., whether the plaintiff has voluntarily undertaken and contracted to accept the risk for himself. An observation by Lord Herschell is worthy of quotation here. He said ([1891] A.C. at p. 362):

> "If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe that it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong."

The principle thus laid down in *Smith* v. *Baker* (5) was emphatically applied by the Court of Appeal in *Williams* v. *Birmingham Battery Co.* (6) and by Atkin, L.J., in *Monaghan* v. *Rhodes* (19) ([1920] 1 K.B. at pp. 498–9).

I venture to agree, however, with the useful observation of Sir John Salmond in his work on Torts (5th Edn.) p. 58, when he says:

> "Knowledge of the danger, even if it does not prove an agreement to take the risk within the rule in *Smith* v. *Baker* (5), may nevertheless be a bar to the plaintiff's action for two other reasons: (a) It may negative the existence of any negligence on the part of the defendant in causing that danger; (b) it may establish the existence of contributory negligence on the part of the plaintiff."

For the reasons I have ventured to give (and without citation of other decisions), I come to the conclusion that *Griffiths* v. *London and St. Katherine Docks Co.* (1) is fundamentally inconsistent with other and binding judgments. It conflicts with established principles, and is, I think, destitute of validity at the present day. In my humble view, it cannot now be quoted as an authority. It is merely a case of historical interest. I feel sure that it would be far from the wish of the great judges who decided *Griffiths' Case* (1) that a decision should, from mere respect to their high distinction, be distinguished on purely artificial and inaccurate grounds, when, apart from the greatness of their names, it would be definitely rejected as an authority.

On the facts of the present case, I find for the plaintiff. He has suffered damage through the personal negligence of the defendants. The default of the two managing directors (who are also the directors and principal shareholders of the defendant company) must be regarded as the personal default of the defendant company: see *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (20). It is clear, and I so hold, that the plaintiff never undertook or consented to take on himself the risks caused by the defective car or the defendants' negligence. It is also clear, and I so hold, that the plaintiff was not guilty of contributory negligence. The damages are substantial. I have carefully considered the details. I assess the amount at £400. I, therefore, give judgment for that sum with costs.

Judgment for plaintiff.

Solicitors: *Phipps & Troup*, Northampton; *J. D. Douglas*, Northampton.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

COLLEY *v.* OVERSEAS EXPORTERS (1919), LTD.

[King's Bench Division (McCardie, J.), May 12, June 9, 1921]

[Reported [1921] 3 K.B. 302; 90 L.J.K.B. 1301; 126 L.T. 58; 37 T.L.R. 797; 26 Com. Cas. 325]

B

Sale of Goods—Recovery of price by seller—F.o.b. contract—Failure to deliver on board due to buyers' fault.

The seller sold to the buyers a quantity of unascertained leather goods f.o.b. Liverpool. There was no agreement that the price should be payable on any specific date before or irrespective of delivery. Pursuant to the buyers' instructions the seller dispatched the goods to Liverpool for shipment on a named C ship, but no effective ship was provided by the buyers and the goods were left lying at the docks. In an action by the seller for the price,

Held: as the contract was an f.o.b. contract and the goods had not been delivered on board ship the property in them had not passed, and, therefore, in the absence of an agreement providing for payment of the price before delivery and notwithstanding the fact that the failure to deliver was due to the fault of D the buyers, no action could be maintained for the price.

Notes. Referred to: *Shell-Mex* v. *Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39; *Mona Oil Equipment and Supply Co.* v. *Rhodesia Railways Ltd.*, [1949] 2 All E.R. 1014.

As to f.o.b. contracts, see 29 Halsbury's Laws (2nd Edn.) 225 et seq.; and for cases see 39 Digest 558, 559. E

Cases referred to:

(1) *Mackay* v. *Dick* (1881), 6 App. Cas. 251; 29 W.R. 541, H.L.; 39 Digest 647, *2424*.

(2) *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T.Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, *3520*. F

(3) *Workman, Clark & Co., Ltd.* v. *Lloyd Brazileño*, [1908] 1 K.B. 968; 77 L.J.K.B. 953; 99 L.T. 477; 24 T.L.R. 458; 11 Asp.M.L.C. 126, C.A.; 39 Digest 644, *2394*.

(4) *Browne* v. *Hare* (1859), 4 H. & N. 822; 29 L.J.Ex. 6; 7 W.R. 619; 157 E.R. 1067; sub nom. *Hare* v. *Browne*, 33 L.T.O.S. 334; 5 Jur.N.S. 711, Ex. Ch.; 39 Digest 513, *1306*. G

(5) *Inglis* v. *Stock* (1885), 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821; 33 W.R. 877; 5 Asp.M.L.C. 422, H.L.; 39 Digest 530, *1433*.

(6) *Wimble, Sons & Co.* v. *Rosenberg & Sons*, [1913] 3 K.B. 743; 82 L.J.K.B. 1251; 109 L.T. 294; 29 T.L.R. 752; 57 Sol. Jo. 784; 12 Asp.M.L.C. 373; 18 Com. Cas. 65, 302, C.A.; 39 Digest 575, *1800*.

(7) *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638; 99 E.R. 1295; 12 Digest H (Repl.) 489, *3672*.

(8) *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 21 T.L.R. 413; 10 Asp.M.L.C. 52; 10 Com. Cas. 189, C.A.; 39 Digest 656, *2496*.

(9) *Sprague* v. *Booth*, [1909] A.C. 576; 78 L.J.P.C. 164; 101 L.T. 211, P.C.; 12 Digest (Repl.) 639, *4946*. I

(10) *Kleinert* v. *Abosso Gold Mining Co., Ltd.* (1913), 58 Sol. Jo. 45, P.C.; 39 Digest 661, *2519*.

(11) *Harrison* v. *Walker*, [1919] 2 K.B. 453; 89 L.J.K.B. 105; 121 L.T. 251; 12 Digest (Repl.) 685, *5272*.

(12) *Boulter* v. *Arnott* (1833), 1 Cr. & M. 333; 3 Tyr. 267; 2 L.J.Ex. 97; 149 E.R. 427; 39 Digest 544, *1542*.

(13) *Atkinson* v. *Bell* (1828), 8 B. & C. 277; Dan. & Ll. 93; 2 Man. & Ry.K.B. 292; 6 L.J.O.S.K.B. 258; 108 E.R. 1046; 39 Digest 497, *1146*.

(14) *Stein, Forbes & Co.* v. *County Tailoring Co.* (1916), 86 L.J.K.B. 448; 115 L.T. 215; 13 Asp.M.L.C. 422; 39 Digest 655, *2487.*

(15) *Laird* v. *Pim* (1841), 7 M. & W. 474; 10 L.J.Ex. 259; 151 E.R. 852; 39 Digest 645, *2395.*

(16) *East London Union* v. *Metropolitan Rail. Co.* (1869), L.R. 4 Exch. 309; 38 L.J.Ex. 225; 11 Digest (Repl.) 215, *804.*

(17) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest 290, *1032.*

(18) *Carr* v. *London and North Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest 288, *1020.*

(19) *Knights* v. *Wiffen* (1870), L.R. 5 Q.B. 660; 40 L.J.Q.B. 51; 23 L.T. 610; 19 W.R. 244; 21 Digest 312, *1147.*

Action under Ord. 14, tried by McCardie, J.

The seller claimed to recover the sum of £985 17s. 4d., which he alleged was due from the buyers as the price of goods sold and delivered. The following statement of facts is taken from the written judgment of McCardie, J. On Dec. 17, 1920, the seller, who was a leather merchant carrying on business at Sheffield, sold to the buyers, who were also carrying on business as merchants at Sheffield, a quantity of leather belting, of stated sizes and qualities, and at certain prices, f.o.b. Liverpool. The goods were not specific within the definition clause (s. 62) of the Sale of Goods Act, 1893. They were unascertained at the date of the bargain. On Jan. 26, 1921, the buyers sent shipping instructions to the seller. These directed that the goods should be packed for export and that they should be marked as ordered and then said:

> "Steamship *Kenuta*. Closing Despatch 2/2/21 and 5/2/21. Consign to Alexandra Dock Station, Liverpool, c/o Daniel Maccabe, Ltd., 17, Brunswick Street, Liverpool, advising them of despatch."

On Feb. 3, 1921, the seller wrote to Maccabe, Ltd. (who were shipping agents at Liverpool):

> "We have to-day despatched by the Great Central Rail. Co. (Alexandra Dock Station) to steamship *Kenuta* to the order of Overseas Exporters, Ltd., of Sheffield, seven cases of Leather Belting."

The goods left Sheffield and reached their destination in Liverpool to be dealt with by Maccabe, Ltd., in order to carry out the seller's obligation to put them on board. A series of misfortunes then occurred. The steamship *Kenuta* was withdrawn from service by her owners who then proposed to substitute another ship. This second ship was, however, inadequate for the intended voyage. Then a third vessel was put forward as a substitute, but, an accident having occurred to a fourth vessel of the same owners, the third ship had to be used to replace that damaged vessel. So a further ship was put forward, viz., the *Sorata*, which was then at Glasgow. She, however, could not reach Liverpool because of a strike. The result was that on April 14, 1921 (the day on which the writ was issued) the goods were still unshipped and the seller was still unpaid. Prior to April 14 Daniel Maccabe, Ltd., sent a note of their charges, amounting to £1 4s., to the seller, and on April 14 he gave them a cheque for that sum. He, of course, was responsible for these charges, as the cost of getting the goods on board fell on him under the contract.

Willes for the seller.

J. G. Joseph for the buyers.

Cur. adv. vult.

June 9. **McCARDIE, J.,** read the following judgment.—This action is brought upon a writ specially endorsed within Ord. 14, to recover the sum of £985 17s. 4d., alleged to be due from the buyers to the seller as the price of goods. The only question is whether that liquidated sum is due. No question arises, as yet, as to damages against the buyers. The case raises a point of legal interest and practical utility as to the circumstances under which the purchase price of goods

can be sued for. The facts are not in dispute. They can be briefly stated. [His Lordship stated the above facts and continued.] The buyers committed no deliberate breach of contract. They suffered a series of misfortunes, they failed, however, to name an effective ship. The seller, on his part, did all he could to carry out his obligations. In these circumstances the seller seeks to recover the price of the goods in question. The able argument of counsel for the seller rested on two well-known passages in the judgment of Lord Blackburn in *Mackay* v. *Dick* (1). The first passage is this (6 App. Cas. at p. 263):

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot be effectively done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

The second passage is this (ibid. at p. 264):

> "It would follow in point of law that the defender, having had the machine delivered to him was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. And by his own default he can now never be in a position to call upon the pursuers to take back the machine on the ground that the list has not been satisfied, he must, as regards that keep and consequently pay for it."

I will consider later on the facts in *Mackay* v. *Dick* (1). The contention of counsel for the seller before me was that inasmuch as the buyers' own default had here prevented the goods from being put on board they were disabled from saying that the price, which would have been payable if and when the goods had actually been put on board, was not now due to the plaintiff. This is a novel and interesting submission. An action for the price of goods is, of course, essentially an action for a liquidated sum. It involves special and technical elements. By special bargain the price of goods may be payable before delivery or before the property has passed from vendor to buyer (see, e.g., *Pordage* v. *Cole* (2), Leake on Contracts (6th Edn.), pp. 467–8; *Workman, Clark & Co.* v. *Lloyd Brazileño* (3); and s. 49 of the Sale of Goods Act, 1893, hereinafter cited).

In ordinary cases and unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions: see s. 28 of the Sale of Goods Act, 1893. Now the full meaning of the word "price" is not actually defined by the Sale of Goods Act, except, perhaps, in s. 1, which says:

> "A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price."

The circumstances, however, under which a claim to the price may be made (as distinguished from a claim for damages for breach of contract) are indicated in s. 49 of the Sale of Goods Act, 1893. Section 49 provides:

> "(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods; (2) where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

Here sub-s. (2) of s. 49 does not apply as it apparently did in *Workman, Clark & Co.* v. *Lloyd Brazileño* (3), where the price was payable by stated instalments on stated dates. The parties before me here made no special agreement as to the payment of the price. Nor can it be said that sub-s. (1) of s. 49 here applies, for the

property in the goods has not in fact and in law passed to the buyer. Several rules for the passing of property in sale of goods contracts are indicated in ss. 16, 17, 18 of the Act, and also in s. 32. The Act does not deal specifically with f.o.b. or c.i.f. contracts. Judicially settled rules exist, however, with respect to them. I need only deal with f.o.b. contracts. The presumed intention (see s. 18 of the Act) of the parties has been settled. It seems clear that, in the absence of special agreement, the property and risk in goods does not in the case of an f.o.b. contract pass from the seller to the buyer till the goods are actually put on board: see *Browne* v. *Hare* (4); *Inglis* v. *Stock* (5); *Wimble, Sons & Co.* v. *Rosenberg & Sons* (6), [1913] 3 K.B. at p. 757, per Hamilton, L.J.; and Benjamin on Sale (6th Edn.), p. 785, where several useful sales are collected. Unless, therefore, the principle involved in the words of Lord Blackburn in the second passage just cited from *Mackay* v. *Dick* (1) here applies the plaintiff will fail. Does the principle go to the extent submitted by counsel for the seller? It is well to consider *Mackay* v. *Dick* (1). The headnote says (6 App. Cas. 251):

> "If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied."

If this headnote be given its full apparent effect, then the principle it suggests would be most far reaching and the results extraordinary. The facts in *Mackay* v. *Dick* (1) must be remembered. Concisely put, they were these. By a contract in two letters the seller agreed to sell and deliver to the buyer's works a digging machine. The price of £1,115 was payable after the machine had satisfactorily performed certain tests. If it failed to do them the seller was to remove the machine. The machine was actually delivered into the buyer's possession. Owing, however, to the buyer's own default, it did not perform the tests. He refused to pay the price, and the plaintiff thereupon brought his action for the £1,115. The plaintiff succeeded on the principle stated by Lord Blackburn. It is to be clearly noted that a specific machine was fully delivered by the seller to the buyer. Apparently the property in the machine actually passed to the buyer. It is true that *Mackay* v. *Dick* (1) fell to be decided by Scottish law. The decision was given by the House of Lords in 1881, i.e., twelve years before the Sale of Goods Act, 1893. Scottish law then rested on the civil law and not on English common law and the transfer of property in goods, therefore, possessed special features derived from the Roman jurisprudence: see Erskine's Principles of the Law of Scotland (20th Edn.), p. 316; Chalmers on the Sale of Goods Act, 1893 (8th Edn.), p. 9; Brown on the Sale of Goods (2nd Edn.), p. 114. It seems clear, however, that under Scottish law the property in the digging machine had passed to the buyer upon delivery: (see Erskine, Principles of the Law of Scotland (20th Edn.) at p. 316). Hence I think that the sale and delivery of the machine must, in *Mackay* v. *Dick* (1), be deemed to have been complete, and payment of the price was therefore subject only to the resolutive condition imposed by the clause as to the test: see Chalmers on the Sale of Goods Act, 1893 (8th Edn.), pp. 6–7, and the cases there cited as to resolutive conditions. Default by the buyer as to the test was proved, and thus the seller got his judgment for the price. The actual decision in *Mackay* v. *Dick* (1) does not, therefore, aid the plaintiff here.

The real question is as to the extent to which the principle indicated by Lord Blackburn in the second passage I have quoted operates to make a price payable which apart from that principle would not be payable. Although, as I have said, *Mackay* v. *Dick* (1) turned on Scottish law, yet I think that that principle is equally settled in English law. It has frequently been asserted in well-known text-books based on English law: see, e.g., Addison on Contracts (11th Edn.), p. 624; Leake on Contracts (6th Edn.), p. 479. In Chitty on Contracts (17th Edn.), p. 833, the matter is put very broadly thus:

"If on a contract of sale payment is conditional on a certain thing being done by the seller, and the buyer prevents the possibility of the condition being fulfilled the seller may recover the price." A

So, too, in BENJAMIN ON SALE (6th Edn.), p. 641, is this passage:

"As long ago as 1787 ASHURST, J., in delivering the opinion of the King's Bench in *Hotham* v. *East India Co.* (7), said that it was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant 'it is equal to performance.'" B

The principle, moreover, has been frequently applied in the courts, and is illustrated, e.g., by *Braithwaite* v. *Foreign Hardwood Co.* (8). Nowhere is that principle more luminously dealt with or English decisions more aptly cited than in POLLOCK ON LAW OF CONTRACTS (6th Edn.), p. 410–412. C It is a corollary and amplification of the rule asserted in the first passage cited by me from LORD BLACKBURN'S judgment. This rule is recognised by the text-books as embodied in English law, which has been widely applied by high tribunals as of obvious justice and convenience: see, e.g., *Sprague* v. *Booth* (9); *Kleinert* v. *Abosso Gold Mining Co.* (10). I respectfully followed those authorities in *Harrison* v. *Walker* (11). D In deciding whether the argument of counsel for the seller in this case be sound, and in determining the extent to which the principle stated in the second cited passage from LORD BLACKBURN may be applied, it is necessary to remember the law which existed before the Act of 1893 was passed. In former days an action for the price of goods would only lie upon one or other of two counts. First, upon the indebitatus count for goods sold and delivered, which was pleaded as follows: E "Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant": see BULLEN AND LEAKE'S PLEADINGS (3rd Edn., 1868), p. 38. This count would not lie before delivery: see *Boulter* v. *Arnott* (12). The count was applicable where upon a sale of goods the property had passed, the goods had been delivered to the purchaser, and the price was payable at the time of action brought. Secondly, upon the indebitatus count for goods bargained and F sold which was pleaded as follows: "Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant": see BULLEN AND LEAKE'S PLEADINGS (3rd Edn., 1868), p. 39. This count was applicable where upon a sale of goods the property had passed to the purchaser, and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. If the property had not passed the count would not lie: see *Atkinson* v. *Bell* (13). G In my view the law as to the circumstances under which an action will lie for the price of goods has not been changed by the Sale of Goods Act, 1893. That enactment appears to crystallise and confirm the old law: see CHALMERS ON THE SALE OF GOODS ACT, 1893 (8th Edn.), p. 112. By the definition clause of the Act of 1893 (s. 62) "sale" is to include a bargain and sale as well as a sale and delivery. A sale or, as it is called for distinction, an executed contract of sale is a contract plus a H conveyance: see CHALMERS ON THE SALE OF GOODS ACT, 1893 (8th Edn.), p. 8. The existing condition of the law is put in BENJAMIN ON SALE (6th Edn.), p. 946, where it is rightly stated that the old principles are by implication preserved by s. 49 (1) of the code, and the learned authors add

"where the property has not passed the seller's claim must, as a general rule, be special for damages for non-acceptance." I

An exception to the general rule is to be found in the cases provided for by s. 49 (2) of the Act. In my opinion (subject to what I say hereafter as to estoppel) no action will lie for the price of goods until the property has passed save only in the special cases provided for by s. 49 (2). This seems plain both on the Act and on common law principle. I have searched in vain for authority to the contrary.

A clear distinction exists between cases where the default of the buyer has occurred after the property has passed and cases where that default has been before

the property has passed. To the former cases *Mackay* v. *Dick* (1) may be applied on appropriate facts. To the latter cases *Mackay* v. *Dick* (1) does not apply so as to enable the buyer to recover a price as distinguished from damages for breach of contract. To hold that *Mackay* v. *Dick* (1) applies where the property has not passed would lead to extraordinary results. Here, e.g., the substantial allegation against the defendants is that their default prevented the plaintiff from passing the property and so entitling him to the price. Just the same default, however, would (in substance) have been committed if the defendants had repudiated the contract before the goods had been sent from Sheffield. So, too, every buyer who refuses to take delivery of unascertained goods merely and prevents the transference of property in them from the seller, commits a similar default. If the ingenious contention of counsel on behalf of the seller were correct, it would be difficult to imagine a case of sale of goods (even though unascertained) to which the *Mackay* v. *Dick* (1) rule would not apply. The pages of Benjamin on Sale (6th Edn.) will afford many appropriate illustrations of this. An interesting decision on the matter is that of Atkin, J., in *Stein, Forbes & Co.* v. *County Tailoring Co.* (14). There the purchasers of goods under a c.i.f. contract (payment to be net cash against documents on arrival of steamer) refused to take up the documents when ready. Atkin, J., held that s. 49 (2) of the Act did not apply, and that as the property in the goods had not passed the sellers could recover damages only and not the price. The rule which applies to sales of goods seems also to apply to sales of land. If the vendor has conveyed the property in land to the purchaser he can recover the price. If not, then he can get damages only: see Leake on Contracts (6th Edn.), p. 469; *Laird* v. *Pim* (15); *East London Union* v. *Metropolitan Rail. Co.* (16). Towards the close of his argument, counsel for the seller submitted a further point viz., that the buyers were estopped from denying that the property had passed to them. Estoppel is a vague word. It is often used to support a submission not capable of precise juristic formulation. The only estoppel which can here be suggested is estoppel by conduct. A good illustration on the point is *Pickard* v. *Sears* (17). I need not state the facts of that case, which has frequently been applied. The main rule was clearly put in *Carr* v. *London and North Western Rail. Co.* (18) (10 C.P. at p. 317) as follows:

> "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

This is a useful rule. It is quite distinct from what is called "waiver" in Benjamin on Sale (6th Edn.), p. 643. If, therefore, the buyers in this case had represented to the seller facts showing that the property in the goods had passed to them, and if also the seller had believed that representation and had acted upon it to his damage, then the buyers would, I conceive, be estopped from denying that the property had passed to them and that the price was therefore payable to the seller: see, e.g., the interesting case of *Knights* v. *Wiffen* (19). I am satisfied that there is no estoppel on the facts and documents here before me. The buyers made no misrepresentation of fact. The seller has not acted on any statement or relied on any misleading conduct of the buyers. He knew the circumstances as fully as the buyers knew them. None of the elements of estoppel are here present. It follows, therefore, for the reasons given that the plaintiff is not entitled to recover here the price of the goods in question. If he desires to claim damages the writ must be amended. On the record at present before me the seller cannot ask for judgment. I am indebted to both counsel for their able arguments.

Judgment for the defendants.

Solicitors: *Ellis Bickersteth & Co.*, for *C. Barker*, Sheffield; *Ernest Salaman & Co.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

R. *v.* WHEAT. R. *v.* STOCKS

[Court of Criminal Appeal (Bray, Avory, Shearman, Salter and Greer, JJ.), February 14, 1921]

[Reported [1921] 2 K.B. 119; 90 L.J.K.B. 583; 124 L.T. 830; 85 J.P. 203; 37 T.L.R. 417; 65 Sol. Jo. 554; 26 Cox, C.C. 717; 15 Cr. App. Rep. 134] B

Criminal Law—Bigamy—Defence—Mistaken, but bona fide, belief by accused of divorce from his first wife when he contracted bigamous marriage—Offences against the Person Act, 1861 (24 & 25 *Vict.*, *c.* 100), *s.* 57.

The bona fide, but mistaken, belief by the accused that he had been divorced from his first wife at the time when he contracted the alleged bigamous marriage is no defence to a charge of bigamy. C

Notes. Referred to: *R.* v. *Denyer*, [1926] 2 K.B. 258.

As to defences to charge of bigamy, see 10 Halsbury's Laws (3rd Edn.) 664; and for cases see 15 Digest (Repl.) 891. For the Offences against the Person Act, 1861, see 5 Halsbury's Statutes (2nd Edn.) 786. D

Cases referred to:

(1) *R.* v. *Tolson* (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629, C.C.R.; 15 Digest (Repl.) 890, *8578*.

(2) *R.* v. *Prince* (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 30 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138, C.C.R.; 15 Digest (Repl.) 1032, *10*, *142*. E

(3) *Bank of New South Wales* v. *Piper*, [1897] A.C. 383; 66 L.J.P.C. 73; 76 L.T. 572; 61 J.P. 660; 13 T.L.R. 413, P.C.; 14 Digest (Repl.) 32, *40*.

(4) *Earl Russell's Case*, [1901] A.C. 446; 70 L.J.K.B. 998; 85 L.T. 253; 17 T.L.R. 685; 20 Cox, C.C. 51, H.L.; 15 Digest (Repl.) 887, *8555*.

(5) *R.* v. *Thomson* (1905), 70 J.P. 6; 15 Digest (Repl.) 890, *8579*. F

Also referred to in argument:

R. v. *Lolley* (1812), Russ & Ry. 237; sub nom. *Sugden* v. *Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 15 Digest (Repl.) 891, *8588*.

R. v. *Connatty* (1919), 83 J.P. 292; 15 Digest (Repl.) 890, *8581*.

Sherras v. *De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 43 W.R. 526; 11 T.L.R. 369; 39 Sol. Jo. 451; 18 Cox, C.C., 157; 15 R. 388, D.C.; 14 Digest (Repl.) 39, *90*. G

Chisholm v. *Doulton* (1889), 22 Q.B.D. 736; 58 L.J.M.C. 133; 60 L.T. 966; 53 J.P. 550; 37 W.R. 749; 5 T.L.R. 437; 16 Cox, C.C. 675, D.C.; 14 Digest (Repl.) 31, *34*.

Appeal on a point of law against convictions for bigamy before Sankey, J., at Derby Assizes. H

The appellant Wheat was married on June 5, 1911, at Nottingham and had two children by his wife. On the outbreak of war he joined the Royal Engineers and went to Egypt, where he stayed until 1918. While he was away his wife sold his business, broke up the home, and went away with another man, by whom she had two other children. In 1918 Wheat discovered what was going on, and I after obtaining leave returned home. He then became ill with malaria and was discharged from the army on Jan. 25, 1919. In December of that year he went to reside at a house where the father of the appellant Stocks lived. He was perfectly straightforward with the girl and told her of the way in which his wife had behaved. Stocks took his two children in charge, and Wheat being illiterate, she conducted his correspondence with a solicitor, who was instructed to take proceedings for divorce against Mrs. Wheat. On finding that Stocks was about to become a mother, Wheat sent an urgent telegram to his solicitor, and a letter was received

from him which was taken by both appellants to mean that the divorce proceedings were completed and the divorce accomplished. This letter was dated July 1, 1920, and read as follows: "We have received your telegram and hope to send you papers for signature in the course of the next day or two." On that letter the jury at the trial found that Wheat had a reasonable belief that he had obtained a divorce from his wife. After receiving the letter Wheat went to a friend, and, clapping his hands, said, "Thank God, my divorce has gone through." The friend said, in giving evidence, that Wheat's heart was full of joy. In three weeks' time he married the appellant Stocks.

Norman Birkett for the appellants.

The Attorney-General (*Sir Gordon Hewart, K.C.*), *H. D. Roome* and *E. L. Hadfield* for the Crown.

Cur. adv. vult.

Feb. 14. **AVORY, J.,** read the following judgment of the court.—The alleged bigamous marriage between the appellants took place on July 21, 1920. The jury, in answer to a question put to them by the learned judge, at the suggestion of counsel for the defence, found that the appellants in good faith and on reasonable grounds believed that the man Wheat had been divorced at the time when he went through the form of marriage with Stocks. The evidence submitted to the jury on which the finding could be based was that Wheat's wife had committed adultery; that in 1919 he was admitted as a poor person to bring divorce proceedings against her; that in May, 1919, solicitors were assigned to him to conduct those proceedings; that after some delay he provided the solicitors with a sum of money to meet the out-of-pocket expenses; that on April 23, 1920, the solicitors wrote: "We have your telegram, and hope to send you papers for signature in the course of a day or two"; and Wheat gave evidence on oath that he was a man of little education and that on receipt of the letter he believed that he was divorced. Stocks did not give evidence. In these circumstances we are of opinion that there was no evidence on which the jury could find that the appellants, or either of them, believed, in good faith and on reasonable grounds, that Wheat had been divorced, and assuming that such a finding would afford any defence the appeal would have to be dismissed on that ground alone. The learned judge, however, notwithstanding that finding, directed a verdict of "Guilty," in order that the question of law whether such a finding does afford any defence to a charge of bigamy might be determined in this court. Counsel for the appellants has contended that the decision in *R.* v. *Tolson* (1), in which it was held that a bona fide belief on reasonable grounds in the death of her husband at the time of the second marriage afforded a good defence to the indictment, governed this case, and that it followed from that decision that a bona fide belief on reasonable grounds that the accused had been divorced afforded a good defence.

On reference to the statute, the Offences Against the Person Act, 1861, s. 57, we find the offence of bigamy defined in these words:

> "Whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony."

To this absolute prohibition there are in the proviso three exceptions applicable to British subjects: (i) When the husband or wife has been continually absent for seven years, then last past, and has not been known by the accused to be living within that time; (ii) when the accused at the time of the second marriage has been divorced from the bond of the first marriage; (iii) when the former marriage of the accused has been declared void by the sentence of any court of competent jurisdiction. It has been decided in the case of the first exception that, upon proof of the continuous absence for seven years, the accused is entitled to an acquittal, in the absence of proof by the prosecution that the accused knew that the wife or husband, as the case may be, was living within that time, and, as the Attorney-General has pointed out in his argument for the Crown, this exception

creates or involves a presumption of death, which, unless rebutted by the prosecution, entitles the accused to be acquitted—in other words, the accused is presumed to believe in such circumstances that the former wife or husband is dead at the time of the second marriage, and therefore has no intention of doing the act forbidden by the statute. In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence. The words do not admit of any such qualification, and the only defence under this head appears to be that the accused has, in fact, been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage, he is a person who, being married, intends to do the act forbidden by the statute—namely, "to marry during the life of the former wife." Having regard to this distinction between the two exceptions, we are of opinion that a bona fide belief on reasonable grounds that the accused has been divorced, where, in fact he has not been divorced, affords no defence in law to the charge of bigamy, although it may afford good reason for the infliction of a nominal punishment; and in our opinion this decision is not in conflict with the decision of the majority of the judges in *R.* v. *Tolson* (1), but is in accord with the principle of the judgment in *R.* v. *Prince* (2). In *R.* v. *Tolson* (1) the accused believed, on reasonable grounds, that her husband was dead, therefore she did not intend at the time of the second marriage to do the act forbidden by the statute—namely, to marry during his life; and it was said in that case that the exception in the proviso to s. 57 of the Act of of 1861 showed that mere separation for seven years has the effect which reasonable belief of death caused by other evidence would have at any other time: see particularly the judgment of STEPHEN, J. It is true that the judgment in *R.* v. *Tolson* (1), though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim Actus non facit reum, nisi mens sit rea—a maxim admitted to be uncertain and often misleading in its application. But it was limited in that case to the belief in the death of the former husband; and the case now in question, of a belief in a divorce, was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the accused to do the act forbidden by the statute—namely, "to marry another person during the life of the former wife or husband": see the judgment of BRAMWELL, B., in *R.* v. *Prince* (2), L.R. 2 C.C.R. at p. 175, as to the application of this maxim, and *Bank of New South Wales* v. *Piper* (3). Counsel for the appellants placed great reliance on the statement in the judgment of CAVE, J., in *R.* v. *Tolson* (1):

> "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim Actus non facit reum nisi mens sit rea. Honest and reasonable mistake stands, in fact, on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind; so far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

If the learned judge was laying this down as a principle applicable to all statutes, we do not agree with him. The principle is stated too widely. In any event, it was not necessary for the decision of that case. In *R.* v. *Russell* (4), where the defendant had obtained a divorce in one of the States of America, and it was not disputed that he honestly believed that the divorce was valid, and that he was free to marry again, it was recognised that this was no defence in law, the divorce, in fact, being invalid according to English law, and the defendant was permitted to plead the circumstances in mitigation of punishment. One other case remains to be noted which was relied on by counsel for the appellants: *R.* v. *Thomson* (5), in which the late Common Serjeant directed the jury that:

A "If at the time of the second marriage the accused bona fide believed that his first marriage was invalid on the ground that the woman he then married had a husband alive at the time, he would be entitled to an acquittal."

The prisoner was convicted, and the question was not further discussed. It is not necessary in the present case to express an opinion on the ruling of the learned Common Serjeant, which was probably based on *R.* v. *Tolson* (1), but we doubt whether it can be supported consistently with our present decision. On both grounds, therefore, the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

GREAT WEST SADDLERY CO. *v.* R., AND CONNECTED APPEALS

[PRIVY COUNCIL (Viscount Haldane, Viscount Cave, Lord Sumner and Lord Parmoor), November 30, December 2, 3, 6, 7, 1920, February 25, 1921]

[Reported [1921] 2 A.C. 91; 90 L.J.P.C. 102; 125 L.T. 136; 37 T.L.R. 436; [1921] 1 W.W.R. 1034; 58 D.L.R. 1]

Canada—Dominion and provincial legislation—Company—Incorporation under Dominion law—Power to carry on business in provinces—Right of provincial legislature to restrict exercise of power—Construction of British North America Act, 1867 (30 *&* 31 *Vict.*, *c.* 3), *ss.* 91, 92.

If, in legislating for the incorporation of companies under the law of the Dominion of Canada and in validly endowing them with powers, the Dominion Parliament, in exercise of the powers conferred on it by s. 91 of the British North America Act, 1867, has by necessary implication given those companies a status which enables them to exercise those powers in the provinces, the companies cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Such a matter falls within the concluding words of s. 91 as not to be deemed to come within the class of matters of a local or private nature assigned exclusively to the legislatures of the provinces. The provisions of s. 91 of the Act are to be read as conferring on the Dominion Parliament powers to legislate which may be fully exercised even though they modify civil rights in a province, and general language in s. 92 yields to particular expressions in s. 91 which are unambiguous. The latter rule may also apply in favour of a province in construing general words in s. 91. Construing the sections together, the provisions of s. 92 are to be read as exceptions to those of s. 91.

Accordingly, where provincial legislatures had passed Acts requiring a Dominion company to obtain a licence or to be registered before being permitted to carry on business in the province and prescribing a penalty if such a company carried on business without being licensed or registered,

Held: the Acts in question were ultra vires the provincial legislatures.

John Deere Plow Co. v. *Wharton* (1), [1915] A.C. 330, applied.

Per **Curiam:** The mere power of direct taxation is specifically given to the provincial legislatures by s. 92, but it does not follow that the government of a province can put an end to the existence, or even the powers, of the Dominion

company it taxes for non-compliance with the demands of the tax gatherer. Furthermore, a Dominion company can be precluded from acquiring and holding land in a province by a general Mortmain Act of the provincial legislature.

Notes. Applied: *Halifax* v. *Lyall & Sons* (1922), 65 D.L.R. 305. Distinguished: *R.* v. *Barton*, [1922] 3 W.W.R. 1195. Applied: *Falls* v. *Shamrock Fuel Co.*, [1924] 1 D.L.R. 789; *Lukey and A.-G. for Saskatchewan* v. *Ruthenian Farm Elevator Co.*, [1924] S.C.R. 56; *Re Reciprocal Insurance Legislation*, [1924] 2 W.W.R. 397; *A.-G. for Manitoba* v. *A.-G. for Canada*, [1929] A.C. 260; *Spooner Oils, Ltd.* v. *Turner Valley Gas Conservation Board*, [1932] 3 W.W.R. 477. Distinguished: *Lymburn* v. *Maryland*, [1932] All E.R.Rep. 291. Applied: *Motor Cars Supply Co.* v. *A.-G. for Alberta*, [1939] 3 W.W.R. 65; *S.M.T., Ltd.* v. *Ruch*, [1940] 1 D.L.R. 190; *Lethbridge Irrigation District Trustees* v. *Independent Order of Foresters*, [1940] 2 All E.R. 220. Considered: *Scales* v. *Auld* (1945), 19 M.P.R. 406; *R.* v. *Paling*, [1946] 2 W.W.R. 49. Applied: *Christie* v. *British American Oil Co.*, [1947] 4 D.L.R. 672. Followed: *Saunders* v. *Hollitt* (1950), 25 M.P.R. 85. Considered: *Re Bowater's Paper Mills, Ltd.*, [1950] S.C.R. 608; *R.* v. *Arrow Transit Lines, Ltd.*, [1953] O.W.N. 861; *Snitzman* v. *Dame Ebling*, [1954] Que.Q.B. 421. Applied: *A.-G. for Ontario* v. *Winner*, [1954] 4 D.L.R. 657; *Reference re Validity of Sec. 198 Railway Act* (1956), 2 D.L.R. (2d) 93. Followed: *Henderson Thriftway Petroleum, Ltd.* v. *Reeves* (1956), 3 D.L.R. (2d) 507; *Re Farm Products Marketing Act*, [1957] S.C.R. 198; *A.-G. for Canada* v. *Canadian Pacific Railway et al.* (1958), 12 D.L.R. (2d) 625. Referred to: *A.-G. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328; *Canon* v. *R.*, [1924] A.C. 999; *A.-G. for Alberta* v. *A.-G. for Canada*, [1939] A.C. 117; *A.-G. for Ontario* v. *Winner*, [1954] 3 All E.R. 177.

As to the legislative powers of the Dominion Parliament and those of provincial legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 494 et seq.; and for cases see 8 DIGEST (Repl.) 705 et seq. For British North America Act, 1867, see 6 HALSBURY'S STATUTES (2nd Edn.) 303.

Cases referred to:

(1) *John Deere Plow Co., Ltd.* v. *Wharton*, [1915] A.C. 330; 84 L.J.P.C. 64; 112 L.T. 183; 31 T.L.R. 35, P.C.; 8 Digest (Repl.) 709, *149*.

(2) *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A.C. 348; 65 L.J.P.C. 26; 74 L.T. 533; 12 T.L.R. 388, P.C.; 8 Digest (Repl.) 707, *134*.

(3) *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C.; 8 Digest (Repl.) 725, *214*.

(4) *Brewers and Maltsters' Association of Ontario* v. *A.-G. for Ontario*, [1897] A.C. 231; 66 L.J.P.C. 34; 76 L.T. 61; 13 T.L.R. 197, P.C.; 8 Digest (Repl.) 726, *217*.

(5) *Citizens Insurance Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; 51 L.J.P.C. 11; 45 L.T. 721, P.C.; 8 Digest (Repl.) 727, *227*.

(6) *Colonial Building and Investment Association* v. *A.-G. of Quebec* (1883), 9 App. Cas. 157; 53 L.J.P.C. 27; 49 L.T. 789, P.C.; 8 Digest (Repl.) 709, 147.

(7) *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; 63 L.J.P.C. 25; 69 L.T. 774; 10 T.L.R. 147; 6 R. 382, P.C.; 8 Digest (Repl.) 705, *126*.

(8) *Re Marriage Legislation in Canada*, [1912] A.C. 880; sub nom. *Re Reference by Governor-General of Canada to Supreme Court*, 81 L.J.P.C. 237, 107 L.T. 330; 28 T.L.R. 580, P.C.; 8 Digest (Repl.) 711, *165*.

(9) *Madden* v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626; 68 L.J.P.C. 148; 81 L.T. 276; 15 T.L.R. 484, P.C.; 8 Digest (Repl.) 728, *237*.

(10) *Canadian Pacific Rail. Co.* v. *Notre Dame de Bonsecours Corpn.*, [1899] A.C. 367; 68 L.J.P.C. 54; 80 L.T. 434, P.C.; 8 Digest (Repl.) 710, *155*.

(11) *A.-G. for Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73; 71 L.J.P.C. 28; 85 L.T. 591; 50 W.R. 431; 18 T.L.R. 94, P.C.; 8 Digest (Repl.) 727, *231*.

A (12) *Union Colliery Co. of British Columbia, Ltd.* v. *Bryden*, [1899] A.C. 580; 68 L.J.P.C. 118; 81 L.T. 277; 15 T.L.R. 508, P.C.; 8 Digest (Repl.) 729, *243*.

(13) *Cunningham* v. *Tomey Homma*, [1903] A.C. 151; 87 L.T. 572; sub nom. *Vancouver City (Collector of Voters) and A.-G. for British Columbia* v. *Tomey Homma and A.-G. for the Dominion of Canada*, 72 L.J.P.C. 23; 19 T.L.R. 126, P.C.; 8 Digest (Repl.) 729, *246*.

B **Consolidated Appeals** by special leave from two orders of the Supreme Court of Canada, and an order of the Appellate Division of the Supreme Court of Ontario.

F. W. Wegenast and *T. Moss* (both of the Canadian Bar) for the appellants.

Sir John Simon, K.C., and *Cyril Asquith* for the Attorney-General for Canada (intervener).

C *Wallace Nesbitt, K.C.* (of the Canadian Bar), and *Geoffrey Lawrence* for the Attorney-General for Ontario (respondent and intervener) and for the Attorney-General for Manitoba (intervener).

S. O. Henn-Collins for the Attorney-General for Saskatchewan.

C. Boville Clark (of the Canadian Bar) for respondent shareholders.

D Feb. 25. **VISCOUNT HALDANE.**—In this case their Lordships are called on to interpret and apply the implications of a judgment, delivered by the Judicial Committee on Nov. 2, 1914, in *John Deere Plow Co.* v. *Wharton* (1). It was then laid down that the British North America Act, 1867, had so enabled the Parliament of the Dominion to prescribe the extent of the powers of companies incorporated under Dominion law with objects which extended to the Dominion generally that E the status and powers so far as there in question of one of the three appellant companies could not as matter of principle be validly interfered with by the provincial legislature of British Columbia. It was held that laws which had been passed by the legislature of that province, and which sought to compel a Dominion company to obtain a certain kind of provincial licence or to be registered in the way brought before the Judicial Committee as a condition of exercising its powers in the province F or of suing in its courts, were ultra vires. The reason given was that their Lordships interpreted what had been done by the province in that case as interfering, in a manner not consistent with the principles laid down, with the status and corporate capacity of a company with Dominion objects to which the Parliament of Canada had given powers to carry on its business in every part of the Dominion. In the consolidated appeals now before their Lordships analogous questions are G raised by legislation in varying forms enacted in three other provinces, Saskatchewan, Manitoba, and Ontario.

Since the decision in 1914 the province of Saskatchewan has passed an Act, in 1915, which supersedes its earlier Companies Acts, and apparently seeks to avoid the features in these which might conflict with the decision of this committee in *John Deere Plow Co.* v. *Wharton* (1) as to the British Columbia legislation. The H question raised as regards Manitoba arises out of older legislation of 1913 (subsequently amended and re-enacted in 1916), and as regards Ontario under an older Ontario Companies Act and the Extra-Provincial Corporation Act, 1914. No question is raised from British Columbia, or from any provinces other than Saskatchewan, Manitoba, and Ontario, on this occasion. The proceedings out of which the present appeals arise concern several Dominion companies, and are, as I to Saskatchewan, two cases before a magistrate for infraction of the provisions of the provincial Companies Act, and an action by a shareholder in one of the Dominion companies concerned to restrain it from attempting to carry on its business without complying with the requirements of the Companies Act of the province. The main issue in all these proceedings is substantially the same. In Manitoba, an analogous question was raised in a shareholder's action, and also in an action by the Attorney-General of the province. The main issue in Ontario was similar to that in Saskatchewan, but there was also raised a question whether a Dominion company could hold land in the province without being authorised to do

so by its government, in accordance with Ontario statute law. In the proceedings referred to judgments were delivered in the courts of first instance and by the Appellate Courts in Saskatchewan and Manitoba, and by the courts of first instance and the Appellate Court in Ontario. In the cases in the two former provinces there was an appeal to the Supreme Court of Canada, but in the Ontario litigation the appeal has been brought directly to the King in Council from the judgment of the Appellate Court of the province. On Aug. 18, 1919, special leave to appeal to the Privy Council was granted, and it was ordered that the appeals, six in number, from judgments which had been adverse to the Dominion companies concerned should be consolidated and heard together.

In order to ascertain the real points now in controversy, it is important to refer in some detail to what was actually decided in 1914 in *John Deere Plow Co.* v. *Wharton* (1). The British Columbia Companies Act had provided that, in the case of an incorporated company which was not one incorporated under the laws of the province, and was called in the Act an extra-provincial company, certain conditions must be complied with. If such a company had gain for its object it must be licensed or registered under the law of the province, and no agent was to carry on its business until this had been done. If this condition were complied with, such an extra-provincial company might sue in the courts of the province and hold land there. Such a company might also, if it were one duly incorporated under the laws of, among other authorities, the Dominion, and if authorised by its charter to carry out purposes to which the legislative authority of the province extended, obtain from the registrar under the general Companies Act of the province, a licence to carry on business within the province on complying with the provisions of the Act and paying a proper licence fee. It was then to have the same powers and privileges in the province as though incorporated under the provincial Act. If such a company carried on business without a licence, it was made liable to penalties, and its agents were similarly made liable. So long as unlicensed, the company could not sue in the courts of the province in respect of contracts in connection with its business made within the province. The registrar might refuse a licence where the name of the company was identical with or resembled that by which a company, society or firm in existence was carrying on business or had been incorporated, licensed or registered, or where the registrar was of opinion that the name was calculated to deceive, or disapproved of it for any other reason. Their Lordships pointed out that, under the Dominion Companies Act, which they held to have been validly passed, the charter of the John Deere Plow company incorporated it with the powers to which the legislative authority of the Parliament of Canada extended. The Dominion Interpretation Act provided that the meaning of such an incorporation included this, that the corporate body created should have power to sue, to contract in its corporate name, and to acquire and hold personal property for its purposes. There was in the Dominion Companies Act a provision that such a company should not be incorporated with a name likely to be confounded with the name of any other known company, incorporated or unincorporated, and it gave the Secretary of State the discretion in this connection. On incorporation the company was to be vested with all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking. It was to have an office in the city or town in which its chief place of business in Canada was situated, which should be its legal domicil in Canada, and could establish other offices and agencies elsewhere. No person acting as its agent was to be subjected, if acting within its authority, to individual penalty. Their Lordships made reference to the circumstance that the concluding words of s. 91 of the British North America Act:

> "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,"

render it necessary to do more than ascertain whether the subject-matter in question apparently falls within any of the heads of s. 92; for if it also falls within any of the enumerated heads of s. 91, then it cannot be treated as covered by any of those in s. 92. As is now well settled, the words quoted apply, not only to the merely local or private matters in the province referred to in the sixteenth head of s. 92, but to the whole of the sixteen heads in that section: *A.-G. for Ontario* v. *A.-G. for the Dominion* (2). The effect, as was pointed out in the decision just cited, is to effect a derogation from what might otherwise have been literally the authority of the provincial legislatures, to the extent of enabling the Parliament of Canada to deal with matters local and private where, though only where, such legislation is necessarily incidental to the exercise of the enumerated powers conferred on it by s. 91. If, therefore, in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion government with powers to trade in any province, it may not the less, consistently with the general scheme, be subject to provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licences for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such provincial laws might be enforced could validly be so directed by the provincial legislatures as indirectly to sterilise or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred. To have said so would have been to misread the scheme of the British North America Act, which is one that establishes interlacing and independent legislative authorities. Within the spheres allotted to them by the Act the Dominion and the provinces are rendered on general principle co-ordinate governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly. This is a principle which has to be kept closely in view in testing the validity of the provincial legislation under consideration as affecting Dominion companies.

Their Lordships will not repeat what was laid down in the judgment delivered in the *John Deere Plow Case* (1) as to the other aspects of the general question there under consideration, but will proceed, in the light of what has just been said, to the consideration of the validity of the Ontario legislation under review. The general Companies Act of Ontario was passed before the decision on the *John Deere Plow Case* (1), and has no special bearing on the question in this appeal. The important statute is the Extra-Provincial Corporations Act, which was also passed before that decision. The purpose of the latter statute is to provide that certain classes of extra-provincial corporations (which mean corporations created otherwise than by or under the authority of an Act of the Ontario legislature), including those created under any Act of the Dominion Parliament and authorised to carry on business in Ontario, must take out a licence (s. 4) under the Ontario statute. On complying with its provisions a corporation coming within these classes is entitled to receive a licence (s. 5) to carry on its business and exercise its powers within Ontario. In the absence of such a licence it is forbidden to do so (s. 7), and its agents are subjected to a like prohibition. A penalty of $20 a day is imposed for any contravention of this provision. An extra-provincial corporation coming within the classes referred to may apply to the Lieutenant-Governor in Council for a licence to carry on its business and exercise its powers in Ontario, and no limitations or conditions are to be included in any such licence which would interfere with the rights of such a corporation, for example, a Dominion company, to carry

on in Ontario all such part of its powers as by its Act or charter of incorporation it may be authorised to carry on and exercise there (s. 9 (1) and (2)). A corporation receiving a licence may, subject to the limitations and conditions of the licence, and the provisions of its own constitution, hold and dispose of real estate in Ontario, just as an Ontario company might (s. 12). A corporation receiving a licence may be called on to make returns comprising such information as is required from an Ontario company (s. 14). The Lieutenant-Governor in Council may make regulations for, among other things, the appointment and continuance by the extra-provincial company of a representative in Ontario on whom service of process and notices may be made (s. 10 (1) (b)). If such a company, having received a licence, makes default in complying with the limitations and conditions of the licence or of the provision as to returns, or of the regulations respecting the appointment of a representative, its licence may be revoked (s. 15). If such a corporation carries on in Ontario without a licence any part of its business, it is to incur a penalty of $50 a day, and is rendered incapable of suing in the Ontario courts in respect of any contract made in whole or in part within Ontario in relation to business for which it ought to have been licensed (s. 16). The Lieutenant-Governor in Counsel may prescribe fees on the transmission of the statement or return required under s. 14. Such fees are to vary with the capital stock of the company (s. 20). It is obvious that the Act thus summarised assumes that the legislature of the province can impose on a Dominion company conditions which, if not complied with, will restrict the exercise of its powers within the province. These conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively provincial object, such as direct taxation for provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra-provincial companies if they seek to exercise these powers within Ontario.

A question of principle is thus raised broadly, and their Lordships now turn to the judgments in the courts of Ontario in which it has been dealt with. In these courts over this question there has been divergence of judicial opinion, and the question itself has been considered there with such thoroughness and ability that it is proper to refer to the diverging reasoning in some detail. MASTEN, J., before whom the cases came in the first instance, was of opinion that in passing the Extra-Provincial Corporations Act the legislature of Ontario had exceeded its powers. He pointed out that the Dominion Companies Act had vested in the companies incorporated under its provisions all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, and that, in view of the decision in the *John Deere Plow Case* (1), the power conferred on the Parliament of Canada to regulate trade and commerce, and to that extent to prescribe these capacities in cases affecting the Dominion at large, must be taken to be paramount and overriding. He thought that s. 7 of the Extra-Provincial Corporations Act afforded the keynote and the "pith and substance" of that Act, the purpose of which, as applied to Dominion companies, was to preclude them from the exercise of some of their powers and to deprive them of their status in Ontario unless a licence were obtained and certain fees paid there. However simple and little oppressive such a process might be, it constituted none the less a direct interference. It had been attempted to support this interference as justified by the powers conferred by s. 92 on the provinces to raise revenue by direct taxation, to deal with property and civil rights, particularly from the point of view of mortmain, to legislate for the administration of justice, and to impose penalties in furtherance of these ends. But in the opinion of the learned judge these aspects of what had been included in the provincial statute, except in the case of the mortmain law, had been introduced into it in reality only as an ancillary to s. 7, and to the main purpose of asserting a direct control over the Dominion companies before permitting them to carry on their business in the province. This purpose so permeated the whole Act that it was not practicable to hold certain of its sections valid and others invalid. The provision of s. 9 (2) which excluded from any licence to be required limitations or conditions restricting the rights of the company to

carry on in Ontario all such parts of its business and powers as by its Act or charter of incorporation it might be authorised to exercise there, did not mend matters. But the provisions of the Ontario Mortmain Act stood on a different footing. For the incapacity to hold lands did not arise because of the application of the Extra-Provincial Corporations Act, but because of the general scope of the Mortmain Act itself, a separate statute which the learned judge seemingly regarded as within the powers of the Province.

In the Supreme Court of Ontario, which heard the appeal from this decision, and from which an appeal has been brought directly to the Sovereign in Council, opinion was divided. The case was argued before five judges, the Chief Justice of Ontario, MACLAREN, J.A., MAGEE, J.A., HODGINS, J.A., and FERGUSON, J.A. By a majority of four to one, FERGUSON, J.A., dissenting, the judgment of MASTEN, J., was reversed. It was declared that the Extra-Provincial Corporations Act was intra vires, excepting as to the words of s. 16 (1) to the effect that the Dominion companies could not sue unless they had obtained provincial licences. In agreement with MASTEN, J., the Court of Appeal held that the companies were bound to comply with the provisions of the Ontario Mortmain Act as a condition of occupying and holding lands in the province. MEREDITH, C.J., made an able and exhaustive scrutiny of the legislation. He observed that it was well settled that, notwithstanding the Dominion having conferred on a company of its creation rights and powers, that company was subject to and bound to obey the laws of the province with regard to taxation for provincial purposes and also to contracts made within the province, and as to the holding and tenure of land, and that the exercise by the province of its authority to pass such laws necessarily limits or restricts the power granted to the company by the Dominion. He then summarised the judgment of this committee in the *John Deere Plow Case* (1), and stated one of its results as having been that as the provisions of the British Columbia statute there in question sought to compel the John Deere Plow Co. to obtain a licence or to be registered in that province, as a condition of exercising its power of suing in the court of the province, these provisions were ultra vires. The learned Chief Justice went on to interpret the reasons assigned by this committee for their judgment. (i) Notwithstanding the generality of the expression in s. 92 of the British North America Act, the words "civil rights" must be regarded as not covering cases expressly dealt with in s. 91 or even in s. 92 itself. (ii) Notwithstanding that a company has been incorporated by the Dominion with power to trade, it is not the less subject to provincial laws of general application enacted under s. 92, including laws as to mortmain and payment of taxes, even though in the latter case the form assumed is that of requiring a licence to trade affecting Dominion companies in common with other companies, and including laws as to contracts. (iii) It might be competent for a provincial legislature to pass laws relating to companies without distinction, requiring those not incorporated within the province to register for limited purposes, such as the furnishing of information or, under a general statute as to procedure, the giving of security for costs. MEREDITH, C.J., thought that the key to the decision was that the judicial committee were of opinion that the provisions of the British Columbia Act were not of these characters, but were directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada. He referred to various earlier decisions of this committee, and came to the conclusion that what was intended in the *John Deere Plow Case* (1) was to lay down that it was not competent for a provincial legislature to single out Dominion corporations and to subject them to laws which were not applicable to all corporations. An important circumstance in that case was, he thought, that the registrar had asserted power to refuse a licence unless the name were changed, an interference with the status of the company. As to this circumstance, he drew attention to what he regarded as an important difference between the British Columbia and the Ontario legislation. In the latter s. 9 (2) precluded the insertion in the licence of any limitation or condition which would limit the rights of a corporation to carry on in Ontario such

parts of the business and powers as by its Act or charter of incorporation had been authorised. The Chief Justice notices in passing that, by s. 15 of the Extra-Provincial Corporations Act, if a corporation receiving a licence makes default in observing or complying with its conditions or the provisions of s. 14 as to returns, or any regulations respecting the appointment of a representative in the province, the licence may be revoked. He thinks that since the amendment made in the original form of the Act, which is embodied in s. 9 (2) just referred to, the words have now no meaning, and would have been eliminated but for the oversight of the draftsman. In his dissenting judgment, however, FERGUSON, J.A., takes the view that, even if the new section was meant to restrict the purpose of the Act, the words of s. 9 (2) do not do so sufficiently to alter that purpose as remaining. The Chief Justice was of opinion that s. 16, which imposes a penalty on the extra-provincial company for every day upon which it carries on its business without being licensed, was ultra vires, and in this the other members of the court appear to have agreed with him. Subject to this exception he thought that the provisions of the enactment in question were of the character of "provincial laws of general application," within the meaning of the decision in the *John Deere Plow Case* (1). What was important was not the form, which need not be uniform. In substance, what was done was to impose a tax which was really lighter than that imposed on provincial companies. The other provisions of the Act were ancillary to this taxation, and it was no valid objection to what was done that, to the extent required for the exercise of powers specifically entrusted to the provincial legislatures, it, in a sense, restricted the exercise of powers conferred by Dominion authority. All laws imposing the necessity of obtaining licences and paying taxes, and of conforming to mortmain requirements, must do so. In the opinion of the Chief Justice the Act was not, in pith and substance, one designed to restrict Dominion companies "in the exercise of the powers conferred on them by the Dominion authority, but an Act lawfully passed for purposes as to which the legislature by which it was enacted had authority to legislate." As to the Mortmain Act, he agreed with MASTEN, J., that the law was one of general application and was binding on all companies which it purported to include. MACLAREN, J.A., MAGEE, J.A., and HODGINS, J.A., agreed in substance with the above conclusions. FERGUSON, J.A., in effect agreed with the reasoning of MASTEN, J. He was of opinion that the Act as originally enacted was passed on the assumption that it was within the legislative authority of the province to control all extra-provincial corporations, and that, notwithstanding that in its existing form amendments had been incorporated into the Act designed to mitigate this, the Act still embodied the object of general control. This was shown by the power given by s. 11 and by the regulations which purported to enable the Lieutenant-Governor in Council to refuse a licence if the name of the company was objectionable in any of various respects.

Their Lordships defer making any observations on these judgments until they have dealt with the other cases. They only observe that with certain of the general propositions expressed by MEREDITH, C.J., in his judgment they are in substantial agreement.

Their Lordships turn next to the case which has been brought forward as regards the legislation on the subject in Manitoba. In the courts of that province analogous questions were raised in a shareholder's action. The Attorney-General of the province intervened in the course of the subsequent appeal. In Manitoba there was passed in 1913 a general Companies Act, of which Part 4 deals with extra-provincial companies and includes Dominion corporations. Under s. 108 every such corporation is required to take out a licence under this part of the Act, and by s. 109 inter alia such a corporation, on complying with the provisions of that part and with the regulations made under the Act, is entitled to receive a licence to carry on its business and exercise its powers in Manitoba. By s. 111 (inter alia) such a corporation may apply to the Lieutenant-Governor in Council

A "for a licence to carry on its business or part thereof, and exercise its powers or part thereof in Manitoba, and upon the granting of such licence such corporation may thereafter, while such licence is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the licence; subject, however, to the provisions of this part and to such limitations and conditions as may be specified
B in the licence."

On such an application the corporation is to file certain evidence and a power of attorney to someone in the province appointing him to accept service. This is not to apply if the head office is within the province (s. 114 (3)). By s. 118 no such corporation is to carry on within Manitoba any of its business, and no agent is to
C act for it, until a licence has been granted to it, and then only so long as this is in force. Section 120 requires annual returns of information to be made. By s. 121 the Lieutenant-Governor in Council may suspend or revoke the licence for default in observing the provisions of the Act. Section 122 provides, as in the case of the Ontario statute, for penalties for the carrying on of business in the absence of the licence, and incapacitates the corporation from suing without it in the courts of the
D province. Section 126 enables the Lieutenant-Governor to fix the fees to be paid. These are for the exchequer of the province, and are to vary in part according to the nature and importance of the business to be carried on in the province, and in part according to the amount of the entire capital stock of the corporation. In addition to these provisions, s. 112 enables a duly licensed corporation to hold real estate in the province, but limited, in its licence, by s. 113, to such annual value as
E may have been deemed proper, as fully as if it had been a Manitoba company under the general Act. There is no Mortmain Act in the province, but the registration of titles to land requires a licence and the registration of title to real estate in the case of extra-provincial companies. Thus there does not appear to be anything in the form or substance of the Manitoba Act which differentiates it materially from the corresponding Ontario Act.

F The *Manitoba* case was heard in the courts of the province in the same year, 1917, as the *Ontario* case, but a little earlier. MACDONALD, J., the judge of first instance, decided in favour of the validity of the legislation, but apparently without giving reasons. On appeal the Court of Appeal of the province was evenly divided, with the result that the appeal was dismissed. HOWELL, C.J., and CAMERON, J.A., were for affirming, while PERDUE, J.A., and HAGGART, J.A., were for reversing.
G HOWELL, C.J., began his judgment by pointing out that the province derives part of its revenue from charges for the incorporation of companies and for licences, and that all companies doing business in Manitoba, no matter where incorporated, have to pay what is sometimes called a tax and at others a fee for a licence. He thought that the Manitoba statute should be taken to have been enacted

H "for the purpose of completing the provincial scheme of direct taxation for the general purposes of the province by a general charge or tax on all corporations, as in *Bank of Toronto* v. *Lambe* (3)."

The decision in that case also disposes, in the view of the learned Chief Justice, of the argument that the discretionary power of prescribing conditions and limitations constituted an objection to the validity of the scheme of the Act, for there was no power to refuse a licence generally, like that in the British Columbia statute.
I CAMERON, J.A., also dwelt on this distinction, and on the more restricted scope of the Manitoba Act in other points. As to the imposition of penalties, that carried the matter no further, for the true test was whether the substantive provision was authorised by s. 92. He arrived at the conclusion that the Companies Act was one the legislation in which was of such a general character as was saved by the decision in the *John Deere Plow Case* (1), being in reality wholly directed to subjects entrusted to the provincial legislatures by s. 92 of the British North America Act. PERDUE, J.A., dissented. Section 111, enabling the Lieutenant-Governor in Council to insert in the licence limitations and conditions as to the exercise of the company's

powers within the province, showed that there was really no difference in this respect between the Manitoba Act and that declared ultra vires in the *John Deere Plow Case* (1). He thought that for the purpose of the question there decided the provisions of the two Acts were indistinguishable. The object of such statutes was, in his view, to restrain Dominion companies from exercising within the province the rights conferred on them by their charters unless licensed. The decisions of the Privy Council in *Bank of Toronto* v. *Lambe* (3) and *Brewers and Maltsters Association of Ontario* v. *A.-G. for Ontario* (4) were not really in point, for they only established that what had to be paid was in these cases in the nature of direct taxation. Here the provincial legislature had gone further and had failed to confine their legislation within the limits which were settled by the *John Deere Plow Case* (1) to be those of what was legitimate. HAGGART, J.A., concurred in this conclusion. There was in this case, unlike that of Ontario, an appeal to the Supreme Court of Canada, which also heard an appeal from the Supreme Court of Saskatchewan. The judgments of the Supreme Court of Canada, dismissing both appeals, were given on the same date, IDINGTON, J., ANGLIN, J., and BRODEUR, J., taking one view and the Chief Justice and MIGNAULT, J., dissenting. It will be convenient to reserve consideration of these judgments until reference has been made to the Saskatchewan cases, which were disposed of along with those from Manitoba.

The four Saskatchewan Companies Acts, now operative, differ from those of Ontario and Manitoba in the circumstance that they were passed in 1915, 1916, and 1917, after the decision in *John Deere Plow Co.* v. *Wharton* (1) by this committee. It is the first of these four Acts that alone is important for the purposes of the present question. This is a general Companies Act, the provisions in which have nothing unusual in them, but which extends to, inter alia, Dominion companies having gain for their object and carrying on business in the province. The effect of s. 23 is that a Dominion company of this nature must be registered under the Act, and that if it does not register, the Dominion company and its representatives are liable to penalties for carrying on business in the province. The effect of s. 24 is that registration cannot be refused to a Dominion company. By s. 25 the company may, on complying with the provisions of the Act, receive an annual licence, for which it is to pay fees to the government of the province, and may then carry on its business, subject to the provisions of the instrument creating it as if it had been incorporated under the Act; but a company carrying on business without a licence is liable to penalties. By s. 27 the Lieutenant-Governor in Council may prescribe such regulations as he may deem expedient for the registration of all companies, and for fixing the fees payable. By s. 29 if the registrar thinks that a company registered has ceased to carry on business he may, after finding on inquiry that this is so, strike the company off the register, whereupon it is dissolved; but by an amending Act passed since the commencement of these proceedings the provision as to dissolution is to take effect only as to Saskatchewan companies. By s. 30 if the prescribed fee is not paid the company may be struck off the register. Proceedings were taken in Saskatchewan before a justice of the peace against a Dominion company for not being licensed or registered, and an action was brought by a shareholder, as in the cases of the other provinces already referred to. The substantial question was again the validity of the provincial statute, and this statute ELWOOD, J., the judge of first instance, held to have been validly enacted. On appeal the Supreme Court of Saskatchewan, en banc, consisting of HAULTAIN, C.J., NEWLANDS, J., LAMONT, J., BROWN, J., and MCKAY, J., dismissed the appeal unanimously. On appeal to the Supreme Court of Canada that court also unanimously dismissed the appeal. ELWOOD, J., thought that the fees imposed were direct taxation, and that there was no prohibition of carrying on business without licence or registration, but merely a penalty, which did not interfere with the status of the company. The judgment of the Supreme Court of Saskatchewan was delivered by NEWLANDS, J. He pointed out that the form of the existing Act, which was passed in 1915, after the decision of the Judicial Committee in the *John Deere*

Plow Case (1), made it evident that the legislature of the province had endeavoured to get rid of what might have been held to be objectionable in older legislation. For example, the old provision had been dropped according to which any company required to be registered should not, while unregistered, be capable of suing in the courts of the province. It was true that there was still a provision that every company carrying on business in the province without a licence was to be guilty of an offence and liable to a penalty; but this did not necessarily render its contracts void. The prohibition of a particular act under a penalty was altogether different from requiring a general regulation to be complied with under a penalty. It was not really the intention of the legislature to prevent the company from doing business, but only to designate what companies were to be registered and pay licence fees. The status and powers of the Dominion company were, therefore, not affected.

In the Supreme Court of Canada the decisions in the *Saskatchewan* and *Manitoba* cases were reviewed and affirmed. There was no appeal brought there from the *Ontario* judgment, but the decision of the Ontario Court of Appeal had been given more than a year previously, and the reasons for it were alluded to in the Supreme Court of Canada in the other cases. It will be convenient to consider together the judgments in the other two cases, which were delivered on the same day.

In the *Manitoba* appeal the Chief Justice of Canada dissented and would have reversed. For he took the same view as PERDUE, J.A., had expressed in the court below. He thought that the Manitoba Act, if valid, would deprive the Dominion companies of their status and powers, notwithstanding that s. 18 of the British Columbia Act did not occur in it, the section which prohibited the registration of an extra-provincial corporation with a name of which the registrar disapproved. But while he formed this opinion about the Manitoba Act, he thought otherwise about that of Saskatchewan, which he held had been so framed as to get over the difficulties indicated in the decision in the *John Deere Plow Case* (1). His view was that in the latter Act the provisions were confined to the levying of direct taxation, and that its construction was such that if a Dominion company paid the tax it could carry on business without taking out a licence. But while arriving at this conclusion he stated that he had done so with difficulty and doubt, and that he considered the statute objectionable in form, though not in essence. ANGLIN, J., expressed an opinion similar in doubt as to the Manitoba legislation, but, on the whole, he thought that the decision in the *Manitoba* case might be affirmed, though he arrived at that conclusion only after doubt. As to the *Saskatchewan* appeal, he thought the provisions of the Act there distinguishable, and he concurred in the reasons given by his colleagues for the dismissal of the appeal. BRODEUR, J., laid much stress in the *Manitoba* case on the title of the Dominion company to have a licence as of right. The licence he considered to be a mere method of effecting direct taxation. He took the same view of the Saskatchewan legislation. The obligation of a Dominion company to take out a licence was under a law of general application, and was a mere means of taxation. He concurred in the dismissal of both appeals. IDINGTON, J., agreed. The cases seemed to him to turn on the same question, whether a provincial legislature could tax a Dominion company. He thought the earlier decisions of the Judicial Committee had established that it could do so in this kind of form. No one of the enumerated powers in s. 91 enabled the Dominion Parliament to entitle a Dominion company to escape from the obligations of a private citizen in the province. MIGNAULT, J., agreed as regards the *Saskatchewan* appeal. The statute there was a pure taxing statute, and the Dominion companies were not prohibited from carrying on business in the province, but were merely subjected to a penalty for not taking out a licence. In the *Manitoba* case he dissented from the majority, and thought that there should be a reversal. For the companies were by the statute there compelled to take out a licence as a condition of exercising their powers in the province, and of invoking the jurisdiction of its courts. He agreed with the view taken by PERDUE, J.A., in the court below.

Their Lordships have thus examined in some detail the course of the proceedings in the cases under consideration, and have stated the substance of the various judgments given. There has been much divergence of opinion in these judgments. It has arisen over the single question which is the crucial one in these appeals. Can the relevant provisions of all or any of the three sets of provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by s. 92 to the legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status? The question is one primarily of the interpretation of the British North America Act and in the second place of the meaning of the principle already laid down by this committee in the *John Deere Plow Case* (1). The Constitution of Canada is so framed by the British North America Act that the difficulty was almost certain to arise. For the power of a province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every province. But such a power is covered by the general enabling words of s. 91, which, because of the gap, confer it exclusively on the Dominion. It must now be taken as established that s. 91 enables the Parliament of Canada to incorporate companies with such status and powers as to restrict the provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of s. 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the provincial legislatures of their capacities under the enumerated heads of s. 92. It is clear that the mere power of direct taxation is specifically given and is to be taken, so far as necessary, on a proper construction to be an exception from the general language of s. 91, as was explained by SIR MONTAGUE SMITH in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons* (5). Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action, with the usual consequences, which was all that was decided to be legal in *Bank of Toronto* v. *Lambe* (3). It does not follow that because the government of the province can tax that it can put an end to the existence, or even the powers, of the company it taxes for non-compliance with the demands of the tax-gatherer. Their Lordships find themselves unable to agree with an observation made by MEREDITH, C.J., towards the conclusion of his judgment where he says:

> "It is, I think, to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each province the power of determining how far, if at all, those powers should be exercised within its limits."

Such a construction would have left an hiatus in the British North America Act. for there would have been in the Act so read no power to create a company with effective powers directed to other than merely provincial objects. It was decided as long ago as 1883, in *Colonial Building and Investment Association* v. *A.-G. of Quebec* (6) that there was no such hiatus. Nor does it appear, if reference may be made as matter of historical curiosity to the resolutions on which the British North America Act was founded, and which were passed at Quebec on Oct. 10, 1864, for the guidance of the Imperial Parliament in enacting the Constitution of 1867, that these resolutions gave countenance to the idea that a different construction on the point in question was desired. The learned Chief Justice refers to them without quoting their language. But, in connection with the topic in controversy, all that was desired by the words of these resolutions to be assigned to the provincial

A legislatures was "the incorporation of private or local companies, except such as relate to matters assigned to the general Parliament."

In *Tennant* v. *Union Bank of Canada* (7) it was decided that the British North America Act must be so construed that s. 91 conferred powers to legislate which might be fully exercised even though they modified civil rights in a province, provided that these powers are clearly given. The rule of construction is that general B language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous. The rule may also apply in favour of the province in construing merely general words in the enumerated heads in s. 91. For, to take an example, notwithstanding the language used at the end of s. 91, the heading in that section, "Marriage and Divorce," was interpreted on an appeal to this committee in *Re Marriage Legislation in Canada* (8) as being pro tanto restricted by C the provision of s. 92 which entrusted the making of laws relating to the solemnisation of marriage to the provincial legislatures. Whether in either case an exception is to be read in depends on the application of the principle that language which is merely general is, as a rule, to be harmonised with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together, and the whole of the scheme for distribution of D legislative powers set forth in their language must be taken into account in determining what is merely general and what is particular in applying the rule of construction. For neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact. The decision in 1896 of *A.-G. for Ontario* v. *A.-G. for the Dominion* (2) is a good illustration of the fashion in which the rule of E construction thus stated has been interpreted and applied. It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinised in its entirety in order to determine its true character. *Madden* v. *Nelson and Fort Sheppard Railway* (9) and *Canadian Pacific Rail. Co.* v. *Notre Dame de Bonsecours Corpn.* (10) are excellent illustrations of how this has F been done. In the first-mentioned case a provincial legislature, by a Cattle Protection Act, sought to make a Dominion railway company liable for injury to cattle straying on the line within the province, unless they had erected proper fences. It was held that the province had no power to impose liability on the Dominion railway companies as such for the provision of works. It was pointed out in the latter case that a very different point really arose, namely, that although any G direction by a provincial legislature to a Dominion railway company to alter the construction of the drains on its works would be ultra vires, still the railway company were not exempted from the obligation of a provincial law applicable to all land owners, without distinction, that they should clean out their ditches so as to prevent nuisance. In cases such as those referred to the rule of construction above stated has been applied wherever possible. It is only where there is actual H inconsistency that the effect of the concluding words of s. 91 can be invoked. *A.-G. of Manitoba* v. *Manitoba Licence Holders' Association* (11) is yet another useful illustration. The legislature of Manitoba had enacted the prohibition of transactions in liquor to take place wholly within the province, with the saving of bona fide transactions between persons in the province and those in other provinces or in foreign countries. It was held that such legislation was valid as falling within I head 16 of s. 92, "matters of merely local or private character in the province," notwithstanding that its effect would be to interfere consequentially with sources of Dominion revenue and with business operations beyond the province. *Union Colliery Co. of British Columbia, Ltd.* v. *Bryden* (12) and *Cunningham* v. *Tomey Homma* (13) also furnish illustrations of how the rule of construction under consideration has been applied.

The only other decision to which their Lordships desire to make reference is that in *Brewers and Maltsters Association of Ontario* v. *A.-G. of Ontario* (4). There the Dominion legislature had previously and validly regulated the manufacture and

wholesale vending of spirituous liquors, and provided for the issue of licences for such manufacture and sale. Ontario had subsequently passed an Act requiring every person so licensed by the Dominion also to obtain a licence for sale from the province, and to pay a fee for it. It was held, in the first place, that this was direct taxation for provincial purposes, and, therefore, within the power of the province, and, secondly, that the licence was such as to be authorised among the "other licences included in the general words of head 9 of s. 92—shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial purposes." Their Lordships think that what is implied in this decision is that while the Dominion legislature had power to place restrictions throughout Canada on the traffic in liquor, the powers conferred by s. 91 did not in any way conflict with the positive powers of taxation and licensing for provincial objects, expressly and particularly conferred by s. 92. These, in so far as there might have been any interference, had been conferred by the Imperial Parliament on the provinces by way of exception both from the general power of legislation given to the Dominion by the initial words of s. 91, and from any purely general enumerated head, such as the regulation of trade and commerce.

The principle of interpretation to be followed in applying the test laid down in the *John Deere Plow Co. Case* (1), that provincial legislation cannot validly destroy the status and powers conferred on a Dominion company by Act of the Parliament of Canada, does not appear to be obscure when read in this light. Turning to its application, the first thing to be observed is the nature of the questions to be answered. Their Lordships will dispose in the first place of a subsidiary matter, which is whether a Dominion company can be precluded from acquiring and holding land in a province by a provincial law of the nature of a general Mortmain Act. It is clear, both on principle and from previous decisions, that it is within the competence of a provincial legislature to enact such legislation, and the question is, therefore, answered in the affirmative. If there be a provision to this effect, occurring even in a statute which in other respects is ultra vires, and that provision be severable, it is valid. In the *Ontario* case there is, therefore, no doubt that the broad result of the contention of the province under this head is well founded, for there the legislature has passed a Mortmain Act of general application, and in regard to this Act a Dominion company is in no better position than any other corporation which desires to hold land. In Manitoba there is no general Mortmain Act, but s. 112 of the Manitoba Companies Act enables a corporation receiving a licence under Part 4 of the Act, relating to extra-provincial companies, to acquire and hold land as freely as could any company under Part 1 of the Act. Even if the provision as to the licensing of extra-provincial companies is held to be ultra vires, so as to prevent such a provision from being operative, as being inseverable, it is plain that the substance of a provision which is of the character of a mortmain law is within the power of the province. In Saskatchewan there is no general Mortmain Act, but the Companies Act, 1915, by s. 19, enables a company incorporated under the law of the province to hold land. By s. 25 a company not so incorporated (and this includes a Dominion company) may, if it has been licensed, carry on its business as if it had been incorporated under the law of the province. This enables it to hold land unless the provisions as to the grant to it of a licence are inoperative. Their Lordships do not think that s. 29 of the Companies Act of Canada, which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, can prevail against any severable provision by a provincial legislature restricting the power of corporations generally to acquire or hold real estate in the province.

Their Lordships now pass to the question of a more general order, which is the main one in these appeals. Had the provinces of Ontario, Manitoba and Saskatchewan power to impose on Dominion companies the obligation to obtain a licence from the provincial government as a condition of the exercise in these provinces respectively of the powers conferred on them by the Dominion? If the condition of taking out a licence had been introduced not so as to affect the status

of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the province, or of causing the doing by that public generally of some act of a purely local character only under licence, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the province to impose. Even then it would have been requisite to see, as was pointed out by LORD HERSCHELL, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case* (4), that the provincial legislature was not, under the guise of imposing such direct taxation, in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration whether the real effect of the licence required by a provincial law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a provincial legislature could impose, not an ordinary penalty, but one extending to the destruction of the status of the company and its capacity in the province, nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

What remains is to apply the principle of the decision in the *John Deere Plow Case* (1) as so interpreted to the actual provincial legislation challenged.

As to Ontario, the statute impugned is the Extra-Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario to the same extent as in other parts of Canada unless they comply with a condition sought to be imposed, that of obtaining a licence to do so from the government of the province. By s. 7 such companies are expressly prohibited from doing so, and the provision in s. 9 (2) that no limitations or conditions are to be included in such a licence as would limit a Dominion company, for example, from carrying on in the province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorises, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a licence as a condition of doing anything at all in the province. By s. 11 the grant of the licence is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor in Council under ss. 2 and 10 of the Act. By s. 16, and also under s. 7 itself, an extra-provincial corporation required to take out a licence is to be fined for not doing so, and under s. 16 is to be incapable of suing in the courts of the province. Their Lordships are of opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and that they are, therefore, ultra vires.

Taking next the Companies Act of Manitoba, Part 4 of this Act deals with extra-provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. Inter alia a Dominion company must take out a licence, which it is entitled to receive if it complies with the provisions of the Act and with regulations to be made by the Lieutenant-Governor in Council. There may, under s. 111, be limitations and conditions specified in the licence, and if the company makes default in complying with these or certain other provisions, the licence may be revoked under s. 121. Unless the company obtains a licence it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a licence, and so long as unlicensed the company cannot invoke the jurisdiction of the courts of the province. It does not alter the scope of these provisions that by s. 126 fees are payable for the licence, to

be applied to the benefit of the revenue of the province. Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes in s. 92. They interpret them, like those of the Ontario statutes, as designed to subject generally to conditions the activity within the province of companies incorporated under the Act of the Parliament of Canada. The restriction in this statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of mortmain legislation.

The statute remaining to be considered is that passed by the legislature of Saskatchewan in 1915 a general Companies Act which, however, contains provisions applicable to Dominion companies. By s. 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies, and also the agents acting for them, are made liable on summary conviction to penalties. By s. 24 such companies are entitled to be registered on complying with the provisions of the Act and on paying the prescribed fees. There are also payable annual fees. By s. 25 such companies may upon certain conditions receive a licence to carry on business in Saskatchewan, and if they carry on business without a licence are guilty of an offence and liable to penalties. By s. 29, where the registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By s. 30, if the registration fees prescribed by the regulations made by the Lieutenant-Governor in Council be not paid, the registrar is to strike the company off the register. Here, again, their Lordships think that the provincial legislature has failed to confine its legislation to the objects prescribed in s. 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Sasketchewan Companies Act or shall become liable to dissolution under s. 29, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a licence, stands on the same footing as the enactments in Ontario and Manitoba, which have been held void as ultra vires; and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The result is that their Lordships take the view which commended itself to a minority of the judges in the courts below, and find themselves unable to agree on the main question argued, either with the preponderating opinion expressed in the Supreme Court of Canada on the Saskatchewan and Manitoba legislation, or with that of the majority of the Court of Appeal in Ontario on the validity of the statute of that province, but that on the subsidiary question as to the Mortmain Act of Ontario they agree with the Ontario courts. The proper course will be to allow the appeals and to declare (i) that in the case of all four appellant companies the provisions of the parts of the provincial Companies Acts which were the subject of the

proceedings in the courts of the provinces of Ontario, Manitoba and Saskatchewan, in so far as they purport to apply to the appellant companies respectively, are ultra vires of the provincial legislatures in each case, and that these companies are not precluded by reason of not having been licensed or registered under these Acts from carrying on business and exercising their powers in the three provinces, and are not liable to the penalties prescribed for having so carried on business and exercised their powers; (ii) that in the case of the province of Ontario none of the appellant companies can acquire and hold lands in the province without a licence under the provincial Mortmain Act, and that it is within the power of the other provincial legislatures to impose the requirements of a licence directed to this purpose. The judgments of MASTEN, J., in the Ontario cases will be restored, and the other proceedings dismissed. As regards costs, their Lordships were informed that in the cases in the courts below it was in certain of the proceedings agreed that there should be no costs. Having regard to the character of the questions raised, and to the circumstance that on one important point, that as to mortmain, the whole of the contentions of the appellants have not been successful, they think that there should be no costs for any of the parties, either of these appeals or in any of the courts below. They will humbly advise His Majesty in accordance with what has been said.

Solicitors: *Lawrence Jones & Co.*; *Blake & Redden*; *Freshfield & Leese*; *Charles Russell & Co.*; *Blake & Redden*; *Freshfields & Leese.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

VAUGHAN *v.* GRINDELL

[KING'S BENCH DIVISION (A. T. Lawrence, C.J., Darling and Avory, JJ.), April 21, 1921]

[Reported [1921] 3 K.B. 412; 91 L.J.K.B. 141; 125 L.T. 315; 85 J.P. 199; 19 L.G.R. 416; 27 Cox, C.C. 5]

Fertilisers and Foodstuffs—Offence—Failure by seller to give invoice on sale—Delivery to seller of part of sample and analyst's certificate—Conditions precedent to prosecution—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *ss.* 1 (1) 3 (3) (4), 6 (1) (3).

By s. 3 (3) of the Fertilisers and Feeding Stuffs Act, 1906 [see now s. 13 (1) of the Fertilisers and Feeding Stuffs Act, 1926]: "Where a sample has been taken with a view to the institution of any civil or criminal proceeding, the person taking the sample shall divide the sample into three parts, and shall . . . deliver or send by post two parts to the agricultural analyst and one part to the seller." By s. 3 (4) [see s. 13 (6) of the Act of 1926] the agricultural analyst shall furnish to, inter alias, the seller his certificate of analysis.

On the prosecution of the respondent for selling fertiliser without giving to the purchaser the invoice required by s. 1 (1) of the Act of 1906,

Held: the delivery or sending to the seller of one part of the sample and the furnishing to the seller of the agricultural analyst's certificate were conditions precedent to the prosecution; in their absence a conviction could not be sustained.

Notes. As to fertilisers and feeding stuffs, see 1 HALSBURY'S LAWS (3rd Edn.) 452–463; and for cases see 2 DIGEST (Repl.) 157–160. For Fertilisers and Feeding

Stuffs Act, 1926, see 1 HALSBURY'S STATUTES (2nd Edn.) 490. See also Fertilisers and Feeding Stuffs Regulations, 1955 (S.I. 1955, No. 1673). A

Cases referred to in argument:

Korten v. *West Sussex County Council* (1903), 72 L.J.K.B. 514; 88 L.T. 466; 67 J.P. 167; 19 T.L.R. 354; 20 Cox, C.C. 402; 1 L.G.R. 445; 2 Digest (Repl.) 157, *1153*.

Smart & Son v. *Watts*, [1895] 1 Q.B. 219; 64 L.J.M.C. 89; 71 L.T. 768; 59 J.P. 54; 43 W.R. 379; 11 T.L.R. 144; 39 Sol. Jo. 135; 18 Cox, C.C. 62; 15 R. 154, D.C.; 25 Digest 103, *256*. B

Barnes v. *Chip* (1878), 3 Ex.D. 176; 47 L.J.M.C. 85; 38 L.T. 570; 26 W.R. 635; 25 Digest 102, *252*.

Needham & Co. v. *Worcestershire County Council* (1909), 10 L.T. 901; 73 J.P. 293; 25 T.L.R. 471; 7 L.G.R. 595; 2 Digest (Repl.) 158, *1155*. C

Case Stated by justices for Kingston-upon-Hull.

At a petty sessions holden at the court of summary jurisdiction sitting at the Guildhall, Kingston-upon-Hull, on Nov. 5, 1920, and by adjournment on Nov. 19, 1920, an information was heard, which had been preferred by the appellant, John Oliver Vaughan, of the Guildhall, the official sampler for the city and county of Kingston-upon-Hull under the Fertilisers and Feeding Stuffs Act, 1906, for that the respondent, John Grindell, of Ravenswood, Hornsea, between Feb. 18, 1920, and April 28, 1920, at the said city and county, having sold to the Humber Fishing and Fish Manure Co., Ltd., for use as a fertiliser of the soil a certain article which had been subjected to an artificial process in the United Kingdom, or had been imported from abroad, to wit, six tons of superphosphate of lime, did unlawfully fail without reasonable excuse to give to the said Humber Fishing and Fish Manure Co., Ltd., the purchasers, on or before, or as soon as possible after, the delivery of the said article, the invoice required by the Fertilisers and Feeding Stuffs Act, 1906, stating the name of the article and the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phophates, and potash contained in the said article. Attached to the summons was a copy of the certificates of the agricultural analyst for the city and county of Kingston-upon-Hull and of the chief analyst, which showed a deficiency of soluble phosphate when compared with the guarantee on the label attached to the sample bottle. D E F

By the Fertilisers and Feeding Stuffs Act, 1906, s. 1 (1) [see now s. 1 (1) of Fertilisers and Feeding Stuffs Act, 1926]:

> "Every person who sells for use as a fertiliser of the soil any article which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article, and the invoice shall have effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error. . . ." G H

By s. 1 (5) [see now s. 2 (1) of Act of 1926]:

> "Any statement by the seller of the percentages of the chemical and other ingredients contained in any article sold for use as a fertiliser of the soil, or of the nutritive and other ingredients contained in any article sold for use as food for cattle or poultry, made after the commencement of this Act in an invoice of such article, or in any circular or advertisement descriptive of such article, shall have effect as a warranty by the seller." I

By s. 3 [see s. 3 and s. 13 of Act of 1926]:

> "(1) Every purchaser of any article used for fertilising the soil or as food for cattle or poultry who has taken a sample thereof within ten days after delivery of the article to him or receipt of the invoice by him, whichever is later, shall, on payment of the required fee, be entitled to have the sample analysed by

A the agricultural analyst. (2) An official sampler shall at the request of the purchaser and on payment by him of the required fee, and may without any such request, take a sample for analysis by the agricultural analyst of any such article as aforesaid which has been sold or is exposed or kept for sale, but, in the case of an article which has been sold, the sample shall be taken before the expiration of ten days after the delivery of the article to the purchaser, B or the receipt of the invoice by the purchaser, whichever is later. (3) Where a sample has been taken with a view to the institution of any civil or criminal proceeding, the person taking the sample shall divide the sample into three parts, and shall cause each part to be marked, sealed, and fastened up, and shall deliver or send by post two parts to the agricultural analyst and one part to the seller. (4) An agricultural analyst to whom a sample is submitted for C analysis under this section—(a) if the sample has not been divided into parts and the parts marked, sealed, and fastened up as hereinbefore mentioned, shall send a copy of the certificate of his analysis to the person who submitted the sample for analysis; and (b) if the sample has been so divided into parts, shall analyse one of the parts of the sample delivered or sent to him and retain the other, and shall send a certificate of his analysis in the prescribed form and D containing the prescribed particulars to the person who submitted the sample for analysis, and where that person is not the purchaser of the article also to the purchaser, and in every case to the seller and to such other persons (if any) as may be prescribed, and shall report to the Board of Agriculture and Fisheries in the prescribed manner the result of any such analysis: Provided that if the agricultural analyst does not know the name and address of the E seller he shall send the certificate intended for the seller to the purchaser, to be by him forwarded to the seller."

By s. 6 (1) [see s. 19 of Act of 1926]:

"If any person who sells an article for use as a fertiliser of the soil or as food for cattle or poultry commits any of the following offences, namely: (a) F Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act, he shall, without prejudice to any civil liability, be liable, on summary conviction, for a first offence, to a fine not exceeding twenty pounds, and for any subsequent offence to a fine not exceeding fifty pounds."

The appellant, in accordance with a request made to the Hull Corporation by G the Humber Fishing and Fish Manure Co., Ltd., gave notice to the respondent of his intention to take, in the manner prescribed by the Fertilisers and Feeding Stuffs Act, 1906, and the regulations thereunder, a sample of superphosphate of lime received by the company from the respondent on Feb. 23, 1920, then lying at the company's works in the city. The appellant, accordingly, attended at the company's warehouse on Mar. 6, 1920, where about twenty-five 2 cwt. bags con- H taining superphosphate of lime were pointed out to him by Mr. William Hewitt, the manager of the company. The appellant thereupon caused the floor of the warehouse to be swept, and selected half a dozen of the bags, had them opened separately and tipped upon the swept floor and a shovelful of the superphosphate taken from each bag, and then thoroughly mixed together the six shovelfuls so obtained, and took a sample containing about 4 lb., which he divided into three I parts. He placed the three parts in three bottles, sealed them, labelled each of them, and initialled and dated them. He handed one part to the said William Hewitt, and the remaining two parts he handed to the witness, Arnold Rowsby Tankard, the city analyst. In due course he received from Mr. Tankard an analysis of the superphosphate. Mr. Tankard proved that he received the two bottles containing superphosphate of lime. He sent one of the two bottles to James J. Dobbie, the government analyst under the Fertilisers and Feeding Stuffs Act, 1906, at the Government Laboratory, Clement's Inn Passage, Strand, London, W.C., and in due course received from him the official analysis of the sample of

superphosphate of lime. He further stated that he himself made an analysis of the sample of superphosphate of lime in the other bottle left with him by the appellant. He produced in court the two certificates of analysis and also the third bottle, which he said had remained in his custody the whole of the time. Ernest Thomas, the managing director of the company, proved that on Feb. 13, 1920, he purchased on the telephone from the respondent ten tons of superphosphate of lime at £8 11s. 6d. per ton, and confirmed the purchase the same day by letter. The superphosphate was to be 36 per cent. solubility. The usual practice of merchants was to quote by percentage, and the price varied according to the percentage of water solubility. On Feb. 18, 1920, his company received three tons of the superphosphate from the respondent, but no invoice was sent or delivered with it. Three tons were used the same day to go to a customer of the company in Herefordshire, and were invoiced to such a customer the same day with a guarantee analysis accordingly. He increased the bulk of three tons by more than 50 per cent. for their customers by adding other ingredients. On Feb. 23, 1920, the company collected four more tons from the respondent, and it was from that consignment that the appellant obtained his sample. No invoice or delivery note was given or sent to the company by the respondent for this second delivery of four tons. Mr. Thomas proved that he pressed the respondent for an invoice, but he never received any invoice containing the terms of the contract. He also proved that on Feb. 23, 1920, he informed the respondent that the company would not take the balance of four tons of superphosphate due under the contract.

On behalf of the respondent at the close of the appellant's case it was objected (inter alia) that, as the sample was taken with a view to the institution of a civil or criminal proceeding, under s. 3 (3) of the Act of 1906, the appellant should have divided it into three parts and caused each part to be marked, sealed, and fastened up, and should have delivered or sent by post two of such parts to the agricultural analyst and one part to the respondent, but such last-mentioned part of the sample was not so sent to him. No part of such sample was at any time sent to the respondent, nor was any certificate of analysis sent to him under s. 3 (4) of the Act of 1906. The justices upheld the objection which they decided was fatal to a conviction in respect of the information, and, without hearing the respondent and his witnesses, dismissed the summons. The appellant appealed.

A. M. Latter for the appellant.
du Parcq for the respondent.

A. T. LAWRENCE, C.J.—This is a Case stated by justices on a prosecution under the Fertilisers and Feeding Stuffs Act, 1906. The justices before whom the prosecution came refused to convict. They overruled most of the objections taken on behalf of the respondent, but they ruled in the respondent's favour in respect of two objections, one of which was that the appellant, who was the official sampler, had not complied with the Act by sending to the respondent a part of the sample which he had taken with the intention of instituting a prosecution. It has been argued that the sending of a part of the sample is not a condition precedent to the maintenance of the particular charge which is here in question, namely, the omission to comply with the Act by sending an invoice of the article sold. The Act provides in s. 1 (1):

> "Every person who sells for use as a fertiliser of the soil any article which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article, and the invoice shall have effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error . . ."

Every seller of a fertiliser must comply with that enactment, which is plainly a very important provision of this rather complicated statute, because it entitles the

purchaser to a considerable amount of information, and the invoice amounts to a warranty by the seller. In the present case the sellers (respondents to the appeal) have omitted to give that invoice. On the other hand, however, the appellant has failed to comply with s. 3 (3) of the Act which provides:

> "Where a sample has been taken with a view to the institution of any civil or criminal proceeding, the person taking the sample shall divide the sample into three parts . . . and shall deliver or send by post . . . one part to the seller."

That was not done. The appellant never sent one part to the seller. The question is whether his doing so was a condition precedent to this prosecution. Though the matter is complicated, it is plain that s. 3 (3) directs that one part is to be sent to the seller, and s. 3 (4) directs the agricultural analyst to send a certificate of his analysis to the seller. Those things not having been done, I think that the justices were right in refusing to convict.

DARLING, J.—I am of the same opinion. This statute is very confused and what it intends is only to be collected, if it can be collected at all, by reading a number of provisions and contrasting them one with another. I have come to the conclusion that the meaning of the statute is that the sending of a part of the sample to the seller shall be a condition precedent to the prosecution. One always likes to find whether the provisions enacted in an Act of Parliament can serve any useful purpose. Here, I think, it is reasonable that not only a certificate showing the result of the analysis, but also one of the three parts of the sample, should have been sent to the seller, even when the only charge is an omission to send an invoice in the terms prescribed by the statute. It seems to me that the reason is this. The omission to send an invoice is made an offence, but it might well be that it was a very venial offence as the analysis might show that the article supplied was absolutely in accordance with the contract. If, however, the article was not in accordance with the contract, the penalty for not sending the invoice should naturally be greater than if the goods were up to guarantee, because this invoice is not a common invoice, but is practically in a statutory form and amounts to a guarantee of what the article is. I think, therefore, that the sending of a part of the sample and the certificate of analysis to the seller is intended by the statute to be a condition precedent to a prosecution. The reason probably is that the justices may be in a position not only to convict, but to impose a light or a heavy penalty according as, in their opinion, the omission to send the invoice was a mere mistake or was done to conceal the inferior quality of the article supplied.

AVORY, J.—I agree. The consent of the Board of Agriculture and Fisheries is clearly a condition precedent to any prosecution for the offence of failing to send or give the invoice required by the Act. That consent under s. 6 (3) cannot be given until the part of the sample retained by the agricultural analyst has been analysed and the certificate of analysis given by the chief analyst. From s. 3 (3) and (4) it is clear that the words in s. 6 (3), "the part of the sample retained by the agricultural analyst," can only mean the part which has been retained after the provisions of s. 3 (3) have been complied with, namely, that the person taking the sample is to divide it into three parts and cause each part to be marked, sealed, and fastened up, and deliver or send by post two parts to the agricultural analyst and one part to the seller. It is only after that has been done that the agricultural analyst can be in possession of the part which he retains; and he retains it for the purpose, if necessary, of submitting it to the chief analyst. It, therefore, appears to me to follow that one cannot arrive at the meaning of the words, "the part of the sample retained by the agricultural analyst," until one assumes that all the steps required by s. 3 (3) have been taken; and one of those steps is that one part of the sample is to be sent to the seller. Therefore, it comes to this, that the sending of a part to the seller becomes, if not in terms, a condition precedent, necessarily involved in the condition precedent which must be fulfilled

before the prosecution can be instituted. Section 6 (4) which requires that in any prosecution for the offence of failing to give an invoice there must be served with the summons a copy of the analyst's certificate, entirely bears out the view which my brother DARLING has expressed—that the statute contemplates that, even when a person is charged with failing to send an invoice, the court which has to adjudicate is to take into consideration the character of the goods or the inferiority of the goods below the required analysis. If they are to take that into consideration, it is obvious that the seller ought to have the opportunity of testing the sample before he can be convicted on the summons.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *H. A. Learoyd*, Hull; *C. J. Smith & Hudson*, for *Locking, Holdich & Locking*, Hull.

[*Reported by* J. F. WALKER, ESQ., *Barrister-at-Law.*]

MOUNTAIN *v.* WHITTLE

[HOUSE OF LORDS (Lord Birkenhead, L.C., Viscount Haldane, Viscount Finlay, Viscount Cave and Lord Sumner), February 10, 11, March 3, 1921]

[Reported [1921] 1 A.C. 615; 90 L.J.K.B. 699; 125 L.T. 193; 65 Sol. Jo. 415; 15 Asp.M.L.C. 255]

Insurance—Marine insurance—Peril of the sea—Fortuitous accident or casualty inordinately high breast wave of tug—Swamping of tow—Construction of policy—"Liberty to shift" clause—Cover against "docking . . . and going on gridiron"—Time policy—No implied warranty of seaworthiness by assured.

By a time policy the appellant insured a houseboat belonging to the respondent against, inter alia, perils of the sea "whilst anchored in a creek off N., however employed, with liberty to shift . . . including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required . . ." During the currency of the policy the respondent wished to have the houseboat cleaned, and he arranged that she should be taken from where she was anchored to the nearest and most convenient yard which was some seven miles away. To remove her to this yard a tug was employed which was larger than was customary for that work and caused an unusually high breast wave which resulted in water reaching the top side seams of the houseboat, which were slightly open, and entering the vessel, whereby she sank. In an action by the respondent on the policy,

Held: (i) the incidence and dimensions of the inordinately high breast wave amounted to a fortuitous casualty of the sea, and so a "peril of the sea" and one of the perils insured against, just as much as if it had been occasioned by a high wind; (ii) the "liberty to shift" clause was to be construed as an extension of the scope of the policy, which would otherwise only cover the houseboat while she was actually anchored in the creek, but it was not apt to cover a voyage of seven miles to a different part of the coast; but (iii) the "docking" clause must be construed as extending the policy to cover a voyage to such a dock or gridiron as a reasonable assured would in all the circumstances be justified in employing; in the present case the respondent was justified in employing the dock in question; and, therefore, he was entitled to succeed.

Per LORD BIRKENHEAD, L.C., and VISCOUNT FINLAY: As the policy was a time policy there was no implied warranty by the respondent of seaworthiness which would afford to the appellant a defence to the claim.

Decision of the Court of Appeal, [1920] 1 K.B. 447, affirmed.

Notes. Considered: *The Stranna*, [1937] 2 All E.R. 383; *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169. Referred to: *P. Samuel & Co.* v. *Dumas, Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co. (No. 2)*, [1923] 1 K.B. 592.

As to time policies and perils insured against, see 22 HALSBURY'S LAWS (3rd Edn.) 31, 56, 57, 73 et seq.; and for cases see 29 DIGEST 125 et seq., 197 et seq.

Case referred to:

(1) *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498; 45 L.J.Q.B. 761; 35 L.T. 445; 24 W.R. 951; 3 Asp.M.L.C. 275, H.L.; 29 Digest 127, *798*.

Also referred to in argument:

Grant, Smith & Co. and McDonnell, Ltd. v. *Seattle Construction and Dry Dock Co.*, [1920] A.C. 162; 89 L.J.P.C. 17; 122 L.T. 203; 29 Digest 199, *1585*.

Leyland Shipping Co. v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, *1858*.

Appeal by the defendant, an underwriter at Lloyd's, from an order of the Court of Appeal, reported [1920] 1 K.B. 447, affirming a judgment of BAILHACHE, J., whereby it was adjudged that the plaintiff was entitled to recover from the defendant £548 16s. 8d. and costs.

The action was brought on a time policy of marine insurance on the plaintiff's houseboat *Dorothy*, which was lost in circumstances that appear from the opinion of the Lord Chancellor.

R. A. Wright, K.C., and *R. I. Simey* for the appellant.

Leck, K.C., and *L. C. Thomas* for the respondent were not called on to argue.

The House took time for consideration.

Mar. 3. The following opinions were read.

LORD BIRKENHEAD, L.C.—This is an appeal from an order of the Court of Appeal affirming the judgment of BAILHACHE, J., in favour of the respondent. The respondent's claim was for a partial loss under a policy of insurance subscribed by the appellant and covering the houseboat *Dorothy*.

The issues which require decision are, in general, whether the damage sustained by the *Dorothy* was caused by a peril insured against and whether the *Dorothy* was covered by the policy at the time of the loss. The facts are simple and may be shortly stated. The *Dorothy* was bought by the appellant in the summer of 1915, fitted out as a houseboat, and used as a residence for himself and his family. In January, 1918, she was let to Messrs. James, a firm of contractors who had undertaken to raise a sunken vessel and required accommodation for the men engaged in this task. Messrs. James towed the *Dorothy* to the Hamble River, where she remained with their men on board till the early autumn of 1918, when they gave up possession in pursuance of a notice from the respondent dated June 22. When the workmen left, the *Dorothy*, being in a dirty condition, required cleansing and renovation before the respondent could re-occupy her. The necessary repairs required that she should be docked and put on the gridiron. Messrs. Camper and Nicholson's yard at Northam, about seven and a half miles away, was the nearest place where the *Dorothy* could be docked. There was no place nearer or more suitable. The respondent had engaged a small tug called *The Test* to tow the *Dorothy* to the repairing yard above-mentioned, but at the appointed time *The Test* broke down and the deputy dockmaster sent the tug *Dorrington*, a much larger and more powerful tug, to tow the *Dorothy*. The contention was abandoned

before your Lordships that the method of towage adopted was unusual or unseamanlike. But during the towage the unusual height of the breast wave, thrown up by the *Dorrington* and the *Dorothy* together, caused the water to reach the top side seams of the *Dorothy*, invade the interior through the seams, and cause the *Dorothy* to sink shortly after her arrival off the gridiron at Messrs. Camper and Nicholson's yard.

It was contended on behalf of the appellants, first, that there was no clear finding of fact that the cause of the casualty was the unusual height of the breast wave, or indeed that the breast wave was unusually high, and it was contended further that, if there were such findings, there was no evidence on which they could properly be found. In my opinion, these contentions fail. Commander Whittle, in his evidence, speaks of the heavy wash of both vessels. Counsel for the appellants admitted, what indeed is obvious, that the larger the tug, the greater the resultant wave, and he could not dispute, having regard to the evidence, that the tug actually employed was of disproportionate size and power. The judgments below seem to me to embody the necessary conclusion of fact in reasonably clear language. BAILHACHE, J., expresses himself as follows:

> "I am satisfied that what happened was that the breast wave, the bow wave from the *Dorrington*, raised the level of the water and caused the water to reach these leaky and defective seams. . . . It must be borne in mind that there was a rather unusual danger about this particular operation by reason of the comparative size and power of the *Dorrington* as compared with this houseboat."

BANKES, L.J., used language even plainer:

> "It seems to me that the unusual height of this breast wave caused by using this very powerful tug to tow this houseboat in the way in which she was towed, may properly be called an unexpected occurrence, and properly be found as it has been found by the learned judge, to be a peril of the sea."

It should be added to this short statement of the facts that the *Dorothy* was found, and rightly found, to be unseaworthy on the ground that her seams above the water side were leaky and defective. But the policy was a time policy, and, therefore, the unseaworthiness of the vessel of itself afforded no defence to the claim. Nor was it contended that the defence under s. 39 (5) of the Marine Insurance Act, 1906, was open to the appellant, as it could not be and was not shown that the respondent was aware of the vessel's unseaworthiness.

The questions which arise upon these facts, and on those submissions of the parties which survive the argument, are the following: (i) Was the loss caused by a peril insured against? (ii) Was the *Dorothy* covered by the policy during the shifting from her anchorage to Camper and Nicholson's yard for the purpose of docking and being put on the gridiron? (iii) Had the insured adventure been abandoned? To answer these questions it is necessary to consider the terms of the policy. This instrument was dated Aug. 19, 1918, and was expressed to be for the space of six calendar months, commencing July 14, 1918, and ending Jan. 13, 1919, for £400 on hull and material, machinery and boilers of the vessel *Dorothy* "whilst anchored in a creek off Netley, however employed, with liberty to shift." The words just quoted are typed at the beginning of the printed form. Additional clauses are annexed to the instrument in print, while at its foot is stamped a short clause to the following effect:

> "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy."

The perils insured against were perils usual in a Lloyd's policy, including perils of the seas.

I have made it plain that there are concurrent findings of fact in the courts below to the effect that the unusual size of the breast wave either caused the entry

of the sea water or effectively contributed to its entry. I see no reason for differing from these findings, and I adopt them as the basis of the conclusion which I have reached. In my opinion, the nature of this wave constituted a "sea peril." The elements which are necessary to form a sea peril have frequently been collected and explained in this House. But it is no longer necessary, unless for the purposes of illustration, to go further than the statutory provisions of the Marine Insurance Act, 1906, that the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas, and does not include ordinary action of winds or waves. In my opinion, the incidence and dimensions of the wave in question amounted to a fortuitous casualty of the seas and were not accounted for merely by the ordinary action of winds or waves. Upon the first point, therefore, I reach the conclusion that the loss was caused by a peril insured against.

It is, in the next place, contended that the *Dorothy* was only protected while anchored in a creek off Netley; that there was a deviation; and that she was unprotected at the moment of the casualty. It is worth noticing that the parties apparently acquiesced in the view that the Hamble River, though not in fact a "creek off Netley," was to be treated as though it were. The appellants, however, disputed the reasonableness of founding upon this agreement a more extensive construction of the words "in a creek off Netley" than they would naturally bear. For the purpose of this opinion I draw no general inference from the tacit agreement to vary in this particular the scope of the original policy. The respondent contended that two clauses of the policy extended its scope sufficiently for his purposes. In the first place he points out that he is given "liberty to shift." In the second place he relies upon the docking clause which I have already set out. BAILHACHE, J., has found in his favour on the shifting facility, but against him on the docking clause. The Court of Appeal reversing this conclusion rejected his submission upon the first point, but decided in his favour upon the docking clause. I agree with the view of the Court of Appeal. I think that the words "with liberty to shift" are to be construed as an extension of the scope of the policy, which would otherwise only protect the vessel while it was actually anchored in the creek. In other words, if the freedom to shift had not been stipulated for the vessel would have been unprotected during the innumerable small movements which circumstances may from time to time have required. I do not think that the words were intended to cover a voyage of seven or eight miles to a different part of the coast. But the docking clause must be determined with reference to quite other considerations. In the first place, it must be given a clear meaning. Counsel for the appellant attempted to attenuate its importance by pointing out that it was merely a stamped clause. I find myself quite unable in any case in which the circumstances are not altogether singular to treat some clauses of a contract as of primary and others as of secondary validity. The clause either is part of the contract or it is not. If it is, it must be construed in the same way as any other clause. It may sometimes be necessary in cases where the clauses of an instrument appear on the face of them to be contradictory to admit speculative appraisements of their comparative weight. But these ought always to be undertaken with hesitation, and applied with extreme caution. In the present case we are to give a meaning to a clause which protects the insured vessel against all risk of docking, changing docks, and going on the gridiron. It is conceded that there is no dock and no gridiron in the Hamble River or in any creek off Netley. But it is, nevertheless, contended by the appellants that in spite of the plain language of the clause protection ceased the moment the *Dorothy* left the Hamble River for Camper and Nicholson's yard at Northam, in other language that the words "now anchored in a creek off Netley" so completely dominate the whole policy as to override the docking clause altogether. I cannot accept this contention. No reasonable meaning can be given to the docking clause, unless it is construed as extending the protection to the course of a voyage to a dock or gridiron such as a reasonable owner might in all the circumstances of the case be expected to employ and be justified in employing. I am not impressed by the arguments used

in order to illustrate the supposed extravagant consequences of this construction. If an insurer extends the protection of the vessel insured to a voyage for the purpose of docking the vessel, he may be expected to acquaint himself with the measure of his liability by ascertaining where docks are reasonably to be found and how far the "changing docks and going on gridiron" to which he has assented will increase his liability, and ought to be reflected in the rate to be charged. For these reasons I am of opinion that the second question must equally be answered in favour of the respondent.

The only remaining point may be very shortly dismissed. It is contended for the appellant that the insured adventure had been abandoned. This contention is founded upon the evidence of the respondent. Commander Whittle there stated that it was his intention to spend the winter living on board the *Dorothy* at Northam, thereby (so it is claimed) abandoning altogether his anchorage in a "creek off Netley." It is sufficient upon this point to observe that it is not alleged that such an intention was ever communicated to the insurers; that it is not contended that the respondent did any act which made his intention irrevocable; and that it is extremely improbable that he would have reached, without any consideration whatever, a decision which might conceivably have deprived him of a protection which in certain contingencies he might still need and for which he was bound to pay. I am of opinion that the appeal fails on every ground and that it ought to be dismissed. I move your Lordships accordingly. **VISCOUNT CAVE** desires me to say he concurs in the opinion I have just read.

VISCOUNT HALDANE.—I have also had the advantage of previously seeing the proof of the opinion delivered by the Lord Chancellor. I concur in the conclusion at which my noble and learned friend has arrived, and there is nothing that I desire to add.

VISCOUNT FINLAY.—The action in this case was brought upon a policy of marine insurance on the *Dorothy*, a houseboat, to recover for a partial loss by perils of the sea alleged to have been sustained during the currency of the policy. The policy was expressed to be for six calendar months, commencing July 14, 1918, and ending Jan. 13, 1919, "whilst anchored in a creek off Netley, however employed, with liberty to shift." It covered perils of the seas and contained the following clause:

> "Including all risks of docking, undocking, changing docks and going on gridiron or graving docks, as may be required during the currency of this policy."

The *Dorothy* had been lying in the Hamble River on Southampton Water. She belonged to the plaintiff, Commander Whittle, and had been used by him as a dwelling-house for himself and his family, but for some months before Sept. 21, 1918, had been occupied with his leave by the workmen employed in some urgent work on Southampton Water. He desired to resume occupation of the houseboat, and finding that she was not in a fit state for habitation by himself and his family he arranged that she should be towed up to Messrs. Camper and Nicholson's yard at Northam on the River Itchen to be thoroughly cleaned and re-painted. A small tug, *The Test*, had been engaged for the towage, but owing to an accident *The Test* could not come, and a much bigger tug, the *Dorrington*, was sent instead. The master of the *Dorrington* lashed the *Dorothy* alongside the tug. Bailhache, J., before whom the case was tried, found that she was lashed alongside in the ordinary way with fenders to keep her off from the tug and fastened ahead and astern. On arriving at Northam, eight miles off, it was found that a great deal of water had entered the *Dorothy* during the voyage. At Northam the *Dorothy* was cast off from the tug, and made further water until she sank. The damages claimed were £400 for partial loss in consequence of the sinking and £148 16s. 8d. under the suing and labouring clause. Bailhache, J., gave judgment for £548 16s. 8d. accordingly, and the Court of Appeal dismissed an appeal from his

judgment by the underwriters. Three questions arise upon this appeal: (i) Whether the *Dorothy* was covered by the policy at the time of the loss; (ii) whether the policy was abandoned; and (iii) whether the loss was by perils of the sea.

(i) The underwriters contend on the present appeal that the insurance covered the Dorothy only while anchored in the Hamble River and while shifting within the limits of the Hamble River, and that they are not liable as the loss took place while she was proceeding up the Southampton Water on her way to the Itchen. It is by no means easy to put a definite meaning upon the expression in the policy "whilst anchored in a creek off Netley." The underwriters assert that the Hamble River had been selected as the creek off Netley where the *Dorothy* was to lie at anchor, and that the shifting clause gave power to shift only within the limits of the Hamble River. The assured, on the other hand, contends that the insurance applied to the *Dorothy* while in any creek off Netley and that the shifting clause covered her while moving from one such creek to another. The expression "a creek off Netley" taken by itself seems equally applicable or equally inapplicable to the Hamble River and to the Itchen. There was no evidence given of any special meaning attributed by usage to this expression. What is clear is that both sides regarded this expression as covering the Hamble River. BAILHACHE, J., must have regarded it as covering also the Itchen. He decided that the *Dorothy* was covered by the shifting clause at the time of the loss. The liberty to shift must be to shift within the limits of the policy, and could not cover the *Dorothy* unless she was shifting to a place which the policy would cover. BAILHACHE, J., was of opinion that the *Dorothy* would not have been covered at the time of the loss by the "docking and undocking" clause. The Court of Appeal did not agree with BAILHACHE, J., that the shifting clause covered the *Dorothy* at the time of the loss, as they were not prepared to hold that shifting to the Itchen would be within the terms of the policy. It is not necessary for your Lordships to decide between the views taken on this point in the Court of Appeal and in the court of first instance respectively. In my opinion, the Court of Appeal were clearly right in holding that, whether the shifting clause did or did not apply, the *Dorothy* was covered by what has been termed the docking and undocking clause. It was argued for the underwriters that the liberty to dock, &c., must be confined to doing so within the limits of the Hamble River, and that the *Dorothy* could not go on gridiron or graving dock unless it was situate within these limits. As there are no such conveniences in the Hamble River this construction would prevent the clause from having any operation whatever in the case of the present policy. I cannot so construe its terms. In my opinion, this clause applies whether the dock or gridiron was itself within or without the limits of the policy protecting the *Dorothy* while anchored, and it would also cover the vessel while proceeding to the dock or gridiron and while returning from it. If this view be correct it follows that the *Dorothy* was covered while she was proceeding up Southampton Water to the gridiron at Northam, even if the policy would not have applied to the *Dorothy* if anchored in the Itchen. The conclusion arrived at by the Court of Appeal upon this clause seems to me to be right on the natural meaning of the words, and to be in conformity with the decision in *Pearson* v. *Commercial Union Assurance Co.* (1). It would very much restrict the operation of such a clause if the vessel could not go to any graving dock or gridiron beyond the limits covered by the policy for ordinary purposes. In the present case there was no place nearer or more suitable for taking the vessel to than Camper and Nicholson's yard.

(ii) A second point was made by the appellants with reference to the voyage to the Itchen. It appears from the evidence that the practice of Commander Whittle had been that the *Dorothy* should be laid up during the winter in Camper and Nicholson's yard, and that his family should live on board her there, and he said that it was his intention to do the same during the winter, which was approaching at the time when this loss was sustained. He said that he meant to re-decorate her and then live on board. The defendants contend that Camper and Nicholson's yard at Northam was beyond the limits of the policy. On this point it is not

necessary for your Lordship's House to express any opinion. Even if Camper and Nicholson's yard were beyond the limits of the policy, so that keeping the vessel anchored there would have amounted to an abandonment of the policy, Commander Whittle, whatever he intended, had not communicated any such intention to the underwriters, and was absolutely at liberty to change his mind. He might, as soon as the decoration was completed, have taken the vessel back to the Hamble River if he were tempted to do so by specially fine weather. The mere fact that he had a certain intention in his own mind cannot amount to an election which would affect him as between himself and the underwriters. I agree with both courts below in thinking that this point entirely fails.

(iii) There remains for consideration the question whether the loss was by perils of the seas. It appears that the *Dorothy* was not seaworthy owing to some opening of the top side seams. As the policy was a time policy there was no warranty of seaworthiness and there is nothing to show that Commander Whittle was aware of the unseaworthiness. It is, however, necessary for the assured to establish that the loss was due to a peril of the seas. If the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the seas—the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils of the seas. There must be some special circumstance, such as heavy waves causing the entrance of the sea water, to make it a peril of the seas. Was there such a peril here? Both BAILHACHE, J., and the Court of Appeal find that there was, and upon the evidence I cannot doubt that they were right. It seems to be quite clear that the *Dorothy* was exposed to a wash of an extraordinary character from the great size and power of the *Dorrington*, the tug to which she was lashed. The breast wave so occasioned amounted to a peril of the seas just as much as if it had been occasioned by a high wind. No attempt was made on behalf of the underwriters to show that the water would have made its way into the houseboat to the same extent if the wash and breast wave had been normal. The wash occasioned by passing vessels at sea may constitute a peril of the seas if of an extraordinary character, and if the wash here was occasioned by something abnormal in the strength and size of the tug or the mode of towage it was equally a peril of the sea. The fact that it was due to some negligence in the management of the vessel on the part of those to whom the owner had confided her does not prevent such an accident being covered by the policy. BAILHACHE, J., and the three judges in the Court of Appeal all agree in finding that there was an abnormally high breast wave caused by the size and strength of the tug to which the houseboat was lashed, and that this breast wave was responsible for the water reaching and entering through the defective seams. Apart altogether from the effect to be given to the concurrent findings of the two courts it appears to me upon perusal of the evidence that these findings were manfestly right, and that the appeal fails also upon this point. I am, therefore, of opinion that the appeal should be dismissed with costs.

LORD SUMNER.—The subject-matter of this time policy is the houseboat *Dorothy*, however, though not wherever, employed, for she is covered only "while anchored in a creek off Netley," with liberty to shift and with such other liberty as is involved in the docking clause. "In a creek off Netley" limits the area within which the *Dorothy* is to be insured. What then is this area? The word is not "at" or "opposite"; and to speak of something being "off" a point on shore is very vague. The word "off" is not to be measured only by the distance straight off shore to the exclusion of the waters up or down the estuary. There is a further indefiniteness. Most creeks in the south of England have names; this creek is nameless. Moreover, is it the houseboat or the creek that is to be "off" Netley? I can only say that I do not know when a creek, which is itself an indentation in or on a shore, can properly be said to be off that shore. At the date of the policy the *Dorothy* was actually at anchor in the River Hamble. The underwriters

A forebore to argue at the trial that, if so, she was not "anchored in a creek off Netley." Not that there was any agreement between the parties that the River Hamble was such a creek, though I think it would probably have been so held, but the point was not taken. The underwriters may have thought that to such a contention a claim for rectification would be a successful answer, for, if not, the policy never attached. At any rate, the policy is now to be construed as it stands, B and not as if it had been expressed "while anchored in the River Hamble." When the *Dorothy* sustained the loss sued for she was off Messrs. Camper and Nicholson's yard on the River Itchen and was still in tow—that is, she was too far from Netley to be "off Netley" or "in a creek off Netley," and further, was not at anchor. Was she then exercising her liberty to shift? I think not. Whatever the area be within which she was laid up, it is within that area that she can shift, C and not beyond it. Liberty to shift is not unlimited liberty to cruise or to anchor wherever the owner likes. The liberty must be confined to the limits of the lying up, to which the liberty to shift is ancillary.

What then is the effect of including "all risk of docking . . . changing docks and going on gridiron as may be required" during the six months covered? As an addition to the perils insured against it may be that these words have no effect on D the area within which those risks are to be incurred, but so read, the words are idle, for there are no docks, graving docks or gridirons in any creek off Netley. No one supposed that there were. However urgently docking might be required, the *Dorothy* on this construction would be at owner's risk on passing the indeterminate limit of her laid-up area, and her owner might have to choose, and quickly too, between sinking at anchor in a creek at underwriters' risk or towing to a E gridiron elsewhere at his own. This is not a practical view to take of the matter. Further, risk of docking and undocking in any case includes some navigation outside the dock, the proximity involved being a question of fact. A fortiori is this true of "changing docks," and this involves a still wider area outside of any dock. If so much navigation outside of any dock is implied, because otherwise the clause would defeat its own object, I see no difficulty in implying that she was F covered during the two or three miles at most by which she departed from her "creek off Netley." I do not understand it to be contested that she would have been covered while going from her anchorage to the gridiron, if there had been one within the area of the insurance, though that would have been implied from the docking clause, since the shifting would not be from anchorage to anchorage. Of course, this clause would not hold her covered while going to any dock, however G far off or in whatever alteration of circumstances; but here the dock lay but a short distance beyond the limit, the passage was through similar waters, involving no different kind of risk from that of the passage within the specified area, and the ancillary character of this addition is strictly preserved. Even the point that in dry dock or on gridiron the craft is not waterborne is not enough to make the risk wholly dissimilar, for the houseboat, grounding at ebb-tide, might run much the H same risk of being wrung as if unskilfully put on a gridiron or in dry dock. The clause is not a new and independent insurance, but is in support of the laid-up or port risk. As she was not in a port at all, except perhaps in the administrative sense, if the clause did not entitle her to go to Messrs. Camper and Nicholson's yard, it meant nothing. The underwriters argue that it did mean nothing; yet it I is a part of the contract. It is not part of the old form of Lloyd's policy; it is purposely added, however humble the hand by which it is stamped on the policy, and however much it is a matter of course to do so with laid-up risks. There is no evidence of any usage; no suggestion of mistake; no counterclaim to rectify the policy by striking it out. The fact that it is added to the form when the blanks are filled in and the form is made up for signature as a contract, shows that the words are words of contract, to which effect is to be given, if that can reasonably be done. Even if the docking clause were now part of the Lloyd's form, in this connection they would be part of this contract, for docking may be as needful to a laid-up vessel as to one making voyages. There are some expressions in this form

of policy which have no application to this risk, such as the liberty to touch and stay. This results from expressing a laid-up risk for time on a voyage form. Similar results always follow from expressing insurances on ship alone on a Lloyd's form, which is also used for insurances on goods. Some words in the common form are always found to have no application to the insurance actually effected. Everyone who is at all familiar with the way in which insurance policies are and long have been framed in practice and have always been interpreted in the courts for a century and more before this policy, must know that an attempt to construe a ship risk by reference to words which really belong to the goods form, is to disregard, and not to give effect to, the intention of the parties, but such is not the case here. The docking clause can have some meaning here; the only question is what that meaning is.

Two matters of fact alone remain, namely, (i) Was there evidence of a loss by perils insured against, and (ii) Had the insured adventure been abandoned by the assured before loss? As to the first, the decision of BAILHACHE, J., was affirmed by the Court of Appeal, and I should not myself presume to differ from the conclusions of four authorities so learned and so experienced in this subject as BAILHACHE, J., and BANKES, SCRUTTON, and ATKIN, L.JJ., and I think there was clearly evidence on which they could so find. In fact, my own conclusion would be the same, for the bow wave must have been indeed an exceptional one for 4 ft. of water in 100 minutes' towing at a moderate speed to have been forced through seams which were not open enough to have attracted attention, and sinking by such a wave seems to me a fortuitous casualty. Whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage. I also think that the adventure was not abandoned in fact. What deviation would be as applied to this insurance I do not know, but, apart from the assured's being free to change his mind, I think he only meant that he did not intend to take the *Dorothy* back to the Hamble River, not that he did not intend that she should be anchored again "in a creek off Netley" at all during the residue of the term insured. The appellant's argument assumed that the policy was to be treated as if it had been expressed simply "whilst anchored in the Hamble River." I, therefore, agree that the appeal fails.

Solicitors: *William A. Crump & Son*; *Constant & Constant.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

CHELLEW *v.* ROYAL COMMISSION OF SUGAR SUPPLY

[King's Bench Division (Sankey, J.), February 2, March 23, 1921]

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), June 23, 24, July 15, 1921]

B [Reported [1921] 2 K.B. 627; [1922] 1 K.B. 12; 91 L.J.K.B. 58; 126 L.T. 103; 37 T.L.R. 588, 903; 15 Asp.M.L.C. 393; 27 Com. Cas. 1]

Shipping—General average—Expenditure—Total loss of ship after expenditure incurred and before completion of voyage—Right of shipowner to contribution—York-Antwerp Rules, 1890, *r.* 17.

C A steamship left Cuba with a cargo of sugar, to be carried to Queenstown and there delivered at the port of destination to consignees. The bills of lading provided that general average should be payable according to York-Antwerp Rules. During the voyage the ship incurred general average expenses at a port of refuge, and soon after resuming her voyage, she and her cargo were totally lost at sea by fire. On a claim by the shipowner for general

D average contribution from the cargo-owners,

Held: by Sankey, J.: at common law a claim to contribution in respect of a general average expenditure was to be assessed on the value of the property sought to be made to contribute at the termination of the voyage at the port of destination and not on its value at the place where the expenditure was incurred; in the present case no cargo had arrived at the port of destination;

E and, therefore, the shipowner was not entitled to claim contribution from the cargo-owners: by the Court of Appeal: (leaving open the question of the position at common law) r. 17 of the York-Antwerp Rules, 1890, which provided: "The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure . . .", was incorporated in the contract of carriage by the terms of the bills of lading; where

F an adventure was terminated prematurely there was still a termination within the rule; at the termination of the present adventure there were no contributing values; and, therefore, there could be no contribution to the shipowner's expenditure.

Notes. Considered: *Morrison Steamship Co.* v. *Greystoke Castle Steamship (Cargo Owners)*, [1946] 2 All E.R. 696. Referred to: *Green Star Shipping Co.* v.

G *London Assurance*, [1933] 1 K.B. 378; *Tate and Lyle, Ltd.* v. *Hain Steamship Co.* (1934), 151 L.T. 249.

As to general average, see 30 Halsbury's Laws (2nd Edn.) 592–604; and for cases see 41 Digest 592 et seq.

Cases referred to:

H (1) *Svendsen* v. *Wallace Bros.* (1885), 10 App. Cas. 404; 54 L.J.Q.B. 497; 52 L.T. 901; 34 W.R. 369; 1 T.L.R. 476; 5 Asp.M.L.C. 453, H.L.; 41 Digest 493, *3224*.

(2) *Fletcher* v. *Alexander* (1868), L.R. 3 C.P. 375; 37 L.J.C.P. 193; 18 L.T. 432; 16 W.R. 803; 3 Mar.L.C. 69; 41 Digest 605, *4326*.

(3) *The Mary Thomas*, [1894] P. 108; 71 L.T. 104; 7 Asp.M.L.C. 495; sub nom. *The Mary Thomas, Mary Thomas Steamship Co., Ltd.* v. *Globe Marine* I *Insurance Co., Ltd.*, 63 L.J.P. 49; 10 T.L.R. 154; 6 R. 792, C.A.; 29 Digest 235, *1888*.

(4) *Atwood* v. *Sellar* (1880), 5 Q.B.D. 286; 42 L.T. 644; 28 W.R. 604; 4 Asp.M.L.C. 283; sub nom. *Attwood* v. *Sellar*, 49 L.J.Q.B. 515, C.A.; 41 Digest 606, *4332*.

Also referred to in argument:

Anderson v. *Ocean Steamship Co.* (1884), 10 App. Cas. 107; 54 L.J.Q.B. 192; 52 L.T. 441; 33 W.R. 433; 5 Asp.M.L.C. 401, H.L.; 41 Digest 601, *4281*.

Appeal from an order of SANKEY, J., on the award of an arbitrator stated in the form of a Special Case which raised the question whether, if, subsequently to the incurring by a shipowner of general average expenditure, the ship and all her cargo were totally lost while completing the agreed voyage, the shipowner could claim any contribution in general average from the owners of the cargo so lost.

By the York-Antwerp Rules, 1890:

"Rule 10. Expenses at Port of Refuge, &c.—(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average. (b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage. (c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. (d) If the ship under average be at a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by (sic) another ship, or otherwise forwarded then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

"Rule 11. Wages and maintenance of crew in port of refuge.—When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in r. 10, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. . . .

"Rule 16. Amount to be made good for cargo lost or damaged by sacrifice.—The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

"Rule 17. Contributory values.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act, or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average. . . ."

Jowitt for the claimant, the shipowner, referred to CARVER, CARRIAGE OF GOODS BY SEA (4th Edn.) paras. 428–30; LOWNDES' GENERAL AVERAGE (5th Edn.) s. 61; PHILLIPS' LAW OF INSURANCE (5th Edn.) paras. 1317–1319, 1373–4; MACARTHUR ON MARINE INSURANCE (2nd Edn.) pp. 204–6; ARNOULD ON MARINE INSURANCE (9th Edn.) p. 1212; and BENECKE ON MARINE INSURANCE, at p. 298.

Le Quesne for the owners of cargo.

Cur. adv. vult.

Mar. 23. **SANKEY, J.,** read the following judgment.—This is a Special Case stated by a legal arbitrator to raise the following question of law. If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost?

The facts are as follows. In January, 1919, the *Penlee* loaded a cargo of sugar at two ports in Cuba. Various bills of lading for this cargo were issued. By such bills of lading the cargo was to be carried to Queenstown for orders and to be delivered at the port of destination to the Royal Commission on Sugar Supply. Each bill of lading contained the provision: "General average payable according to York-Antwerp Rules." The respondents were at all material times the owners of the cargo and holders of the bills of lading. The *Penlee* left Cuba with the cargo on Jan. 29, 1919. She encountered a hurricane on Feb. 10, and received damage to her hull and engines. In consequence of the damage her master prudently determined to put into Horta, in the Azores, as a port of refuge, where she arrived on Feb. 22. At Horta certain repairs were done and she left Horta upon their completion on Mar. 15. At Horta certain expenses, of the nature of port of refuge expenses, were incurred by the claimant amounting in all to £717 16s. 3d. As the damage to the ship which caused resort to Horta was of the nature of particular average, and did not arise from any general average sacrifice, the claimant would not have been entitled to assert that he had a right at common law to a contribution in general average towards any of the above expenses in view of the decision in *Svendsen* v. *Wallace* (1). But under Nos. 10 and 11 of the York-Antwerp Rules, 1890, the claimant was primâ facie entitled to say that all the above expenses, amounting to £717 16s. 3d., ought to be treated as a general average expenditure. The said expenses were incurred for wages and maintenance of the officers and crew at Horta, and post charges, and did not include any outlay for discharging or reloading cargo, or otherwise directly incurred in relation to the cargo or its preservation. The *Penlee* left Horta on Mar. 15 for Queenstown, and signs of fire on board were discovered on Mar. 18. This fire apparently broke out in the cargo in No. 2 hold, but there was no evidence before the arbitrator as to its cause. The fire increased so rapidly and seriously that on Mar. 20 her master and crew were compelled to abandon the vessel and take refuge on another ship. The *Penlee* and her whole cargo thus abandoned were totally lost at sea. The claimant subsequently procured an average adjustment to be prepared by Messrs. Manley, Hopkins, Sons & Cookes, in which the above sum of £717 16s. 3d. was treated as general average expenditure. This was apportioned over the steamer valued at £89,250, the cargo valued at £140,000, and the shipowner's freight at risk valued at £1,184. The value of £89,250 for the steamer was the estimated value, which she would have had on arrival in the United Kingdom, and the value of £140,000 for the cargo was the estimated value that the cargo would have had if it had arrived at the port of delivery in good condition. On the above apportionment the cargo's proportion of the £717 16s. 3d. was £436 2s. 2d. The claimant required the respondents to pay this sum of £436 2s. 2d., but the respondents refused, and this was the dispute referred to the arbitrator.

The question which falls for determination is not easy to decide. There is apparently no judicial authority on the matter, but it is one which has been considerably discussed by distinguished jurists who have written on the subject, namely, ARNOULD ON MARINE INSURANCE, CARVER ON CARRIAGE OF GOODS BY SEA,

LOWNDES ON GENERAL AVERAGE, MCARTHUR ON MARINE INSURANCE, and PHILLIPS ON INSURANCE. These authors differ from one another without always assigning the most satisfactory reasons for their conclusions. With regard to a general average sacrifice, the law would appear to be settled. BOVILL, C.J., in *Fletcher* v. *Alexander* (2) says (L.R. 3 C.P. at p. 382):

"If, however, after the jettison or the matter which is the subject of average has arisen, the remainder of the goods are entirely lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other."

LOWNDES says (5th Edn., p. 302):

"On this point all the authorities and the practice are agreed. The question as to which there is room for a difference of opinion is whether the rule thus laid down for jettison is to be applied to the case of expenditures."

Both PHILLIPS (5th Edn.) ss. 1317 and 1319, and ARNOULD (9th Edn.) s. 976, distinguish between sacrifice and expenditure, the latter saying:

"As regards sacrifices, then the law is clear, but in the case of expenditures attention must be paid to some different considerations."

He sets them out and concludes the section by saying:

"Hence the long-established rule used to be that disbursements for the general benefit must be fully reimbursed in general average whether the ship and cargo be eventually saved or not."

But at s. 977 he states:

"Notwithstanding these considerations, however, the general practice of adjusters is, as we have already observed, not to give practical effect to this distinction, but to allow contribution, and to assess the contributory values, in all cases with respect to the state of facts as existing at the port where the adventure is terminated, whether the claim for contribution arises out of sacrifices or expenditures. In neither case, therefore, does any property contribute which does not ultimately arrive, and such property, moreover, only contributes on its arrived value."

On the other side there is the authority of CARVER (4th Edn.), who states in s. 428:

"Hence, it has been repeatedly laid down by writers of authority both in England and the United States that the rule as to contribution to an expenditure is different from that as to a sacrifice. It is said that all the parties interested in the adventure become, there and then, as soon as the advance is made, liable to pay their shares, and that those shares should be in proportion to the values of the property at the time of the expenditure without regard to subsequent losses or deterioration. There has not, however, been any decision on the point, and adjusters in practice do not recognise the supposed distinction. They take the state of things at the termination of the adventure as the bases for contribution both with regard to sacrifices and expenditures. . . . It is therefore established in the case of a sacrifice that the contribution shall be in proportion to the benefits ultimately derived. The reasons for this equally apply (with the one reservation) in the case of an expenditure. The rule of law should therefore if possible be the same in both cases."

MCARTHUR (2nd Edn.) p. 205, footnote (a), says:

"There appears no sufficient reason for altering the rule that with the exceptions above mentioned contribution to expenses should be made upon the same basis as to sacrifice, namely, upon the net value of the property at the

termination of the venture, that is to say, assuming that the amount of the general average is within the net value of the property."

To sum up the matter, PHILLIPS and ARNOULD appear to distinguish between sacrifice and expenditure. CARVER and MCARTHUR appear to treat them on the same footing subject to certain exceptions, one of which is stated by CARVER in the above-mentioned section to be that:

> "If after general average disbursements have been made a total loss of ship and cargo occurs, it seems clear that the disbursements should not be borne by the shipowner entirely; or if the value of what is ultimately saved of the adventure is less than the expenditure it is equally clear that the excess of expenditure should not fall wholly either on the shipowner or on the owners of what has been saved."

LOWNDES (5th Edn.), at p. 302, sets out the argument on both sides with a leaning to the view held by ARNOULD. Those who are in favour of distinguishing between sacrifice and expenditure contend that an expenditure of a nature, as in the present case, incurred in the middle of a voyage constitutes a debt which at the moment it is incurred is due rateably from each contributor. Their opponents argue (i) that the state of facts at the termination of the adventure is to be regarded; (ii) that the claim to contribution in general average must be assessed upon the value of the property of all parties to the contract of affreightment at the port of adjustment; (iii) that if the voyage had not been abandoned at an earlier port, the port of adjustment is the port of the agreed destination under the contract.

In my opinion, the arguments in favour of taking the state of facts at the termination of the venture are more weighty, especially because: (i) The value of the property when it reaches the hands of its owners can be ascertained with precision; (ii) there ought to be only one adjustment of the nature of general average: endless confusion would result from a multiplicity of adjustments made on a multiplicity of different considerations; (iii) the whole law depends, as was said in *Fletcher* v. *Alexander* (2), on the loss to the one and the benefit—that is, in my view, the ultimate benefit—to the other (see LOWNDES, p. 303). It is true that CARVER, as above pointed out, suggests one reservation to the principle that contribution in the case of expenditure should be the same as in the case of a sacrifice, namely, in proportion to the benefits ultimately derived, but he appears to me to give no good or logical reason for this reservation. It was urged that in *The Mary Thomas* (3) the Court of Appeal, affirming GORELL BARNES, J., suggested a distinction between a sacrifice and an expenditure, but that case was not a direct decision on the law of general average, but upon the rights of a shipowner under an insurance policy when different considerations may apply. Neither do I think that the case of expenditure by a ship's master in reward or salvage operations is a true analogy or a safe guide, because if a shipowner pays a cargo's proportion of salvage he must reclaim it from the cargo-owners, not as a contribution to a liability he has incurred, but as indemnity for a payment he has made on behalf of and as agent for the person directly liable.

I agree with the conclusions stated by the learned arbitrator in para. 18 of the Special Case, which are as follows: "(i) On the question of principle the law demands the loss of the one and the ultimate benefit of the other, and (ii) on the question of practice, certainty and convenience, instead of confusion, are to be obtained by one adjustment at the port of destination. Apply that question of principle and that matter of practice to the present circumstances, and I am of opinion that, as no cargo arrived at the port of destination, the shipowner is not entitled to claim contribution from the cargo-owners." The result is that the award of the learned arbitrator will be upheld.

The claimant appealed.

Jowitt for the claimant.

Le Quesne for the respondents, the cargo-owners.

Cur. adv. vult. A

July 15. The following judgments were read.

BANKES, L.J.—This is an appeal from a judgment of SANKEY, J., upon a Special Case stated by an arbitrator. The Case was stated to raise a point of law which is formulated by the arbitrator in these terms: "If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost?" B

The cargo in this case was being carried under bills of lading which contained the clause: "General average payable according to York-Antwerp rules." The learned arbitrator in the Special Case discusses at length all the text-book writers' opinions on the point, upon which no judicial decision has ever been given, in order to discover what the proper answer to the question of law would be were the matter governed by the common law. He then goes on to say: "The shipowner's right to treat this sum of £717 16s. 3d. as general average expenditure arises solely as matter of contract by the incorporation in the bills of lading of the York-Antwerp Rules, 1890. In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17 . . ." He adds that, the rules being so construed, as no cargo arrived at the port of destination, the claimant was not entitled to claim contribution from the respondent. For the reasons given by SCRUTTON, L.J., I agree with the view taken by the arbitrator that the present case falls within r. 17. I express no opinion upon what the common law rule should be. The appeal must be dismissed with costs here and below, the court expressing its opinion that the award of the arbitrator is correct. I may say that **ATKIN, L.J.**, agrees with the judgment I have just read. C D E

SCRUTTON, L.J.—This appeal was stated to raise a very controversial question in the law of general average, namely, whether there is any difference between the principles of adjustment in cases of general average sacrifice and general average expenditure where after the sacrifice or expenditure the ship and goods are lost by other perils before arrival at the port of destination. If the facts raised this point, they would raise a question of considerable difficulty. There is an absence of case law on the subject, an embarrassing abundance of contradictory opinions of text writers, and a varying practice of average adjusters. F

But, in my view, the facts do not raise this question. The parties to the contract of affreightment agreed that their contract should be governed by York-Antwerp rules. These rules, the result of two conferences of leading representatives of underwriters, shipowners, and average adjusters, were intended to avoid by agreement difficult questions on which lawyers and experts disagreed. For instance, the English law on port of refuge expenses, as appears from *Atwood* v. *Sellar* (4) and *Svendsen* v. *Wallace* (1), was far from clear. The York-Antwerp rules solved the difficulty by making rules not in accordance with the existing decisions under which all the port of refuge expenses in the present case are treated as general average. The first question, therefore, is to see whether the York-Antwerp rules provide an agreed answer to the present problem. Rule 17 provides: G H

> "The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure . . ." I

When the adventure arrives at its intended port of destination it is agreed, therefore, that the contributing values are to be those at that port and not at the port where the expenditure was incurred, thus avoiding the question most in dispute as to expenditure, whether the values should not be taken as at the port where the expenditure was incurred. What happens when ship and cargo are lost and never reach the intended end of the adventure? Though the adventure terminates prematurely it seems clear to me that it terminates, and the actual values are then nothing and no contribution can be levied on them. If part of the interests get

to the intended end of the adventure, as if cargo be trans-shipped and freight earned, there are contributing values available. But having regard to the conflicting language of text writers and conflicting practice of average adjusters, it appears to me that r. 17 was intended to avoid the decision of the difficulties by agreeing a rule. And, in my view, that rule decides that in this case there was no contribution to the shipowner's general average expenditure, because at the termination of the adventure there were no contributing values.

If this is the true view of the case there is no need to discuss what would be the law if the parties had not agreed on York-Antwerp rules, and I notice that the learned arbitrator is of opinion that the York-Antwerp rules decide the question adversely to the claim, though he was unable to resist the temptation of deciding what would be the law if the rules did not exclude the claim. I reserve to myself full liberty to consider the question of common law in the absence of agreement when it arises, as, in my view, there is a great deal to be said in principle for the view of MR. PHILLIPS and SIR JOSEPH ARNOULD, supported by the analogies of liabilities for salvage both maritime and by agreement, and by the view of GORELL BARNES, J., in *The Mary Thomas* (3), as to the rights of the person making general average expenditure against his underwriters. It may be that practical difficulties giving rise to a practice of average adjusters may overcome the advantages in principle of this view, but I prefer to postpone the decision of this difficult question till it arises. In the present case, in my opinion, it does not, as the parties have avoided the difficulties by an agreed rule of adjustment and contribution. The person incurring the expenditure under the agreed rule runs a risk of loss which he can cover by insurance of his interest in the arrival of the interests on which he has a lien for contribution to his expenditure. For these reasons in the result the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan*; *Waltons & Co.*

[*Reported by* R. F. BLAKISTON *and* W. C. SANDFORD, ESQS., *Barristers-at-Law.*]

Re KUTNER

[COURT OF APPEAL (Lord Sterndale, M.R., Atkin and Younger, L.JJ.), April 29, 1921]

[Reported [1921] 3 K.B. 93; 90 L.J.K.B. 1264; 125 L.T. 458; 37 T.L.R. 667; [1921] B. & C.R. 113; 65 Sol. Jo. 604]

Bankruptcy—Discharge—Suspension—Condition—Suspension pending payment exceeding ten shillings in the pound—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 26 (2), (3).

On an application for an order of discharge by a bankrupt, the court cannot impose as a condition of discharge the payment of any dividend higher than 10s. in the pound.

Notes. As to the form of order suspending a discharge, see now the Bankruptcy Rules, 1952, Appendix 1, Form 111. [3 HALSBURY'S STATUTORY INSTRUMENTS.]

As to refusal of immediate unconditional discharge to a bankrupt by the court, see 2 HALSBURY'S LAWS (3rd Edn.) 520–522; and for cases see 4 DIGEST (Repl.) 620–624. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Re Barker, Ex parte Constable, Re Jones, Ex parte Jones* (1890), 25 Q.B.D. 285; 59 L.J.Q.B. 331; 38 W.R. 609; 6 T.L.R. 296; 7 Morr. 111, C.A.; 4 Digest (Repl.) 620, *5533*.

Also referred to in argument:

Re Gaskell, [1904] 2 K.B. 478; 73 L.J.K.B. 656; 91 L.T. 221; 20 T.L.R. 469; 48 Sol. Jo. 475; 11 Mans. 125, C.A.; 4 Digest (Repl.) 623, *5557*.

Re Huggins, Ex parte Huggins (1889), 22 Q.B.D. 277; 58 L.J.Q.B. 207; 60 L.T. 236; 37 W.R. 432; 6 Morr. 38, D.C.; 4 Digest (Repl.) 622, *5548*.

Appeal from an order of the registrar in bankruptcy suspending the discharge of the bankrupt, Nathan Gashon Kutner, until a dividend of not less than 15s. in the pound had been paid to his creditors.

The order was made by the registrar on application by the bankrupt under the Bankruptcy Act, 1914, which provides by s. 26:

"(2) On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs . . . and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after-acquired property. Provided that the court shall refuse a discharge in all cases where the bankrupt has committed any misdemeanour . . . connected with his bankruptcy or any felony connected with his bankruptcy . . . and shall on proof of any of the facts hereinafter mentioned, either (i) refuse the discharge, or (ii) suspend the discharge for a period of not less than two years; provided that the period may be less than two years if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, or (iii) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors. . . . (3) The facts hereinbefore referred to are (a) that the bankrupt's assets are not of a value equal to ten shillings in the pound. . . ."

The bankrupt had not committed any misdemeanours or felonies connected with his bankruptcy, but his assets were not of a value equal to 10s. in the pound, and he had committed some other bankruptcy offences. The bankrupt appealed against the order on the ground that the registrar had no power under the section to impose payment at a higher rate than ten shillings in the pound as a condition of discharge.

Courthope Wilson, K.C., and *Tindale Davis* for the bankrupt.

The Attorney-General (*Sir Gordon Hewart, K.C.*) and *E. W. Hansell* for the respondents.

LORD STERNDALE, M.R.—This appeal has been argued before us on a point which was not before the learned registrar, and on which, therefore, he has not given any decision. It is an important point, and it is this: whether there is a power to impose as a condition of granting a discharge a suspension until a sum exceeding 10s. in the pound, in this case 15s. in the pound, has been paid to the creditors. I do not say whether it would or would not be a wise provision that there should be such a power, but in my opinion there is no such power. The question depends on the construction of the Bankruptcy Act, 1914, s. 26. Sub-section (1) of that section provides that the bankrupt may apply for a discharge. Then sub-s. (2), which consists of two parts which I will call the operative part and the proviso, describes what can be done upon the application for a discharge. I propose to take first what I call the operative part—the first paragraph:

"On the hearing of the application, the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs . . . and may either grant or refuse an absolute order of discharge [that is one thing] or

suspend the operation of the order for a specified time [that is the second thing] or grant an order of discharge subject to any conditions with respect to his after-acquired property."

That part of the subsection does not authorise such an order as this. The only power of suspension is to suspend the operation of the order for "a specified time." It was argued as an alternative that this order was a suspension for "a specified time," but in my opinion it is not. To suspend an order until a bankrupt has paid 15s. in the pound on his debts is not suspending it for a specified time. There is no time specified, the time is perfectly indeterminate. It may be until one year hence, when the bankrupt comes into money, or it may be until twenty years hence if he does not come into money or has not sufficient money to pay until then.

Then there comes the proviso. Lord Esher, in *Re Barker, Ex parte Constable* (1), took this view as to the primâ facie function of a proviso. He says:

"Now the ordinary and proper function of a proviso, coming after a general enactment, is to limit that general enactment in certain instances. No doubt sometimes a proviso has been used in Acts of Parliament and in other documents to enlarge a previously given discretion; but that is not its proper function."

That was my impression, and I am glad to see that it is in accordance with what Lord Esher said in that case. It seems to me clear that this proviso does enlarge the power of suspension because the only power of suspension in the operative part being, as I have said, to suspend the discharge for a specified time, by the proviso cl. (iii) power is given to "suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors." That is an enlargement of the power given in this first part of sub-s. (2), because to suspend the discharge until a dividend of 15s. in the pound has been paid to the creditors is not suspending it for a specified time. The proviso, so far as it is necessary to read it, is as follows:

"Provided that the court shall refuse a discharge in all cases where the bankrupt has committed any misdemeanour . . . connected with his bankruptcy or any felony connected with his bankruptcy . . . and shall on proof of any of the facts hereinafter mentioned, either—clause (i) refuse the discharge, or clause (ii) suspend the discharge for a period of not less than two years; provided that the period may be less than two years if the only fact proved of those hereinafter mentioned is that his assets are not of a value equal to 10s. in the pound . . . or, clause (iii) suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors. . . ."

Then sub-s. (3) provides:

"The facts hereinbefore referred to are: para. (a) that the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible."

There are a number of other facts mentioned, and I assume for the purposes of my judgment that, as the registrar has found, some of them have been proved against the bankrupt.

The words in sub-s. (3), para. (a), as to the fact, which is considered as an offence, of the bankrupt's assets not being of a value equal to 10s. in the pound, are dealing with the same subject-matter as the words "a dividend of not less than 10s. in the pound" in cl. (iii) of sub-s. (2), and that throws some light on the question. The offence, if it be an offence, is that the bankrupt's assets are not of a value equal to 10s. in the pound. If his assets are sufficient to pay a dividend of 10s. in the pound, then so far as that offence, as I call it, is concerned, he is free, and if he has committed no other offence, he can get a discharge at once, an unconditional discharge. It would be an odd thing, supposing there was nothing else against

him, and if he could get his discharge in that way, if the words used in sub-s. (2), cl. (iii) were to be read as having a different meaning from the words used in sub-s. (3), para. (a). There is also another matter—which one has to look at. These words have been used in the Bankruptcy Acts since the year 1869. There has been a tendency since 1869 to take the matter more out of the hands of the bankrupt's creditors, and to put it more into the hands of the court, so as to exercise a stricter supervision over the conduct of the bankrupt, but that does not seem to me to alter the meaning of words which have been used in the previous Acts. Though I do not think one can interpret an Act by rules made by certain persons under it, yet it seems to me that in 1870 those who made the rules under the Bankruptcy Act, 1869, read those words in the sense, contended for by the bankrupt, that when 10s. in the pound has been paid the bankrupt is entitled to his discharge, so far as the condition of payment is concerned. Although we have not had all the authorities brought before us under the earlier Acts, I have no doubt, from what is stated in the text-books and from some of the cases which have been cited to us, that that was the sense in which the words were read up to 1914. If the words were so read up to 1914, and were re-enacted in 1914, after having been read in that way ever since they were introduced into the earlier Bankruptcy Acts, then they must be taken to have been re-enacted in the sense in which they had been used before, and that sense is that when the bankrupt, so far as this particular condition goes, has paid 10s. in the pound he is considered free as to that requirement. The only argument of any weight against that contention is that the words "not less than" two years in sub-s. (2), cl. (ii), make a suspension of two years the minimum suspension under the conditions there contemplated, and that the same words in cl. (iii) of sub-s. (2) must be read in the same way. I do not think that that argument is sound. I think the words "not less than" are used in different senses in the two clauses of sub-s. (2) because they are dealing with different matters; they are dealing in one case with what the court has to do, and in the other case with what the bankrupt has to do, namely, where he has to pay not less than 10s. in the pound to the creditors.

Looking at the whole of the Act, not these subsections alone, and looking at the previous user of the words, a user given to them for a great number of years, I think the meaning of them is that, so far as this particular requirement goes, the dividend which is to be paid before the suspension of discharge ends is to be 10s. in the pound, and that when 10s. in the pound has been paid, then the requirement which is contemplated would be fulfilled. Therefore an order such as this, suspending the discharge until a dividend of 15s. in the pound has been paid—it might be until 18s., 19s. or 20s. in the pound has been paid—is not within the power of s. 26. For these reasons I think that this appeal succeeds and that this order should be discharged with costs, and the matter must be remitted to the registrar to deal with it in the light of what we consider to be the proper construction of the section. We do not put any fetter upon his discretion in the sense that we say he must grant an unconditional discharge, or that we tell him what conditions must be imposed except that he cannot now impose this one condition which he has imposed; perhaps he would not have imposed it if the argument had proceeded before him as it has before us. The case will be remitted to him to make such order of discharge as he thinks fit subject to this judgment.

ATKIN, L.J.—I agree. The registrar had to consider this application for discharge, and in the circumstances of the case he had to consider it under the terms of the proviso to sub-s. (2) of s. 26 of the Bankruptcy Act, 1914. It is quite plain that he proceeded upon that footing because the order of discharge recites some of the facts, or a good many of the facts which are mentioned in sub-s. (3), and it is plain, therefore, that he sought to justify making the order in this case under cl. (iii) of sub-s. (2), namely, that where any of the facts mentioned are proved he shall, amongst other things, as one of the alternatives, suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors. Now

A he has made an order suspending the discharge until a dividend of not less than 15s. in the pound has been paid. The question is whether that is right, and it appears to me that it is wrong. Clause (iii) of sub-s. (2) fixes definitely what the terms of the suspension can be; it fixes it in the only way that the registrar can make it; in other words, the only power of the registrar, if he acts under sub-s. (2), is to suspend the discharge until a dividend of not less than 10s. in the pound has been B paid. That is the plain meaning of the words when one has to look at cl. (iii) and nothing else, but when one remembers the history of this proviso and the use of the words in the clause, and deals with the other parts of s. 26 as well, that construction is quite plain. One of the facts which deprives the registrar of his unlimited discretion to grant the order of discharge is the fact that the assets are not of a value equal to 10s. in the pound. When that fact is proved, subject to special circum- C stances, and he is not responsible for the circumstances, the registrar is deprived of the discretion given by the first part of sub-s. (2) to grant the discharge, and he must make one of the alternative orders under cll. (i) to (iv) of sub-s. (2). The power in sub-s. (2), cl. (iii), has a direct reference to the particular facts which give him jurisdiction, or to one of the facts which gives him jurisdiction, namely, that the assets are not of value equal to 10s. in the pound. It certainly would be a D remarkable circumstance, if it were the only fact relied on as giving him jurisdiction, that whereas if a man's assets were equal to 10s. in the pound no order suspending the discharge could be made, yet if his assets were 9s. 6d. in the pound the registrar would have power to suspend it until 20s. in the pound had been paid. I do not think that it can have been intended to give to the Bankruptcy Court that large discretion over the future of the debtor.

E It was said that one should not so construe sub-s. (2), cl. (iii), because the same words "not less than" are to be found in cl. (ii), where there is a direction to suspend the discharge for a period of "not less than" two years. It is said, and said perfectly correctly, that in that case the period is a period at the discretion of the registrar, and that the cl. (ii) only provides a minimum of two years, leaving it to the registrar to fix the period, being not less than two years for which the F discharge is to be suspended. It is said that you should construe cl. (iii) in the same way, and that that clause only fixes a minimum dividend of 10s. in the pound, leaving the registrar to fix the dividend, being not less than 10s. in the pound, until payment of which discharge shall be suspended. That is not the right way of construing this Act. Under sub-s. (2) a mere order that the discharge is to be suspended for a period of not less than two years would be entirely indefinite in G determining the order; it would not determine anything, except that the man was not to be discharged for two years; it would not fix any period, and in some way or other the order would have to be substantially revised so that the man should know exactly what order was made. Under sub-s. (3), where the discharge is to be suspended in certain events, it has a completely different operation. The order is complete and final, and can automatically be worked out. The assets remain in H the possession of the official receiver or trustee, and as soon as the assets, supplemented by what the debtor is able to supply either by himself or his friends, can pay a dividend of 10s. in the pound, then the order automatically works itself out and the discharge is granted by the court. I think, therefore, that there was no power under sub-s. (2), cl. (iii), to alter the terms of the Act and to suspend the discharge until a dividend of not less than 15s. in the pound has been paid.

I That would be sufficient to dispose of this appeal, because it is quite plain from the terms of the order that it was under the power in sub-s. (2), cl. (iii), that the order was made, but the powers in the first part of the subsection were also relied on. It appears reasonably plain that unless the facts such as are mentioned in sub-s. (3) are proved, there is no power under the first part of sub-s. (2) to make an order of this kind. It is true, as was said in *Re Barker, Ex parte Constable* (1), that the registrar may make a conditional order without proof of the special facts which I have referred to, but the conditional order can only be made subject to the conditions which are expressed in the first part of the sub-s. (2), namely, "subject

to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property." The only other power which he has under that first part of sub-s. (2) is either to grant an absolute discharge or to refuse an absolute discharge or to suspend the operation of the order for a specified time. I agree with what has been said by the Master of the Rolls, that this particular order cannot be said to be an order suspending the operation of the order of discharge for a specified time. For these reasons it appears to me that this appeal should be allowed, and that this case should be remitted to the learned registrar to make the order which it is in his discretion to make.

YOUNGER, L.J.—I am of the same opinion, and having regard to the judgments which have been delivered, I can express my conclusion, I think, almost in a sentence. In my judgment the direction which is given to the court by sub-s. (2) of s. 26 of the Bankruptcy Act, 1914, in the event of proof being given of any of the facts set forth in sub-s. (3) of that section, if the court thinks the order appropriate, to suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors, does not empower the court to suspend that discharge until a greater dividend has been paid. To give such a power to the court, and thus, in effect, to compel the debtor to work for his creditors to an extent beyond the prescribed sum as a condition for his discharge, is not, in my judgment, to be implied in a bankruptcy statute. Such a power, having regard to the principles of the law of bankruptcy in regard to this matter, must, I think, plainly be conferred if it is to be held to be exercisable.

Appeal allowed.

Solicitors: *Harris, Chetham & Cohen*; *Solicitor to the Board of Trade.*

[*Reported by* C. F. Duncan, Esq., *Barrister-at-Law.*]

Re OXTED MOTOR CO.

[King's Bench Division (Lush and Greer, JJ.), May 26, 1921]

[Reported [1921] 3 K.B. 32; 90 L.J.K.B. 1145; 126 L.T. 56; 37 T.L.R. 757; [1921] B. & C.R. 155]

Company—Director—Ultra vires act—Act ultra vires the directors, but intra vires the company—Ratification by shareholders.

Company—General meeting—Formalities necessary to constitute—Waiver by agreement of all shareholders.

Company—Winding-up—Voluntary winding-up—Extraordinary resolution—No notice of resolution given—Resolution unanimously passed, and minute thereof signed, by all shareholders—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 69, 182.

Any act of the directors of a company which is ultra vires the directors but not ultra vires the company may be ratified by the company in general meeting, or at an informal meeting of all the shareholders. The formalities otherwise necessary to constitute a general meeting need not be complied with if all the shareholders agree to waive them.

The giving of the "notice specifying the intention to propose the resolution as an extraordinary resolution" required by s. 69 of the Companies (Consolidation) Act, 1908, was **held** to have been waived when, there being no question of fraud, all the shareholders of a company entitled to vote were present at a

meeting and there unanimously passed, and signed, a minute of an extraordinary resolution, of which no such notice had been given, that the company should be voluntarily wound-up.

Re Express Engineering Works, Ltd. (1), [1920] 1 Ch. 466, applied.

Notes. Section 278 (1) of the Companies Act, 1948, contains the provision formerly contained in s. 182 (3) of the Act of 1908, but s. 141 (1), (5) of the 1948 Act now defines an extraordinary resolution in terms slightly different from those of s. 69 of the Act of 1908, and requires specification of the actual nature of an extraordinary resolution to be made in the notice thereof. Despite these changes it seems that the decision set out in the second paragraph of the headnote would still be applied, but there has not yet been any express decision on this point.

As to acts ultra vires, see 6 HALSBURY'S LAWS (3rd Edn.) 299, as to different kinds of company meetings, see ibid. 329 et seq., as to extraordinary resolutions, see ibid. 345, and as to voluntary winding-up, see ibid. 733 et seq.; and for cases see 9 DIGEST (Repl.) 601, 602, 618. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466; 89 L.J.Ch. 379; 122 L.T. 790; 36 T.L.R. 275, C.A.; 9 Digest (Repl.) 606, *4016*.

Appeal from Croydon County Court.

An application was made to the registrar of the Croydon County Court by a judgment creditor of the Oxted Motor Co. for an order that the appointment of certain liquidators of the company be set aside on the ground that a resolution for the voluntary winding-up of the company had not been properly passed. All the shares in the company were held by the two directors, G. H. Henry and E. L. Tessier. On Nov. 2, 1920, Captain Welling Laurie obtained a judgment against the company for £875 and costs. On Nov. 3 a warrant to levy execution was issued to the sheriff, but he was already in possession under another judgment. On Nov. 2 Henry and Tessier, the only shareholders of the company, met at the offices of the company, and passed a resolution that the company could not by reason of its liabilities continue its business, and that it was advisable to wind-up the same. A formal resolution for the voluntary winding-up of the company on these grounds was then signed by Henry and Tessier, and one B. B. McCullum was appointed liquidator. No previous notice of the intention to propose this resolution as an extraordinary resolution had been given to the shareholders. The voluntary liquidation was confirmed at a meeting of creditors of the company on Nov. 22, 1920, when one Sunderland was appointed joint liquidator with McCullum. On Dec. 3, 1920, Sunderland's appointment was confirmed by an order of the registrar of the Croydon County Court, and a committee of inspection, including the judgment creditor, was appointed. Cross proceedings followed, by the liquidators to restrain the judgment creditor from proceeding with the execution under his judgment, and by the judgment creditor for the removal of the liquidators on the ground that no valid resolution to wind-up the company had been passed. The contention of the judgment creditor was upheld by the registrar, and he set aside the appointment of the liquidators. The liquidators appealed to the county court judge, who affirmed the order of the registrar setting aside the appointment of the liquidators. The liquidators appealed to the Divisional Court.

By the Companies (Consolidation) Act, 1908:

"Section 69. A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy . . . at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. . . . Section 182. A company may be wound-up voluntarily . . . (3) if the company resolves by extraordinary

resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to wind-up." A

Luxmoore, K.C., and *C. A. J. Bonner* for the liquidators.
W. Higgins and *Engelbach* for the judgment creditor.

LUSH, J.—This appeal must be allowed. There is no doubt that all the shareholders in this company—there were in fact only two—met at the office of the company and passed a resolution that the company could not by reason of its liabilities continue its business, and that it was advisable to wind it up, and accordingly that it be wound-up voluntarily. It is argued that notwithstanding the fact that all the shareholders in the company were present and supported that resolution, it was not a valid extraordinary resolution to wind-up the company, because the requirements of s. 69 of the Companies (Consolidation) Act, 1908, had not been complied with. That section defines an extraordinary resolution. There is no doubt that no notice had been given before the shareholders met intimating an intention to propose this resolution as an extraordinary resolution. It is contended that unless the notice contemplated by that section has been given a resolution is not valid as an extraordinary resolution, and it is said that, notwithstanding that all the shareholders in the company were present and were dealing with a matter which was intra vires, and were all supporting the resolution, and notwithstanding that there was no fraud, still this resolution was invalid as an extraordinary resolution to wind-up the company voluntarily because the statutory requirements of s. 69 with regard to notice had not been complied with. In my opinion, that contention is not well founded. It would be an extraordinary result if, after all the shareholders of a company had been present at a meeting and had unanimously passed a resolution to wind-up the company voluntarily, anyone else could impeach that resolution on the ground that the shareholders had not had notice of the intention to propose the resolution as an extraordinary resolution, and that, therefore, the requirements of s. 69 had not been complied with. In my opinion the shareholders are just as much entitled to waive the formality of notice for the purpose of turning a resolution into an extraordinary resolution as for any other purpose. B C D E F

Re Express Engineering Works, Ltd. (1) is an authority in support of the view that the statutory requirements with regard to notice can be waived. It is true that in that case the resolution was not a resolution to wind-up the company, but a resolution to issue certain debentures. What happened there was this: all the shareholders of the company—there were only five—were also directors, and met as directors at a board meeting, and afterwards passed the resolution to issue the debentures without constituting themselves into a meeting of shareholders and without any notice having been given for the calling of a general meeting of shareholders, as required by s. 67 of the Companies (Consolidation) Act, 1908. The company was afterwards wound-up, and it was contended by the liquidator that as the requirements of the statute had not been complied with the resolution to issue the debentures was invalid. The Court of Appeal affirmed the decision of Astbury, J., that the requirements of the statute were intended for the protection of the shareholders, and that if the resolution was a matter intra vires the members of the company, and there was no fraud, the shareholders could waive all formalities as regards notice, and that the resolution was just as valid as if the requisite notice had been given. Warrington, L.J., said: G H I

"It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not, but as shareholders acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meetings, &c., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question."

If that is true in the case of a resolution to issue debentures, it seems to me that it is equally true in the case of a resolution to wind-up a company voluntarily, such as the resolution in the present case. It is said that in the case of an extraordinary resolution the legislature has made it imperative that the notice required by s. 69 should be given, in order to give an opportunity for the shareholders to consider whether the resolution should be passed, and that it is not competent to waive that formality. I cannot see any reason why shareholders should not be able to do in that case what they can do in any other case. In the absence of fraud I think that shareholders can waive the notice in this case just as freely as they could in *Re Express Engineering Works, Ltd.* (1). For these reasons I think that the judgment of the county court judge was wrong, and that the appeal must be allowed.

GREER, J.—I agree that this appeal must be allowed. The question is whether the resolution that was passed was a valid and effective resolution to wind-up the company. It is said that the resolution cannot be valid as an extraordinary resolution within s. 182 of the Companies (Consolidation) Act, 1908, owing to the absence of the notice required by s. 69 of that Act. Under s. 182 a company can only be wound-up voluntarily in three ways. The third method is the one which is material in this case, which is that if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind-up. There was a general meeting of the company in the sense that there was a meeting of the shareholders of the company at which all the shareholders were present, but there had been no notice given of an intention to propose an extraordinary resolution at that meeting or otherwise, unless the request to sign the minute of the resolution is a notice of intention to propose the resolution as an extraordinary resolution. The liquidators may put their case in two ways; they may say that notice was duly given by reason of what took place between the two shareholders, and that the requirement that the notice should be a seven days' notice was waived. It may also be said that whether the notice required by s. 69 has been duly given or not that is a matter that concerns the shareholders alone, because the legislature has given the shareholders the right to say whether or not a company shall be voluntarily wound-up. The creditors of the company have no voice in the matter, and they cannot object to the validity of a resolution to wind-up voluntarily by saying that the proper notice to pass that resolution as an extraordinary resolution has not been given. This view is supported by the decision of the Court of Appeal in *Re Express Engineering Works, Ltd.* (1). That is a case in which it might be said that the creditors had an interest in the matter, because it arose after the company was being wound-up, and when the interest of the creditors of the company had come into conflict with the interests of the shareholders.

Appeal allowed.

Solicitors: *Woodham Smith & Borradaile*; *Calvert H. E. Smith*, Richmond.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

Re HILL. Ex parte HOLT & CO.

[KING'S BENCH DIVISION (Horridge and Salter, JJ.), May 2, 1921]

[Reported [1921] 2 K.B. 831; 90 L.J.K.B. 734; 125 L.T. 736; [1921] B. & C.R. 12]

B

Bankruptcy—Bankruptcy notice—Petition—Notice or petition based on judgment debt—Change in membership of judgment creditor firm between date of judgment and issue of notice—Need of leave to issue execution.

Execution—Leave to issue—Partnership—Change in membership of judgment creditor firm between judgment and execution—"Change . . . in parties entitled to execution"—R.S.C., Ord. 42, r. 23 (a).

C

Where a firm has recovered judgment in the firm name against a debtor, the subsequent retirement of a member of the firm does not render it necessary to obtain leave of the court to issue execution before a bankruptcy notice may be issued or a bankruptcy petition presented in the name of the firm, for such retirement is not a "change by death or otherwise in the parties entitled to execution" within the meaning of R.S.C., Ord. 42, r. 23 (a).

D

Notes. As to service of a bankruptcy notice by a firm, see 2 HALSBURY'S LAWS (3rd Edn.) 274, as to presentation of bankruptcy petitions by a firm, see ibid. 287; and for cases see 4 DIGEST (Repl.) 91–93. As to leave to issue execution, see 16 HALSBURY'S LAWS (3rd Edn.) 7–9; and for cases see 21 DIGEST 424–429. As to the power of continuing parties to issue execution, see 28 HALSBURY'S LAWS (3rd Edn.) 574; and for cases see 36 DIGEST (Repl.) 512.

E

Cases referred to in argument:

Re Woodall, Ex parte Woodall (1884), 13 Q.B.D. 479; 53 L.J.Ch. 966; 50 L.T. 747; 32 W.R. 774; 1 Morr. 201, C.A.; 4 Digest (Repl.) 92, *826*.

Re Wenham, Ex parte Battams, [1900] 2 Q.B. 698; 69 L.J.Q.B. 803; 83 L.T. 94; 48 W.R. 627; 44 Sol. Jo. 609; 7 Mans. 309, C.A.; 4 Digest (Repl.) 93, *844*.

F

Appeal from the decision of the registrar of the Brentford County Court refusing to set aside a bankruptcy notice and petition.

In 1919 one Frank Hill (hereinafter termed "the debtor") was indebted to the then firm of "Holt & Co." On Nov. 15, 1919, the firm obtained judgment against the debtor in the King's Bench Division. At the date of the judgment the members of the firm were (i) Victor George Mackenzie Holt; (ii) Herbert Frederick Guinness; (iii) Martin Drummond Vesey Holt; and (iv) Arthur Vavasour Barter. They were persons who under the Registration of Business Names Act, 1916, were registered as constituting the said firm in 1919. Herbert Frederick Guinness retired from the said firm on or as from Mar. 31, 1920, and so far as he was concerned the partnership subsisting between the said four persons was dissolved. Formal notice of the dissolution of the said firm was published in the "London Gazette." On Jan. 1, 1921, the firm of Holt & Co. issued a bankruptcy notice against the debtor following the form of the judgment above referred to, and, the said notice not having been complied with, a petition in bankruptcy was presented against the debtor on Feb. 9, 1921. Objection having been taken both to the notice and the petition on the ground that the firm of "Holt & Co." therein referred to was not the firm which had recovered judgment, the registrar of the Brentford County Court overruled the objection and made a receiving order. The debtor appealed.

G H I

By R.S.C., Ord. 42, r. 23 (a):

"Where . . . any change has taken place by death or otherwise in the parties entitled to execution . . . the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. . . ."

Hinde for the debtor.

Stable for the creditor, the firm.

HORRIDGE, J., stated the facts and continued: It is now said that as Guinness had retired, leave should have been applied for and obtained in order to enable the firm to issue execution. In other words it is said that that execution cannot issue unless there is leave to proceed under R.S.C., Ord. 42, r. 23 (a). In my judgment this contention is ill-founded. "The parties entitled to execution" in this case are the firm. The proceedings in 1919 were instituted in the name of the firm. It is the same firm with one partner gone that issued the bankruptcy notice.

It is material in this connection to remember that by s. 38 of the Partnership Act, 1890

> "After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners, continue notwithstanding the dissolution as far as may be necessary to wind-up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

In my judgment the receiving order in the present case was rightly made and this appeal should be dismissed.

SALTER, J.—I agree.

Appeal dismissed.

Solicitors: *Fowler, Legg & Young*; *Dowson & Sankey.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

Re MORRIS. MAYHEW *v.* HALTON

[COURT OF APPEAL (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), October 20, 21, 24, 1921]

[Reported [1922] 1 Ch. 126; 91 L.J.Ch. 188; 126 L.T. 281; 38 T.L.R. 27; 66 Sol. Jo. (W.R.) 18]

Income Tax—Deduction of tax—Interest—Mortgage interest—Compound interest with yearly rests—Capitalisation of interest.

By a mortgage executed in 1898 the next-of-kin of a person, who had not made a will and had been certified a lunatic, assigned all their shares and interests as such next-of-kin in the estate of the lunatic on her death to an insurance society on the payment by the society to them of £20,000, with a proviso that the society should re-assure the mortgaged premises to them on payment at any time after the death of the lunatic to the society of £40,000 with compound interest for the same at the rate of 4½ per cent. per annum from the day of the death of the lunatic with yearly rests. The lunatic died in 1915, and in October, 1919 (before which date no payment had been made to the mortgagees), the mortgagors claimed to be entitled to deduct income tax from the sum then due to the society for such compound interest prior to payment of the same to the society.

Held: the provision for the payment of compound interest with yearly rests did not (as each year's interest was added to capital) change the interest into capital for the purposes of income tax, and, therefore, the mortgagors were entitled to make a deduction for income tax.

Re Craven's Mortgage, Davies v. *Craven* (1), [1907] 2 Ch. 448, approved and followed.

Decision of P. O. LAWRENCE, J., (1920), 124 L.T. 329, affirmed.

Notes. Applied: *I.R.Comrs.* v. *Oswald*, [1945] 1 All E.R. 641. Referred to: *Re Jauncey*, *Bird* v. *Arnold*, [1926] Ch. 471; *I.R.Comrs.* v. *Holder*, [1931] 2 K.B. 81; *Marland* v. *I.R.Comrs.* (1934), 19 Tax Cas. 467.

As to yearly interest, etc., payable out of profits brought into charge to tax, see 20 HALSBURY'S LAWS (3rd Edn.) 368 et seq.; and for cases see 28 DIGEST (Repl.) 180 et seq.

Cases referred to:

(1) *Re Craven's Mortgage*, *Davies* v. *Craven*, [1907] 2 Ch. 448; 76 L.J.Ch. 651; 97 L.T. 475; 28 Digest (Repl.) 183, *751*.

(2) *Hopkinson* v. *Rolt* (1861), 9 H.L.Cas. 514; 34 L.J.Ch. 468; 5 L.T. 90; 7 Jur.N.S. 1209; 9 W.R. 900; 11 E.R. 829, H.L.; 35 Digest 437, *1776*.

Appeal by mortgagees, Norwich Union Life Insurance Society, from an order of P. O. LAWRENCE, J.

By an indenture of mortgage, dated June 6, 1898, and made between John Harrison Hodgson and other persons therein named (hereinafter called the mortgagors) of the one part and the Norwich Union Life Insurance Society (hereinafter called the Norwich Union) of the other part, the mortgagors in consideration of £20,000 advanced to them by the Norwich Union assigned to the Norwich Union the shares, rights, and interests which the mortgagors or any of them as some or one of the next-of-kin of Ellen Ann Robinson Morris (who was then living, but had been found "lunatic" by inquisition) might be, or become, possessed of or entitled to expectant upon the death of Ellen Ann Robinson Morris (hereinafter called "the lunatic") of and in certain investments and other property therein specified, subject to the following proviso for redemption:

> "Provided always, and it is hereby agreed and declared that if the mortgagors or some or one of them or any persons entitled to the equity of redemption in the mortgaged premises shall at any time after the death of the lunatic pay to the mortgagees or their assigns all costs, charges, and expenses which they may hereafter properly incur in relation to this security and also the sum of £40,000 with compound interest for the same at the rate of £4 10s. per cent. per annum from the day of the death of the lunatic with yearly rests, the mortgagees or their assigns will at any time thereafter upon the request and at the cost of the persons requiring the same reassure the mortgaged premises to the persons entitled thereto respectively or as they shall direct."

The indenture of mortgage also contained a declaration that nothing therein contained should render the mortgagors or any of them personally liable for the principal sum and interest thereby secured, but that the same should be exclusively charged on and payable out of the mortgaged premises. The lunatic died on Jan. 24, 1915. On May 17, 1915, judgment was pronounced in this action for the administration of the real and personal estate of the lunatic. By the order on further consideration dated Oct. 10, 1919, £40,000 was directed to be paid out of court to the Norwich Union in discharge of the amount (exclusive of interest and costs) due under and by virtue of the indenture of mortgage of June 6, 1898, and by the same order a sufficient amount of war stock was directed to be carried over to a separate account to answer the compound interest due under the indenture of mortgage as from Jan. 24, 1915, such carrying over to be without prejudice to any question as to the interest or income tax which might arise between the mortgagees and mortgagors, and liberty was given to the parties to apply to the judge in chambers as to payment out or otherwise in respect of the funds so carried over. Pursuant to that order £40,000 was duly paid to the Norwich Union, and a sufficient amount of war stock to answer the compound interest was duly carried over to a separate account as directed.

On April 1, 1920, the Norwich Union took out a summons, which, so far as material for the present decision, asked in substance for a declaration that the mortgagors were not, under the mortgage of June 6, 1898, entitled by way of deduction for income tax to any part of the funds so carried over and for payment

out to them of such funds without deduction on account of income tax except in respect of tax payable on the dividends accrued on the funds since they were carried over. The mortgagors opposed that application and claimed that they were entitled by way of deduction for income tax to so much of the funds carried over to the separate account as was equal to the income tax on each instalment of interest as and when it became due. The summons was adjourned into court and came on to be heard before P. O. Lawrence, J., in October, 1920, when his Lordship decided (124 L.T. 329) that the mortgagors were entitled to deduct income tax before payment of the amount found due for compound interest in accordance with the decision of Warrington, J., in *Re Craven's Mortgage, Davies* v. *Craven* (1), which completely covered the point and must be followed. From that decision the Norwich Union now appealed.

Jenkins, *K.C.*, and *J. W. F. Beaumont* for the mortgagees, Norwich Union Life Insurance Society.

Hildyard, *K.C.*, and *A. M. Latter*, *Cyril L. King* and *Wilfrid Hunt*, for the several mortgagors, were not called on to argue.

LORD STERNDALE, M.R.—This is a very important case because it arises on a common form reversionary mortgage deed. It is a matter which, with income tax at the present rate, involves large sums of money. It arises on a mortgage to the Norwich Union Life Insurance Society, of a reversion falling in on the death of a lady who is a lunatic. The mortgage provided that in consideration of £20,000 paid to the mortgagors by the mortgagees, they conveyed as beneficial owners their interests in the real and personal estate of the lunatic to the mortgagees, subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of £40,000, with compound interest on the same at the rate of 4½ per cent. per annum from the day of the death of the lunatic, with yearly rests. I do not think that "yearly rests" adds anything to the matter because it merely states the periods at which the interest is to become payable on what I will call for the moment—I do not wish to beg the question—the overdue interest. It might have been half-yearly rests, or it might have been two-yearly rests, and the result would have been just the same. On payment to the mortgagees it is sought to deduct income tax on the amount of interest from the death of the lunatic. It is contended by the mortgagees that that amount cannot be deducted, but that the only amount that can be deducted would be the tax on the interest of the last year if that were paid in the last year. It is contended that the result of the words "compound interest," means that at the end of each year, when the rest is taken any interest that is overdue at that time at once becomes capital for all purposes, and therefore when it is paid to the mortgagees it is a repayment of capital and not a payment of interest.

The question is whether the payment of the amount which is equal to the number of years' interest which was unpaid is interest on money paid yearly, or otherwise, or any annuity or other annual payment. If it be, then income tax is payable on it, and if the income tax be payable on it the mortgagors, when the money comes to be paid over, would be entitled to deduct this tax.

To my mind the question is a very short one, and my answer to the question whether right or wrong, can be stated very shortly indeed. In my opinion the words "compound interest" are not comprehensive, and do not mean all that it is said by the mortgagees that they do mean. The agreement which the mortgagor makes—and I am satisfied that it would probably be the only one that he ever thought he was making—is that if he does not pay his interest as it should be paid after the death of the lunatic at its due date, then he shall have to pay interest on that interest as well as interest on capital which is unpaid. The way in which it is generally done in keeping accounts is that at the end of the first and every other year the interest for that year which is unpaid is added to the capital. At the end of the first year it is added to the capital; at the end of the second year if it is

unpaid, it is added to the sum made up of the capital and the first year's interest; and on those aggregate sums interest is calculated for the future. It would be more complicated but it seems to me it would carry it out just as well, if the interest were not added to the capital, but two accounts were kept, one charging interest on the sums of overdue interest which are not paid from year to year. I think the effect would be exactly the same. That is not the way in which it is done. It would be a cumbrous and unbusinesslike way of doing it.

The adding of the interest year by year, the first year to the capital sum, the second year to the capital sum plus the first year's interest, is commonly and conveniently spoken of as "capitalising" the interest. It is capitalising the interest in a sense, and in the sense in which junior counsel for mortgagees put the matter to us. He said that the interest should be treated as capital for the purpose of bearing interest; and in the sense that it becomes a thing which bears interest itself, which interest, as a rule does not, it may be said to be capitalised, that is to say, it may be said to be put in the same position as capital is, as a thing which bears interest. But it seems to me that it is going a very long way beyond that to say that it is made capital for every purpose, and that when it is paid, at the expiration of perhaps ten years, it is paid, all except the last year, as capital. I do not think that these words necessarily show, or indeed do show, that the mortgagor intended that any unpaid interest should become capital for all purposes, the result no doubt if it were so being that he pays more than he would pay if it is to be considered as interest, because if he had paid his interest at the end of the first year he would have paid it, less tax. That is admitted. If it is to become capital for all purposes, then he has to pay that as part of the capital, without any deduction of tax at all. I do not think such a matter was ever contemplated, and I do not think that that is the meaning of an agreement simply to pay compound interest. The word "capitalisation," used in many of the quoted books, is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as meaning capitalised for all purposes, income tax and otherwise. I do not think that is the meaning of the words. I think, not to beg the question, that when these sums come to be paid, at the end of the time when payment is made, although interest has been charged on that, and although as a matter of bookkeeping, they have been from time to time added to the capital, they do not cease to be interest on which interest has been paid. Therefore, I think that this appeal fails and should be dismissed with costs. I may add that in principle I do not think that any distinction can be drawn between this case and *Re Craven's Mortgage*, *Davies* v. *Craven* (1). I agree with P. O. Lawrence, J., as to that, and I think that that case was rightly decided.

WARRINGTON, L.J.—The question in the present case is whether or not, in calculating the amount of interest payable by certain mortgagors to their mortgagees, on the redemption of the property comprised in the mortgage, it is right to deduct income tax from time to time payable in respect of that interest. It happens that the interest is described as "compound interest," and it is said that because the interest is compound interest, there is then no longer any possibility of deducting income tax, except of course in respect of the interest during the final year when redemption takes place, as it does in this case, in the middle of the year.

One, Ellen Morris, was in 1898, and had for many years previously, been a lunatic. She had a number of relations who were her presumptive next-of-kin, that is to say, who, if she died, under the existing circumstances would be entitled, as statutory next-of-kin, to share between them her estate, which was a large one. In those circumstances, in 1898 certain of those persons were desirous of raising money on their presumptive interests in Miss Morris's estate, and they succeeded in getting the Norwich Union Life Insurance Society to make them an advance. The security for the advance took this form. The actual sum advanced was

£20,000, the principal sum to be paid on redemption was £40,000. The proviso for redemption was in these terms:

> "If the mortgagors or some or one of them . . . shall at any time after the death of the lunatic pay to the mortgagees or their assigns all costs, charges and expenses which they may hereafter properly incur in relation to this security, and also the sum of £40,000 with compound interest for the same at the rate of £4 10s. per cent. per annum from the day of the death of the lunatic with yearly rests . . ."

then the mortgagees will reassign. The lunatic died on Jan. 24, 1915. The time has now arrived when the money arising from her estate is available for redemption. The mortgagors propose that out of that money there shall be paid £40,000 and compound interest, deducting each year the tax at the legal rate in force for that year, that is to say, for the first year ending Jan. 24, 1916, there would be deducted income tax on £1,800, for the next year the interest would have to be reckoned upon that £1,800, less the tax, and again what would be actually paid would be that amount, less the income tax, and so on. The mortgagees, on the other hand, insist that they are entitled to have each year's interest treated as if it were not interest at all but capital, added to the capital and paid in full, without any deduction for income tax, the only interest then being subject to that deduction being the interest for the broken year at the end of the period.

Which of those two contentions is right? Deduction of income tax from interest is provided for by r. 19 of the General Rules applicable to all the Schedules of the Income Tax Act, 1918. I read it shortly, leaving out what is immaterial:

> "Where any yearly interest of money . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due."

The real question is: Does the interest cease to be yearly interest of money, because at the end of the specified period expressed by the expression yearly or half-yearly rests, as the case may be, the interest unpaid itself bears interest? In my opinion it does not. All that the expression "compound interest" means is that if the interest is not paid, or so much thereof as is not paid, it, or that portion of it, shall itself bear interest, and so on. The mortgagees insist that the real effect of expression "compound interest" is that the interest unpaid shall for the future for no purpose be regarded as interest, but shall thenceforth be added to the principal to be paid. In my opinion, that is not the result of the expressions which have been used.

It is unnecessary to deal with anything except the document before us which contains the expression simply "compound interest . . . with yearly rests." It is unnecessary to express my opinion as to what might be the result if, instead of so wording the document, it had provided, in express terms, for the capitalisation of each year's interest—and by capitalisation I mean for the complete conversion of that interest into principal. Whether such a provision would make any difference in the result, and whether, if it did, it would contravene r. 23 of the Rules applicable to All Schedules which renders void any contract for payment of interest without deduction and would so be void, or not, I express no opinion, except, that I think both points are open to grave consideration, namely, whether the express provision I have referred to would have any more effect than that with which we are dealing, or whether, if it had that effect, it would contravene the provisions

of the Income Tax Act, 1918. I think that both those questions are open to very serious consideration if and when they arise. They do not arise in the present case, and I, therefore, express no opinion on them. In my opinion, both *Re Craven's Mortgage*, *Davies* v. *Craven* (1) and the present case were rightly decided, and therefore this appeal must be dismissed with costs.

YOUNGER, L.J.—I am of the same opinion. I so far agree with the argument on behalf of the mortgagees that I think, whether these annual instalments of interest are in fact or in substance capitalised or not, there can be little doubt that as a mere matter of administration there is little or no distinction between accounts properly kept under this security and those which would be kept if these instalments were in fact for all purposes capitalised. That is to say, so far as I can see, after the operation directed by this deed is completed, there remains no respect in which any part of the aggregate fund thereupon secured is differentiated for any purposes from any part of it. I may illustrate what I mean by an example: In the case of a mortgagee's account, on realisation of his security or on receipt of an instalment on account of what is due to him, where there is an arrear of interest, all moneys received by the mortgagee are properly applied by him, firstly, in payment of interest in arrear, and thereupon in reduction of principal, the result, of course, being to increase the total sum of interest unpaid beyond the amount which would be in arrear if the instalment was applied, first, in payment of principal, or was applied rateably in payment of both principal and interest. But in the case of this mortgage deed, if the mortgagees had, after Jan. 25, 1916, proceeded to realise their security, the amount due to them calculated to Jan. 25, 1916, would not, so far as principal and accrued interest were concerned, be due to them so far as I can see, in respect of two accounts, principal and interest, but would be due to them, on one account only, and the interest first discharged out of the proceeds of realisation would be confined to the current interest only. But I take leave gravely to doubt whether the provision referred to, although it produces a result not in substance distinguishable from a capitalisation of interest, is either such a capitalisation or is intended so to be. If it be, then I fear and think that consequences quite unforeseen and unintended both by the mortgagors and mortgagees might necessarily ensue.

These payments, if they are held to be so capitalised must, I conceive, be treated as if the arrangement in the deed had amounted to an agreement on the part of the mortgagees to permit the sum payable to them in every year by way of interest, instead of being paid, to be charged on the property as an addition to the original advance, or as a further advance. If so, then on the principle of *Hopkinson* v. *Rolt* (2), the mortgagees might or would find themselves in respect of any or all of those advances postponed in point of security to any mesne incumbrance of which before they were made they had notice. I think it may well be that this consequence, neither foreseen nor intended by either of the parties to the deed, can only be avoided by treating all accumulations of interest as being additions to the sum remaining unpaid in respect, not of principal, but of interest, and therefore not in the sense now contended for capitalised at all. My own view is that this is the true result of the clause, and it is agreed as I understand, if that be so, that the order under appeal is not open to review.

I will assume, however, contrary to that opinion that these instalments are capitalised, and also I will assume, without deciding it, that there is nothing in the Income Tax Act, 1918, which precludes an agreement between the parties to that effect. The question then remains: What is the sum which is so capitalised in every year. In my judgment, on the true construction of this deed, it is that sum and no more than that sum which would in respect of interest have been then payable to the mortgagees if the deed, in place of permitting it in effect to be added to the principal, had directed it to be paid to them.

It would seem that one of two possible transactions may on analysis be said to be elliptically provided for by the provision here in debate. It may be said that

the provision is in effect one by which the mortgagor submits to the addition in every year to the principal then secured by the mortgage of a further capital sum equal to 4½ per cent. on that principal; or it may be said that the provision is in effect one under which the mortgagees re-lend to the mortgagor the interest which is treated as having been paid to him. I cannot myself see how the mortgagees can succeed here unless they are able to establish that the first and not the second of these transactions is that which is really carried out by the provision in question. But I cannot myself doubt that the second and not the first of these operations more closely approximates to what is actually effected by the words used. This provision is not dealing with a capital sum at all. It is dealing with a sum of interest accruing from day to day as interest and bearing that character, until by virtue of the provision of the deed by being added to the principal it itself carries interest. The mortgagor under this deed could, it is agreed, in any year stop this operation from being completed by paying to the mortgagees the interest for that year. What is the sum he would have to pay? Admittedly, the interest less tax. I am led by this consideration to the conclusion that the real effect of such a provision as this on analysis is to add to the principal the sum only which would be added if notionally that interest had been paid and were at once re-lent to the mortgagor on the security. It is said that this view of the bargain is subversive of existing practice. It may be; I do not know. It is, however, a fair observation to be made in that connection that a provision for capitalising interest can fairly be construed so as to charge the mortgagor with a rate higher than that payable by him if the interest be paid as it becomes due. That is a strong thing to say; yet that, and nothing less would result from acceding to the claim here made by the appellants. They will, if they be right, in fact receive a sum in respect of interest exceeding any which would be theirs under a covenant to pay each year interest at the rate of 4½ per cent., and that addition to the mortgagees' receipts would be obtained by in effect charging the mortgagors for their benefit with income tax twice over. In these days of high income tax the result to a mortgagor of accepting the mortgagees' view would be crushing. It ought, I think, only to be brought about by language so clear and unambiguous as to be free from any uncertainty. The terms of the present deed are, I think, quite inadequate for any such purpose. Accordingly, I think that the decision of the learned judge in the court below was correct, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Collisson, Prichard & Barnes*, for *Ernest Hicks*, Norwich; *Tucker, Lake & Lyon*, for *D. A. Woodcock*, Manchester; *A. T. Plant*, for *Plant, Abbott & Plants*, Preston.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

BOYCE *v.* COX

[KING'S BENCH DIVISION (Lord Trevethin, C.J., Sankey and Acton, JJ.), October 21, 1921]

[Reported [1922] 1 K.B. 149; 91 L.J.K.B. 122; 126 L.T. 254; 85 J.P. 279; 38 T.L.R. 51; 66 Sol. Jo. 142; 20 L.G.R. 686; 27 Cox, C.C. 139] B

Bastardy—"Single woman"—Mother of illegitimate child married to man other than father—Separation order against husband—Affiliation proceedings against putative father—Competency—Bastardy Laws Amendment Act, 1872 (35 *& 36 Vict., c.* 65), *s.* 3. C

The respondent, when unmarried, gave birth to a child of which the appellant was the father, and during the following twelve months he made payments to her for the child's maintenance. The respondent then married a man other than the appellant, and the husband maintained the child until the respondent left him on account of his cruelty and obtained a separation order. She then applied to the justices for an affiliation order against the appellant. D

Held: the effect of s. 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, in conjunction with s. 26 of the Matrimonial Causes Act, 1857, was to confer on the respondent the status of a feme sole, and, therefore, she was to be regarded as a "single woman" within s. 3 of the Bastardy Laws Amendment Act, 1872, and as such was entitled to have a summons issued to the appellant and an affiliation order made against him. E

Notes. Section 26 of the Matrimonial Causes Act, 1857, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 and Sched. 6, and replaced by s. 194 (1) (b) of that Act, and a new subsection was substituted for s. 194 (1) (b) by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5 and Sched. 1 (11 HALSBURY'S STATUTES (2nd Edn.) 835). The Bastardy Laws Amendment Act, 1872, was repealed by the Affiliation Proceedings Act, 1957 (37 F HALSBURY'S STATUTES (2nd Edn.) 36), of which ss. 1 and 2 (1) replace s. 3 of the Act of 1872.

As to affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110, 111; and for cases see 3 DIGEST 387 et seq. For the Bastardy Laws Amendment Act, 1872, see 2 HALSBURY'S STATUTES (2nd Edn.) 478.

G

Cases referred to:

(1) *Stacey* v. *Lintell* (1879), 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551, D.C.; 3 Digest 387, *259*.

(2) *Peatfield* v. *Childs* (1899), 63 J.P. 117; 3 Digest 388, *262*.

Also referred to in argument:

R. v. *Pilkington* (1853), 2 E. & B. 546; 21 L.T.O.S. 165; 17 Jur. 554; 1 W.R. 410; 17 J.P.Jo. 388; 1 C.L.R. 945; 118 E.R. 872; sub nom. *Ex parte Grimes*, 22 L.J.M.C. 153; 3 Digest 388, *265*. H

Tozer v. *Lake* (1879), 4 C.P.D. 322; 41 L.T. 280; 43 J.P. 656; 3 Digest 387, *260*.

Healey v. *Wright*, [1912] 3 K.B. 249; 81 L.J.K.B. 961; 107 L.T. 413; 28 T.L.R. 439; 23 Cox, C.C. 173, D.C.; 3 Digest 388, *261*.

Lang v. *Spicer* (1836), 1 M. & W. 129; 1 Gale, 426; 3 Nev. & M.M.C. 556; 5 L.J.M.C. 60; 150 E.R. 374; sub nom. *Laing* v. *Spicer*, Tyr. & G. 358; 37 Digest 236, *295*. I

Plymouth Union v. *Gibbs*, [1903] 1 K.B. 177; 72 L.J.K.B. 33; 87 L.T. 685; 67 J.P. 61; 51 W.R. 157; 19 T.L.R. 11; 47 Sol. Jo. 32; 1 L.G.R. 48, D.C.; 37 Digest 236, *296*.

Case Stated by a Metropolitan Police Magistrate, sitting at the North London Police Court.

(a) On May 1, 1916, the respondent was delivered of a child of which the appellant was the father. (b) Between May, 1916, and May, 1917, he paid 8s. to 10s. weekly to the respondent for the maintenance of the said child. (c) On Dec. 9, 1919, the respondent married James Alfred Cox, with whom she lived and cohabited until Nov. 25, 1920, when she left him. (d) The said James Alfred Cox before the said marriage knew of the illegitimate child, and from the date of the said marriage until Nov. 25, 1920, the said illegitimate child lived with the respondent and her husband and was maintained by and at the expense of the said husband. (e) On Jan. 18, 1921, the respondent obtained a separation order at the North London Police Court on the ground of the persistent cruelty of her husband and was granted maintenance to the amount of 10s. a week and the custody of the child of the marriage. (f) The existence of the illegitimate child was mentioned to the court by the respondent on the hearing of the complaint for a separation order, but the expense of its maintenance was not included in the 10s. allowed. (g) On Jan. 26, 1921, the respondent applied for and obtained a summons against the appellant to affiliate the said child.

It was contended on behalf of the appellant that the respondent was not a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3, and that if the mother of an illegitimate child married before obtaining an affiliation order her husband was bound under the Poor Law Amendment Act, 1834, s. 57, to support the illegitimate child to the exclusion of the putative father. The magistrate held that the respondent was a "single woman" and made an order for the payment of 7s. 6d. a week till the child should attain the age of sixteen.

The Matrimonial Causes Act, 1857, provided:

"Section 126. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding. . . ."

The Bastardy Laws Amendment Act, 1872, provided:

"Section 3. Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

The Summary Jurisdiction (Married Women) Act, 1895, provides:

"Section 5. The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.: (a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty). . . ."

Colam, K.C. (*Hilton D. Warner* with him), for the appellant.
G. L. Hardy for the respondent.

LORD TREVETHIN, C.J.—This case raises a point as to the power to make an order on the putative father of an illegitimate child. The respondent had a child by the appellant and afterwards married and had a child by her husband, who treated her cruelly, and she obtained an order for separation and to pay 10s. a week. The magistrate said that he did not intend that to cover the expense for maintaining the illegitimate child. Subsequently an order was applied for against the putative father and he was ordered to pay 7s. 6d. a week. The order was objected to on the ground that she was not a "single woman." I think that the respondent's contention in answer to that objection was right. By s. 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, a separation order is to have the effect of a decree of judicial separation on the ground of cruelty, and s. 26 of the Matrimonial Causes Act, 1857, provides that a woman who obtained such a decree was to be regarded as a feme sole. That distinguishes this case from those cited for the appellant. There is a distinct status: the respondent was a "single woman," not living with her husband, and the appeal must be dismissed.

SANKEY, J.—I agree. The only point which the court has to decide is whether the respondent was a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3. The courts have from time to time given definitions, of which some have been cited, but it is to be observed that in this case the respondent had already obtained a separation order from the magistrate, which, by s. 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, is to have the effect of a decree of judicial separation. The effect of judicial separation as defined in the Matrimonial Causes Act, 1857, s. 26, is that the respondent was a feme sole. The only argument adduced against this is that two persons might be liable. I do not know whether that may be so, but in the cases cited the circumstances were different, because there was no such order. In *Stacey* v. *Lintell* (1) in particular, the wife was living with her husband at the date of the application. In this case the respondent was not only not living with her husband, as in *Peatfield* v. *Childs* (2), but was actually separated from him by an order of the court.

ACTON, J.—I agree.

Appeal dismissed.

Solicitors: *Edmond O'Connor & Co.*; *Tilley & Watts.*

[*Reported by* J. F. WALKER, *Barrister-at-Law.*]

A

Re CUBAN LAND AND DEVELOPMENT CO. (1911), LTD

[Chancery Division (P. O. Lawrence, J.), May 31, June 7, 1921]

[Reported [1921] 2 Ch. 147; 90 L.J.Ch. 440; 125 L.T. 792; 65 Sol. Jo. 680; [1921] B. & C.R. 168]

B

Company—Debenture—Redemption—Clog on equity—Term in debenture inconsistent with or repugnant to company's right to redeem—Right of debenture holders in winding-up to share of surplus assets.

The holders of debentures in a company were entitled to 6 per cent. interest and 50 per cent. of the net profits and to 50 per cent. of the surplus assets in
C a winding-up. They were liable to be paid off by the company at any time on receiving six months' notice. By extraordinary resolutions passed at a meeting of the debenture holders on Nov. 11, 1913, the creation of prior lien debentures was authorised and the rights of the debenture holders were modified, the net profits, and in the case of a winding-up any surplus assets, being payable as to one-third to the prior lien debenture stockholders, as to another third to the
D 6 per cent. debenture stockholders, and as to the remaining third to the company. When the company went into voluntary liquidation the moneys secured by the debenture stock and prior lien debenture stock had already been paid to the holders.

Held: the collateral bargain made with the prior lien debenture holders to pay them one-third of the surplus assets on a winding-up was not in any way
E inconsistent with or repugnant to the contractual or equitable right of the company to redeem; the only distinction between the collateral bargain made with the prior lien debenture holders and that made with the 6 per cent. debenture holders was that, if the company were to give notice to pay off the latter stock before a winding-up, a longer interval would elapse between the time when the principal moneys were paid off and the time when the additional
F sum fell due than would be the case with regard to the prior lien debenture stock; the fact that the payment of the additional sum was postponed until the winding-up did not render the bargain with the 6 per cent. debenture holders inconsistent with or repugnant to the contractual and equitable right of the company to redeem; nor was it in the nature of a penalty, clogging the equity of redemption.

G *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.* (1), [1914] A.C. 25, applied.

Noakes & Co. v. *Rice* (2), [1902] A.C. 24, distinguished.

Notes. As to clogging the equity of redemption of debentures, see 6 Halsbury's Laws (3rd Edn.) 485; and for cases see 10 Digest (Repl.) 805, 806.

H Cases referred to:

(1) *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A.C. 25; 83 L.J.Ch. 79; 109 L.T. 802; 30 T.L.R. 114; 58 Sol. Jo. 97, H.L.; 35 Digest 241, *20.*

(2) *Noakes & Co.* v. *Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, *19.*

I **Adjourned Summons.**

The Cuban Land and Development Co. (1911), Ltd., was incorporated in 1911 as a private company with a capital of £33,000 divided into 33,000 shares of £1 each, of which 32,753 shares had been issued and were fully paid. In 1912 the company created an issue of debenture stock for £20,000 and secured the same by a deed poll in which it was provided that the stock should bear interest at 6 per cent. and should carry the right to 50 per cent. of the net profits of the company available for distribution as dividend. On a winding-up, after payment in full of the debenture stock for the time being outstanding and of the share-capital of the

company, the holders of the stock were to be entitled to 50 per cent. of the surplus assets. The stock was repayable by the company on six months' notice. The company issued debenture stock of the said issue amounting to £15,950. No interest ever became payable in respect of this debenture stock. At a meeting of the holders of the debenture stock held on Nov. 11, 1913, in accordance with the provisions of the deed poll, resolutions were passed (inter alia) (i) authorising the company to create in priority to the existing debenture stock an issue not exceeding £20,000 of prior lien debenture stock carrying interest at 6 per cent . . . (iv) that in lieu of the debenture stock carrying the right to 50 per cent. of the net profits of the company available as aforesaid and on a winding-up (after payment in full of the debenture stock for the time being outstanding and of the share capital of the company as provided by the terms of issue thereof) to 50 per cent. of the surplus assets, the balance of such net profits, and in the case of winding-up any surplus assets should, after the redemption in full of the prior lien debenture stock and the 6 per cent. debenture stock, be payable as to one-third to the prior lien debenture stockholders, as to another third to the 6 per cent. debenture stockholders, and as to the remaining third to the company. Prior lien debenture stock was issued to the amount of £10,000. In April, 1920, the company paid to the holders the whole of the principal moneys secured by the prior lien debenture stock and the 6 per cent. debenture stock of the company. In October, 1920, the company went into liquidation. The liquidator, desiring to know how to deal with a sum which would remain in his hands after the payment of the debts and liabilities of the company, took out this summons for the determination of the questions (i) whether the provisions of the fourth resolution (above set out) were valid and binding on the company, and (ii) whether, having regard to the fact that the principal sums secured by the prior lien debenture stock and debenture stock referred to in the resolution were fully paid off and discharged prior to the winding-up of the company the holders or former holders of such prior lien debenture stock and debenture stock were entitled to participate to any and what extent in the surplus assets of the company.

J. B. Lindon for the liquidator.
H. E. Wright for a shareholder.
W. P. Spens for debenture holders.

Cur. adv. vult.

June 7. **P. O. LAWRENCE, J.,** read the following judgment: The principles governing the determination of the questions arising on this application are fully expounded by LORD PARKER in his speech in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.* (1), and I need not repeat them on this occasion. Applying those principles to the present case I have come to the conclusion that the provisions of the fourth of the extraordinary resolutions passed at the meeting of the debenture stockholders on Nov. 11, 1913, are valid and binding on the company.

The prior lien debenture stock is what is commonly known as perpetual debenture stock, that is to say, no day is specified for the repayment of the principal moneys secured. The stockholders only become entitled to repayment if an order is made or an effective resolution is passed for the winding-up of the company (otherwise than for the purpose of reconstruction) or if the company commits a breach of any of the conditions upon which the stock is issued and the company cannot redeem the stock without going into liquidation. The doubt which formerly existed as to the validity of debenture stock of this nature was removed by s. 14 of the Companies' Act, 1907, which is reproduced in a slightly altered form in s. 103 of the Companies (Consolidation) Act, 1908 [now s. 89 of the Companies Act, 1948]. It is not suggested that the collateral bargain made with the prior lien debenture stockholders to pay them one-third of the surplus assets on a winding-up was in any way unfair or unconscionable nor that it was in the nature of a penalty clogging the equity of redemption. It was, however, faintly suggested that this collateral bargain was in some way (which counsel failed to particularise) incon-

sistent with or repugnant to the contractual and equitable right of the company to redeem. In my opinion, upon the facts of this case, no such inconsistency or repugnancy exists. The only effect of the bargain is that, when the company is wound-up, these stockholders will be entitled to receive one-third of the surplus assets in addition to the principal moneys secured by the stock. The bargain appears to me to have been perfectly fair and businesslike, and, in my judgment, is valid and binding upon the company.

As regards the 6 per cent. debenture stock created in 1912, it is contended that the collateral bargain for payment to the holders of this stock of 50 per cent. of the surplus assets on a winding-up is inconsistent with and repugnant to the right of the company to pay off this stock at any time on giving six months' notice under the power in that behalf reserved to the company by one of the conditions upon which the stock was issued. In support of this contention reliance is placed upon the decision in *Noakes & Co.* v. *Rice* (2). In my judgment, however, that decision does not apply to the facts of the present case. The effect of the bargain made with the 6 per cent. debenture stockholders is that such stockholders, in addition to the principal money secured, are to receive a collateral advantage in the shape of an additional sum of money which will become payable on a winding-up. LORD PARKER in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.* (1) points out that there is no objection to a mortgage stipulating for a payment falling due after the principal moneys advanced are repaid. The only distinction between the collateral bargain made with the prior lien debenture stockholders and that made with the 6 per cent. debenture stockholders is that, if the company were to give a notice to pay off the latter stock before a winding-up, a longer interval would elapse between the time when the principal moneys were paid off and the time when the additional sum fell due than would be the case with regard to the prior lien debenture stock. In my opinion, the fact that the payment of the addition sum is postponed until the winding-up of the company does not render the bargain inconsistent with or repugnant to the contractual and equitable right of the company to redeem. In *Noakes & Co.* v. *Rice* (2) the court had to deal with an entirely different set of circumstances. In the first place, it was a case not of debentures or debenture stock issued by a limited company, but of a mortgage between private individuals, and, secondly, the mortgage in that case contained an express provision for the reconveyance of the mortgaged property on payment of the moneys secured. The decision in that case that the continuance of a tie in favour of the mortgagees after all moneys had been paid off was inconsistent with the express provision for re-conveyancing contained in the mortgage does not, in my judgment, govern the determination of the question in the present case. Here the court is considering a bargain for the payment to debenture stockholders of an additional sum on a winding-up of the company. Such a bargain, if fairly made, is, in my opinion, valid as it is neither in the nature of a penalty, clogging the equity of redemption nor is it inconsistent with or repugnant to the contractual and equitable rights of the company to redeem.

There will be a declaration in accordance with this judgment and the costs of the parties (to be taxed as between solicitor and client) will be paid by the liquidator out of the assets.

Solicitors: *Gilbert Samuel & Co.*; *W. L. Dell.*

[*Reported by* J. L. DENISON, ESQ., *Barrister-at-Law.*]

OLDHAM, ASHTON AND HYDE ELECTRIC TRAMWAYS, LTD. *v.* ASHTON CORPORATION AND OTHERS

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), February 23, 24, March 22, 1921]

[Reported [1921] 3 K.B. 511; 90 L.J.K.B. 828; 125 L.T. 391; 85 J.P. 181; 19 L.G.R. 327]

Tramway—Purchase by local authority—"Then value"—Matters to be considered—Engineers' remuneration at time of construction—Interest on capital during construction—Cost of raising capital—Temporary diversion of tramway under terms of company's Order—Preliminary expenses of company—Tramways Act, 1870 (33 & 34 *Vict.*, *c.* 78), *s.* 43.

On the purchase by a local authority under s. 43 of the Tramways Act, 1870, of a tramway in their district, **held:** in ascertaining the "then value" of the tramway under the section the tramway company was entitled (i) to a sum in respect of engineers' fees paid at the time of the construction of the tramway, subject to a deduction for depreciation, since the expenditure on the fees did not represent expenditure made once for the whole life of the undertaking; and also (ii) to a sum in respect of interest on capital during construction, that sum being subject to depreciation according to whether the capital on which it was interest was depreciable or not, but (iii) (Bankes, L.J., dissenting) the tramway company was not entitled to any allowance in respect of the cost of raising capital since that expenditure had no relation to the present cost of construction of the tramway and was too remote from the "then value" of the undertaking, nor (iv) to anything in respect of the cost of a temporary diversion of the tramway some twelve years before the date of purchase which the tramway company was bound to make under the terms of the Order under which the company was promoted, in the event, which happened, of a railway company wishing to make structural alterations to a bridge by which the tramway was carried over the railway.

Per Rowlatt, J.: a sum in respect of the preliminary expenses of the company should be allowed.

Notes. As to the powers of local authorities to purchase tramways, see 32 Halsbury's Laws (2nd Edn.) 731–737; and for cases see 43 Digest 353–357. For Tramways Act, 1870, see 25 Halsbury's Statutes (2nd Edn.) 1289.

Cases referred to:

(1) *National Telephone Co., Ltd.* v. *Postmaster-General* (1913), 29 T.L.R. 190.

(2) *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* (1894), 21 R. (Ct. of Sess.) 688; affirmed [1894] A.C. 456; 63 L.J.Q.B. 769; 71 L.T. 301; 10 T.L.R. 625; 6 R. 317, H.L.; 43 Digest 354, *113*.

(3) *Re L.C.C. and London Street Tramways Co.*, [1894] 2 Q.B. 189, 204; 63 L.J.Q.B. 433; 70 L.T. 572; 10 T.L.R. 405, C.A.; affirmed sub nom. *London Street Tramways Co.* v. *L.C.C.*, [1894] A.C. 489; 10 T.L.R. 630, H.L.; 43 Digest 355, *115*.

Appeal by the tramways company from the judgment of Rowlatt, J., upon an award stated in the form of a Special Case.

In 1896 the British Electric Traction (Pioneer) Co., Ltd., obtained the Oldham, Ashton, Hyde and District Electric Tramways Order, 1896, under which certain tramways were constructed. The Oldham, Ashton and Hyde Electric Tramways, Ltd., had become at the date of notice hereinafter mentioned the owners of these tramways with the benefit of the rights and subject to the obligations created by the Order. On May 1, 1918, the corporations of Ashton-under-Lyne and Hyde and the Audenshaw and Denton Urban District Councils, under the powers conferred by s. 43 of the Tramways Act, 1870, gave notice in writing to the tramways

company that they required them to sell to them such parts of the tramway undertaking as were within the respective districts of the purchasing authorities. Differences arose between the parties within the meaning of s. 43, and were referred to arbitration, and the arbitrator stated his award in the form of a Special Case. The arbitrator awarded £142,174 as the "then value," at the date of notice, of the "purchased undertaking" (other than certain loose tools, &c.)

> "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever, except the consideration of the value of the purchased undertaking measured by what it would cost to construct and establish the purchased undertaking on the date of notice if such purchased undertaking had not existed at that date, but taking into account a proper deduction in respect of depreciation as hereinafter mentioned."

The above sum was made up as follows:

	£	s.	d.
(A) Value of permanent way, overhead electric equipment, cables and cars, less an agreed deduction of £3,600	110,396	0	0
(B) Value of lands, buildings, office furniture and fittings, car shed track, car shed equipment, &c.	10,717	0	0
(C) Value of plant, tools and fittings and car shed and plant and fittings belonging to the tramway company at Ashton Power Station	2,906	0	0
(D) Amount allowed for Parliamentary expenses	3,000	0	0
(E) Amount allowed for preliminary expenses	1,500	0	0
(F) Amount allowed for miscellaneous items	2,395	0	0
(G) Amount allowed for cost of raising capital	5,500	0	0
(H) Amount allowed for interest on capital during construction	5,760	0	0
	£142,174	0	0

There was no dispute in the case as to items (B), (C) or (D).

The questions for the arbitrator were: (i) Whether an item for "engineering" included in (A) should be subject to depreciation. (ii) Whether certain expenses in the formation of the promoting company, and certain preliminary expenses, directors' fees and managerial expenses in (E) and (F) should be allowed, and, if allowed, should be subject to depreciation. (iii) Whether (G) and (H) should be allowed, and, if so, whether subject to depreciation. The arbitrator stated that he was of opinion: (i) That he ought to depreciate the engineering item on the ground that it should be treated in the same way as other items of cost of construction in respect of the structure of the purchased undertaking which did not represent expenditure made once for the whole life of the undertaking. (ii) That the company were not entitled to the sums claimed in respect of formation expenses and expenditure on directors' fees and other managerial expenses on the ground that he ought to disregard specific items of expenditure under these heads and merely include in his valuation such sums as he considered "would be properly and reasonably spent on preliminary expenses by anyone undertaking the construction and establishment of the purchased undertaking." (iii) That the company were entitled to a sum in respect of preliminary expenses as part of the necessary cost of construction and establishment and represented expenditure which would be incurred by anyone undertaking the construction and establishment, and that he ought, accordingly, to take such expenses into account to such an extent as he considered necessary and proper. (iv) That the company were entitled to receive a sum in respect of the cost of raising capital on the ground that such cost was part of the necessary cost of construction and establishment of the purchased undertaking and represented expenditure which would have to be incurred by anyone in good credit undertaking such construction and establishment as aforesaid,

and that he ought, accordingly, to take it into account to such an extent as he considered necessary and proper. (v) That the company were entitled to a sum in respect of interest on capital during construction as part of the necessary cost of construction and establishment. (vi) That a certain sum (part of (A) expended on Guide Bridge should be allowed, as being incurred in pursuance of obligations created by the Order. The arbitrator further held that the items mentioned in cll. (iii), (iv), (v) and (vi) of this paragraph "were not subject to depreciation on the ground that they represented expenditure made once for the whole life of the purchased undertaking, and ought to be treated on the same basis as Parliamentary expenses and the cost of excavation, both of which last-mentioned items it was conceded were not subject to depreciation." In the event of the court holding that he was wrong, he made alternative awards as to each item. He awarded the above, and in addition the value of certain stores, spare parts and loose tools, the whole representing the "then value" of the "purchased undertaking" within the meaning of s. 43 of the Tramways Act, 1870.

By the Tramways Act, 1870, s. 43:

> "Where the promoters of a tramway in any district are not the local authority, the local authority . . . may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is in such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party. . . ."

By s. 5 of the Ashton-under-Lyne Corporation Act, 1917 (7 & 8 Geo. 5, c. xcii), application might be made by the local authorities under the Special Acts (Extension of Time) Act, 1915, for the extension of the period of twenty-one years mentioned in s. 43 of the Tramways Act, 1870, and the period was extended. The Oldham, Ashton-under-Lyne, Hyde and District Electric Tramways Order, 1896 (scheduled to the Tramways Orders Confirmation (No. 2) Act, 1896, s. 8 (4), provided: "Whenever and so often as the company," that is, the railway companies whose lines the tramway crossed by Guide Bridge, "shall require to widen, lengthen, strengthen," and make any specified structural alterations to the bridge, and "shall find it necessary for effecting any of such purposes that the working and user of any of the said tramways over such bridge . . . shall be wholly or partly stopped or delayed or that such tramways shall be temporarily diverted . . . this shall be done "accordingly at the expense of the promoters and under the superintendence of their engineer. . . ."

Rowlatt, J., in giving judgment, said that the question raised first was as to the allowance for the engineers' remuneration. The arbitrator had properly allowed it, for one could no more build a railway without paying the engineers than without paying the workmen. The next question raised was as to the preliminary expenses. Counsel for the purchasing authorities did not press his objection to their inclusion. The arbitrator had not taken the actual expenses of formation, directors' fees and other managerial expenses. He said that there must be preliminary expenses, and had taken a round sum which he considered reasonable. He was justified in so doing. The arbitrator had allowed the cost of raising capital as part of the necessary cost of construction and establishment of the undertaking. Divergent views were expressed in *National Telephone Co.* v. *Postmaster-General* (1), and the view he (Rowlatt, J.) took was that of the dissenting commissioner, Sir James Woodhouse. That item could not be allowed. The cost of raising capital was

A antecedent to the relevant history of the case. It did not seem to matter whether the promoters got money in the money market, or how they got it. How much of it had they spent in making the tramway? That is where the inquiry began. For that short reason he thought that the cost of raising capital cannot be allowed. Counsel for the purchasing authorities conceded that the arbitrator had rightly allowed the interest on capital during construction. That differed toto cælo from B the cost of raising capital, because it was in fact a part of the actual cost. If one spent £100 on buying something in 1919 which brought in nothing until 1920, one spent on that not only that amount of capital, but also the value of that capital lying idle for a year. That was part of the cost. Regarding the expenses in connection with Guide Bridge, when the Order was under discussion the promoters were put upon terms to pay for the temporary diversion of their tramway if it C became necessary to strengthen the railway bridge over which it ran. It did become necessary, and they made a temporary bridge alongside the railway bridge, and for some time ran their tramway across it. It was said that the cost of the diversion was part of the cost either of making the tramway or or obtaining the Order. He (ROWLATT, J.) could not agree. The expense of doing that was not the expense of constructing a thing, but a burden put upon the thing when D constructed. The promoters got something less for their money, namely, something subject to that burden. It did not cost them to construct this tramway what they subsequently had to pay on diverting it. The arbitrator was wrong on that point. On the question of depreciation, the arbitrator had depreciated the allowance for engineering, i.e., he has treated the engineering expenses as expenses like the wages of the workmen paid for building the tramway, which was getting E older and had depreciated. If a new tramway were built, a new engineer would have to be paid, but the purchase of the tramway postponed that necessity. Counsel for the tramways company said he could not quarrel with that, because it was a question of fact. The arbitrator had not depreciated the preliminary expenses. He had not given the items. If he had said that he had allowed so much for the preliminary expenses, and so much for that, and had then added F it up, one could dissect it, and say: "That preliminary expense is a once-for-all expense, while the other is really an increment to the cost of something which is perishable." But he had not done that. He had taken a round figure to represent what must be done by anybody in starting such a tramway, and he had not depreciated it. It could not be said that he was wrong. He had taken a right and supportable view in reaching that round figure, as a non-depreciable thing, G and his decision could not be questioned. As to the allowance of interest on capital during construction, the interest on capital was linked up with and formed an accretion to the capital itself, and so was depreciable or not depreciable with the capital on which it was the interest. Much of the capital was sunk in non-depreciable things like excavation and acquisition of powers. On the other hand, much of the capital was spent in making the tram lines, which was a depreciable H item. Therefore, that sum of interest on capital must be analysed and divided, and the award must go back to the arbitrator for that purpose. The tramways company appealed.

Tomlin, *K.C.*, and *E. E. Charteris*, *K.C.*, for the tramways company.
Tyldesley-Jones, *K.C.*, and *Eastham* for the purchasing authorities.

Cur. adv. vult.

I Mar. 22. The following judgments were read.

BANKES, L.J.—This appeal raises questions as to the amount to which the tramways company are entitled on the taking over of their undertaking by the purchasing authorities. The basis upon which the value of the tramways company's property has to be assessed was settled by the decision of the House of Lords in *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* (2). The effect of that decision, so far as it is material to the present case, is, I think, correctly summarised in the headnote where it says

"the 'then value of the tramway' [quoting the language of s. 43 of the Tramways Act, 1870] must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for depreciation and . . . rental value must not be taken into consideration." A

An arbitrator was appointed to assess the value of the tramways undertaking. He made an award subject to a Special Case. In arriving at the amount awarded he uses language in his award which indicates that he has followed the directions of s. 43 of the Tramways Act, 1870, and the decision in the *Edinburgh Tramways Case* (2). At the request of the purchasing authorities he stated a Special Case in reference to certain items of the claim. It is in respect of four of these items that this appeal is made. B

The first related to an allowance for engineering. The purchasing authorities contended that this item should be depreciated; the tramways company contended that it should not. The arbitrator finds in the Case that he ought to depreciate the allowance. He says: C

"I ought to depreciate the said allowance for engineering on the ground that such allowance should be treated in the same way as any other item in respect of the structure of the purchased undertaking which did not represent expenditure made once for the whole life of the undertaking." D

ROWLATT, J., thinks that he was entitled to deal with the matter in that way, and I agree with him. I do not see how any question of law arises upon the point in the absence of any information as to what the sum allowed actually represented. The experienced arbitrator has said that the amount which he has allowed did not represent expenditure made once for the whole life of the undertaking, and I fail to see how any court can interfere with this finding. E

The second item related to the cost of raising capital. The arbitrator allowed this. ROWLATT, J., has disallowed it upon the ground that the raising of capital is antecedent to the history of the case. I doubt whether, in the ordinary order of events in such a case as the present, the raising of capital precedes the Parliamentary expenses, or the engineers' fees, both of which have been allowed, but that is not the question. The only question here must be whether, upon the Case as stated, the arbitrator was wrong in law in allowing this item. For this purpose it is necessary to look somewhat closely into the Case to see what the suggested point of law is. The purchasing authorities objected to any allowance of this item. The arbitrator expressed the view that the tramways company were entitled to receive a sum in respect of the cost of raising capital. I read the first part of his finding as negativing the contention that the expenditure related to the commercial undertaking, and not to the tramway, in which view, if it is a question of law, I agree with him. I read the second part of his finding as negativing the suggestion that he was to take into consideration the case of any particular purchaser, in which view I also agree with him. I do not think that this Special Case raises the question in its widest form, which was discussed in *National Telephone Co.* v. *Postmaster-General* (1). In my opinion, it is not possible to interfere with the arbitrator's finding on this point. F G H

The next point had reference to an expenditure incurred in connection with a temporary shifting of the tramway line during some alterations to a railway bridge. The line as it existed on May 1, 1918, was the line in its original position after it had been restored to that position. I do not think that there was any evidence upon which the arbitrator could find that the cost of shifting the line and restoring it again to its original position formed part of the construction of the purchased undertaking as it existed on that day. I further think that the fact that the expenditure was incurred in pursuance of the obligations created by the order is immaterial. Upon these grounds I agree with the view expressed by ROWLATT, J., on this point. I

The last point has reference to interest upon capital during construction. Upon this point also I agree with ROWLATT, J.'s view that the interest must follow the

capital, and that a further inquiry is, therefore, necessary. As the other members of the court think that the appeal must be dismissed with costs, that will be the order of the court.

SCRUTTON, L.J.—The Tramways Act, 1870, by s. 43 gave local authorities, after a tramway in their streets had been constructed by a private promoter for twenty-one years, the power of purchasing "the undertaking" "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." Under this power certain local authorities at Ashton-under-Lyne have purchased the tramway of the Oldham, Ashton and Hyde Electric Tramways, Ltd., and the questions before the court arise on a Special Case stated by the arbitrator who is ascertaining "the then value" as above defined.

The court would be in great difficulty but for the decision of the House of Lords in *Edinburgh* (2) and *London Tramways* (3) cases. In those cases the tramway companies contended that the then value should be ascertained by the rental that a person hiring the undertaking would give for it as a going concern. The arbitrators in those cases had rejected the criterion of rental value, and had proceeded on the principles stated by LORD WATSON ([1894] A.C. at pp. 469, 470):

> "The referees have dealt with 'the tramway' as a subject belonging to the second of these classes, and they have accordingly put upon it what may conveniently be termed a construction value. The rule which they followed is thus stated by Mr. Tennant, 'that the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition.' Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led by the company for the purpose of showing 'the rental value of the purchased tramways considered as let or capable of being let,' while he received, and took into account, evidence adduced on behalf of the county council tending to show 'the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed."

The arguments and the judgments of the court are directed to the broad difference between the then cost of construction less depreciation and the then rental value, and do not, except in one matter, throw any light on how the then cost of construction less depreciation should be worked out in detail.

Four matters of detail were brought before us by the present appeal, two relating to the then cost of construction, two relating to the allowance for depreciation. Of those items relating to cost of construction I take first the item relating to Guide Bridge. The Special Case contains practically no facts in regard to it, and I suppose ROWLATT, J., obtained the facts stated in his judgment from an agreement of counsel. It appears that the tramway as originally constructed crossed certain railway bridges. The railway companies, to whom these bridges belonged, obtained a protective clausee (s. 8 (4), of the Oldham Order), whereby if the railway company desired (inter alia) to "lengthen" their bridge the tramway company were at their own expense temporarily to divert their tramway till the lengthening was completed. The railway company did, at their own expense, lengthen Guide Bridge, and the tramway company did, at their own expense, temporarily divert their tramway. When the bridge was lengthened the tramway went back to its old site. The tramway company now claim the cost of the temporary diversion. This would obviously not be part of the cost of constructing at the time of purchase

a tramway on the road as then existing. The reason why it is claimed is that in the *Edinburgh Case* (2) (21 R. (Ct. of Sess.) at p. 695) it appeared that the tramway company had originally at their own expense widened the North Bridge to allow a double line of tramways to be laid on it. They claimed this expense as part of then cost of construction, the arbitrator allowed it, and LORD LOW, the Lord Ordinary, said:

> "The referee has proceeded upon the footing of giving to the company the value of everything which has cost them money, in so far as the same is available to the corporation, and that appears to me to be what the statute directs."

Nothing is reported to have been said on the point in the First Division of the Court of Session or in the House of Lords. It appears to follow that the "then value," that is, as stated by LINDLEY, L.J., in *L.C.C.* v. *London Street Tramways Co.* (3) ([1894] 2 Q.B. at p. 206), what it would then cost the purchasers to make if they had to make the tramway themselves, would include the cost of making at the time of purchase on the site, as it would be if the tramway company had not spent any money on it. This may be right, though it is getting a good deal of meaning out of "then value," but it does not seem to cover the present case. No part of the site, the Guide Bridge, is paid for by the tramway company, as was the case of the North Bridge. The tramway company had paid the cost of a temporary diversion which no longer exists, or is available. The railway company paid for the bridge. I agree in the view of ROWLATT, J., who disallowed the arbitrator's allowance of this claim, that this item cannot, as a matter of law, be allowed in the cost of construction at the present time necessary to obtain the "then value" of the tramway.

The second point was whether there could be included in the cost of construction the cost of raising capital. The arbitrator finds that the tramways company were entitled to receive a sum in respect of this matter. His finding appears to be that anyone in good credit who had to raise money by borrowing to construct a tramway would expend a certain sum, and that this should be included in cost of construction at the time of purchase. This is the point on which in *National Telephone Co.* v. *Postmaster-General* (1) the Railway Commission differed, LAWRENCE, J., and Mr. Gathorne Hardy thinking the claim was admissible, the late LORD TERRINGTON that it was not. ROWLATT, J., adopted the view of LORD TERRINGTON, and held that the claim was, as a matter of law, irrecoverable, being "antecedent to the relevant history of the case," or, in other words, too remote. It seems clear that you are not to consider the actual costs of raising capital to the company. This would make the then value, the then cost of construction, vary with the financial stability of the original constructor. Nor could it depend on the estimated cost to the particular purchaser, so that Rothschilds would pay a less sum than a speculative promoter. The arbitrator assumed a person of good credit who must borrow money. It is true that a man who has no money must borrow money if he wants to construct a work that costs money. But it is equally true that to get a man, a company, to construct a work, the man must be born, reared and educated, which costs money, and the company must be formed and registered, which costs money. The reason why the cost of forming the company, or rearing the man, is not included in the cost of constructing the tramway is that it is too remote, and in my view the same reason excludes the cost of providing money, if that has to be incurred. The cost of a rail, its purchase price, does not, in my opinion, include the cost of finding the money to pay that price; that is too remote from the cost of the rail. On this point also I agree with the view of ROWLATT, J.

The other two points arise on the measure of depreciation, if any, to be allowed from the then cost of construction. The then cost of construction gives a new tramway, but the purchaser gets an old tramway with a certain amount of wear, and, therefore, a reduction should be allowed from the then cost of construction to

A get the then value. It is said that there are some items of cost of construction which are incurred once and for all and will never occur again, so that a purchaser does not get any depreciated value, but the full value of an expenditure which will not occur again. It appears to me that this is in principle right, and whether any item comes within this class is usually a question of fact. The first item in question is the percentage added to cost of construction for engineering fees. The B very experienced arbitrator treated this as an item which should be depreciated, and the judge upheld his view. I think it is a question of fact, with the decision of which this court cannot interfere. The second point is depreciation in interest on capital during construction. The arbitrator did not depreciate this item on the ground that in his view it represented expenditure made once and for all. The judge took the view that the interest followed the principal, and that, as some of C the capital expenditure was admittedly depreciable, the interest on it was depreciable also, and he remitted this part of the award to the arbitrator to alter his figure on this basis. I agree with this view. If, as appears, the arbitrator treated all interest on capital during construction as not subject to depreciation, whether the capital itself was subject to depreciation or not, I think he went wrong in law, and should re-consider his decision. The appeal, in my view, fails on all points, D and should be dismissed with costs.

ATKIN, L.J.—The questions that we have to decide in this case arise upon a Case stated by an arbitrator. The learned judge has come to a conclusion upon all the points of law raised in the Case. We only have to deal with such of the points decided by him as are complained of by the tramways company. There is no cross-E appeal by the purchasing authorities in respect of points decided against them. The parties are sellers and buyers respectively of the tramway under s. 43 of the Tramways Act, 1870. The dispute arises on the determination of the price to be paid by the buyers to the sellers in pursuance of the section. The principles of valuation have been laid down by the House of Lords in *Edinburgh Tramways Case* (2). They are not disputed by the parties, and have been adopted by the F arbitrator in his award in these terms:

> "The value of the purchased undertaking measured by what it would cost to construct and establish the purchased undertaking on May 1, 1918, if such purchased undertaking had not existed at that date, but taking into account any proper deduction in respect of depreciation."

As to this statement, the arbitrator was not asked to state a Case; and it is agreed G that it is this principle that we have to apply in determining the point in issue.

The first item is for engineering fees. The arbitrator allowed engineering fees, subject to a reasonable depreciation. The learned judge affirmed the arbitrator. The sellers complain of depreciation being allowed. The method adopted by the arbitrator is to investigate the various items of cost of the tramway, the structure purchased, to consider their age and prospective life at the fixed date, which I will H call the valuation date, and to make the necessary allowances from original cost in respect of the proportion of age to life. In some cases he has considered that the items are in respect of cost incurred once and for all, which I understand to mean items the life of which is, for the purposes of the buyer, perpetual, and which will never require renewing. Among such items is included, apparently with the consent of both parties, the cost of excavation. The arbitrator has also included I preliminary expenses of the formation of the selling company without depreciation, and the judge has affirmed this item, and there is no appeal. In the particular case of engineering fees, the arbitrator has depreciated it upon the ground that it did not repesent expenditure made once for the whole life of the undertaking. Taking his principle, I think it impossible to quarrel with his decision, which, on this point, appears to me to be one of fact only. Speaking for myself, I have great difficulty in seeing how, in the cost of a structure such as a tramway, there can be any items which do not admit of any depreciation. It cannot be supposed to last for ever, and as its value must diminish in a proportion bearing some relation

to its age, I should have thought that if one bases value on cost every item of cost must undergo some diminution in value. Excavation is only of value in so far as it serves in constructing the tramway. If the structure eventually dies the excavation will be of no value, and may represent a liability. It is, however, sufficient to say that in any view of depreciation the decision in this respect cannot be interfered with.

Cost of raising capital. This is allowed by the arbitrator on the ground that it is part of the necessary cost of construction, as it represented expenditure which would have to be incurred by anyone in good credit undertaking such construction. It has been disallowed by the judge on the ground that it is no part of the cost of construction, but is an expense independent of such cost. We have had the advantage of reading the verbatim report of the decisions of LAWRENCE, J., and LORD TERRINGTON in the *Telephone Case* (1). They put the respective views as clearly and forcibly as they can be put, and, assisted by their complete reviewing of the question, I have come to the conclusion that ROWLATT, J., was right in disallowing the item. The principle laid down in the Tramways Act as interpreted by the House of Lords in *London Street Tramways Co.* v. *L.C.C.* (3) is that the purchase price is to be present cost of replacement with an allowance for age. From this point of view the buyer in considering value has to consider which will be worth more to him, to build a new tramway himself, or to buy an old one. If this is calculated on a money basis, the cost of raising capital, even if constant, comes into both sums, and if it is to be taken into account in the price, in the second alternative it comes in twice over. For instance, in the present case the arbitrator has fixed this item as £5,500 without depreciation. If the sellers' tramway was quite recently constructed, say within six months of the valuation date, so that depreciation might be ignored, the buyers would find themselves paying £5,500 for the sellers' cost of raising capital, and £5,500 for their own cost of raising the capital to pay the sellers their price. The formula requires adherence to present cost of construction, and has no reference to expenditure for other purposes. The present item, which must vary infinitely with the credit and resources of the particular constructor, seems to me incapable of being averaged for a hypothetical constructor, and in any case is too far removed from cost of construction in any business sense to admit of being included in the calculation. I am inclined to think that this view might exclude preliminary expenses, which have been allowed without an appeal. This consideration has caused me some doubt, but whatever the logical consequences may be, I have come to a definite conclusion as stated.

Interest on capital during construction. This has been allowed by the arbitrator without depreciation. The judge also allowed it, but has taken the view that depreciation will follow the purposes of the capital expenditure on which the interest is allowed, and has remitted the matter for depreciation to be adjusted accordingly. I agree with this view, and have nothing to add to the learned judge's judgment.

Expenses incurred in respect of Guide Bridge. These were expenses incurred by the sellers in 1906, about eight to ten years after the tramway was constructed. The expenditure was imposed upon the sellers by s. 8 (4) of their Tramways Order, which provided that if, and whenever necessary, the named railway companies desired to make certain structural alterations to the bridges carrying any road over the railway the tramway company should, at their own expense, temporarily divert or remove the tramway. In 1906 one of the railway companies required the bridge in question to be altered, so that the railway line might be widened, and the expenses here claimed are the expenses incurred by the sellers in complying with the section. It appears to me that this has nothing to do with the hypothetical cost of construction at the valuation date. That cost will be considered, and, no doubt, has been considered, as though the tramway were constructed over the lengthened bridge. The cost actually incurred by the sellers while carrying on their statutory obligations seems to me to be quite irrelevant, and was rightly disallowed by the judge. It is quite different from the case suggested in argument

where an Order imposes upon the tramway company, as part of the conditions of allowing the undertaking, that structural alterations, such as construction or widening of bridges or streets, be made by the company at their cost. In such a case, inasmuch as the value is to be the cost of construction at the valuation date as if the undertaking had not existed at that date, the cost of such alterations might reasonably be imputed to the hypothetical constructor. The present claim seems to me essentially different. For these reasons I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Sydney Morse; Lees & Co.*, for *F. W. Bromley*, Ashton-under-Lyne; *Thomas Brownson*, Hyde; *William Richards*, Denton; *Frederick Hamer*, Ashton-under-Lyne.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

HAWKINS AND SUNDERLAND *v.* DUCHÉ & SONS AND ANOTHER

[KING'S BENCH DIVISION (McCardie, J.), May 10, 11, 27, 1921]

[Reported [1921] 3 K.B. 226; 90 L.J.K.B. 913; 125 L.T. 671; 37 T.L.R. 748; [1921] B. & C.R. 173]

Business Names Registration—Default—Abrogation of right of defaulter to enforce contract—Relief—Jurisdiction to grant relief after action begun—Bankruptcy of defaulter—Need for trustee to apply for relief—Registration of Business Names Act, 1916 (6 *& 7 Geo.* 5, *c.* 58), *s.* 8 (1).

By s. 8 (1) of the Registration of Business Names Act, 1916, the rights of a person who has not complied with the requirements of the Act regarding registration under or arising out of any contract made by or on behalf of him shall not be enforceable, but the court may grant relief against this provision where it is satisfied that it is just and equitable to do so.

The court has power to grant relief under this subsection even though proceedings to enforce the rights under a contract of a person in default have been begun.

Per **Curiam**: the trustee in bankruptcy of a person in default is not infected by that person's disability, and, consequently, need not apply for relief (though, if it were necessary he would be entitled to do so) in connection with proceedings to enforce a contract taken for the benefit of the bankrupt's estate.

Bankruptcy—Evidence—Receiving order—Publication in "London Gazette"—Evidence of facts stated therein.

By s. 137 (1) of the Bankruptcy Act, 1914: "A copy of the 'London Gazette' containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice."

Notice of a receiving order, stated to be "Re M. T. and B. T. carrying on business as general produce merchants under the style of M. and B. T.," was published in the "London Gazette."

Held: this must be deemed to be conclusive of the fact that a partnership existed between M. T. and B. T.

Notes. As to registration of business names, see 32 HALSBURY'S LAWS (2nd Edn.) 634–637; and for cases see 43 DIGEST 268–270. For Registration of Business Names Act, 1916, see 25 HALSBURY'S STATUTES (2nd Edn.) 1146. As to gazetting

advertisement of a receiving order, see Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321), s. 11, s. 74 (1) (f), and Bankruptcy Rules, 1952, rr. 5, 177, 178 (1) (b) (3 HALSBURY'S STATUTORY INSTRUMENTS). A

Cases referred to:

(1) *Cullen* v. *Knowles*, [1898] 2 Q.B. 380; 67 L.J.Q.B. 821; 12 Digest (Repl.) 39, *157*.

(2) *Lovell and Christmas* v. *Beauchamp*, [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587; 43 W.R. 129; 11 R. 45; sub nom. *Re Beauchamp Bros., Ex parte Beauchamp*, 10 T.L.R. 682, H.L.; 36 Digest (Repl.) 451, *220*. B

(3) *Revell* v. *Blake* (1873), L.R. 8 C.P. 533; 42 L.J.C.P. 165; 29 L.T. 67; 22 W.R. 96; Ex. Ch.; 4 Digest (Repl.) 40, *345*.

(4) *Re Foulds, Ex parte Learoyd* (1878), 10 Ch.D. 3; 48 L.J.Bcy. 17; 39 L.T. 525; 27 W.R. 277, C.A.; 4 Digest (Repl.) 195, *1761*. C

(5) *Weller* v. *Denton*, [1921] 3 K.B. 103; 90 L.J.K.B. 889; 125 L.T. 569; 37 T.L.R. 599; 65 Sol. Jo. 473, D.C.; 43 Digest 269, *1052*.

(6) *Lucas* v. *Dixon* (1889), 22 Q.B.D. 357; 58 L.J.Q.B. 161; 37 W.R. 370, C.A.; 12 Digest (Repl.) 145, *914*.

(7) *Daniel* v. *Rogers*, [1918] 2 K.B. 228; 87 L.J.K.P. 1149; 119 L.T. 212; 62 Sol. Jo. 583, C.A.; 43 Digest 269, *1047*. D

Action tried by McCARDIE, J.

The plaintiffs, trustees of Meyer Taper, or Toper, (a bankrupt), claimed from the defendants damages for breach of contract on the sale by them of certain goods to M. and B. Taper in September, 1918. The defence raised the point that M. and B. Taper were in default under the Registration of Business Names Act, 1916, and, therefore, by s. 8 of that Act, the plaintiffs were disabled from enforcing any rights under the contract. E

A. S. Comyns Carr and *J. G. Kelly* for the plaintiffs.

Montgomery, K.C., and *T. E. Haydon* for the defendants, Duché and Co.

The defendant B. Taper in person.

Cur. adv. vult. F

May 27. **McCARDIE, J.**, read the following judgment.—This action is brought by the trustees of one Meyer Taper (a bankrupt) to recover damages against the defendants, Duché & Sons, for breach of contract on the sale by them to M. and B. Taper of five tons of cream of tartar substitute at the price of £165 per ton in September, 1918. The defendant, Bernard Taper, or Toper, is the son of Meyer Taper. He may be described as a formal defendant. He was made a party because the plaintiffs asserted that he was a partner with his father. He refused to join as a co-plaintiff, and he was, therefore, made a defendant in accordance with the now established principle of *Cullen* v. *Knowles* (1). The defendants, Duché & Sons, deny any breach of contract. The action so far would raise the normal features of a claim for damages for breach of contract on the sale of goods. But the case is remarkable for the novelty and importance of the points raised upon the Registration of Business Names Act, 1916. The whole scheme and effect of the Act has been discussed before me. Messrs. Duché & Sons contend that this action is not maintainable against them by reason of s. 8 of that Act. G H

Before I consider the merits of the case it is essential to deal with the preliminary points. The Registration of Business Names Act, 1916, constituted a new departure in legislation. It provides (so far as material) by s. 1, that: I

> "(a) Every firm . . . carrying on business under a business name which does not consist of the true surnames of all partners who are individuals . . . without any addition other than the true Christian names of individual partners or initials of such Christian names; and (b) Every individual . . . carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . shall be registered in the manner directed by this Act."

Section 2 is not material. Sections 3, 4 and 5 provide for the manner and particulars of registration. Section 6 provides for further registration whenever a change is made or occurs in any of the particulars registered in respect of any firm or person. Section 7 imposes a penalty of £5 per day on a firm or person who, without reasonable excuse, makes default in registration under s. 1 or s. 6. The penalty is recoverable on summary conviction. Section 8 (1) provides:

> "Where a firm or person . . . have made default [in furnishing particulars required by the Act] then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise."

The provisos to s. 8 (1) are important:

> "(a) The defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contract, on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions (if any) as the court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if this Act had been complied with, he would not have entered into the contract; (b) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid; (c) If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim, set off or otherwise, such rights as he may have against that party in respect of such contract."

By s. 8 (2):

> "In this section the expression "court" means the High Court or a judge thereof: Provided that, without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a county court, the county court may, as respects that contract, grant such relief as aforesaid."

The contract by the defendants Duché & Sons was made with "M. and B. Taper." Before January, 1919, they had committed the breach (if any) of the contract alleged and "M. and B. Taper" had complained of that breach. One of the questions at issue is whether the initials and word "M. and B. Taper" meant Meyer Taper only, or whether it indicated Meyer Taper and Bernard Taper as co-partners. I must decide this question of fact later. On Jan. 4, 1919, Meyer Taper signed and filed a petition in bankruptcy. It is headed "Re Meyer Taper and Bernard Taper." It is stated to be "Ex parte Meyer Taper and Bernard Taper (an infant)," carrying on business as general produce merchants under the style of "M. and B. Taper." It says further:

> "I, Meyer Taper, a member of the firm of M. and B. Taper, of 65, Crutched Friars in the city of London . . . hereby petition the court that a receiving order be made in respect of my estate and firm other than against my infant son Bernard Taper."

On the same day a receiving order was duly made. This receiving order followed the wording of the petition. At this time Bernard Taper was about twenty years old. An adjudication duly followed on Jan. 16, 1919, and the plaintiffs became

trustees in bankruptcy on Jan. 17, 1919. The writ in this action was issued on Mar. 11, 1919, against Duché & Sons. The plaintiffs were described as the trustees of the property of Meyer Taper (a bankrupt). The defendant Bernard Taper was added as a defendant at a much later date. The original statement of claim was delivered in April, 1919. The original defence of Duché & Sons raising the point as to the registration of Business Names Act, 1916, was delivered in May, 1919. In July, 1919, an application was made to ROCHE, J., for relief under s. 8 of the Act of 1916. He refused it upon the material and arguments before him. In November, 1919, another application was made to SALTER, J., for relief under s. 8. He refused it upon the material and arguments then before him without prejudice to a further application. In December, 1919, an application was made to BAILHACHE, J., for relief under that section. Upon the further evidence and arguments before him he made the following order:

> "It is ordered that relief be given against the mis-spelling of the name only without prejudice to the question of partnership."

It is agreed that the effect of this order is (subject to the other contention of the defendants Duché & Sons), that, if in fact no partnership existed between Meyer Taper and Bernard Taper, then the provisions of the Act of 1916 are broken and as yet unrelieved, for BAILHACHE, J., declined to grant relief if the fact was that Meyer Taper was trading in the name of M. and B. Taper. If, however, a partnership in fact existed between the two then relief was granted in respect of the use of the word "Taper" instead of the word "Toper." The facts as to the spelling of the name are these. Meyer Taper is a Russian subject. He was born at Sokolof near Warsaw. In the Russian Polish dialect his name was spelt Toper. The "o" was pronounced in his native place as if it were "a" in "male." When Meyer Taper arrived in England twenty-seven years ago he gave his name as it was pronounced in his own country, viz., Taper. Thus he became known as Taper; his name was written Taper and Taper he has been ever since. I am not clear as to the precise grounds on which ROCHE, J., and SALTER, J., refused relief or the grounds upon which BAILHACHE, J., granted partial relief only. I will assume (though I think the point is very doubtful in view of the facts) that relief was necessary with respect to the mere spelling of the name.

The serious contention was, however, made by the leading counsel for Duché & Sons, that the High Court has no power whatever to grant relief in and for the purpose of actually pending proceedings. He submits that relief must be granted (if at all) before, and not after, the issue of the writ. If this be so, it would follow that the order of BAILHACHE, J., was without jurisdiction, and counsel submits that that order is a mere nullity. I will not consider this point until I have decided whether or not a partnership existed between Meyer Taper and Bernard Taper. If no partnership existed, then a breach of the Act of 1916 was committed when Meyer Taper traded as "M. and B. Taper" without registration of the required particulars and no relief has been granted as to this. I have no doubt that a partnership in fact existed at the material times between Meyer Taper and Bernard Taper. It is true that Bernard Taper was an infant. There is nothing, however, in English law which disables an infant from being a partner: see LINDLEY ON PARTNERSHIP (8th Edn.) p. 90, and per LORD HERSCHELL in *Lovell and Christmas* v. *Beauchamp* (2). It is, however, settled that a receiving order cannot be made against an infant partner: see *Lovell and Christmas* v. *Beauchamp* (2). Hence the form of the receiving order made in the present case. The question of partnership is mainly one of fact. The evidence before me satisfies me that Bernard Taper was a partner with his father, and I have no doubt that he knew of and assented to the presentation of the petition on the footing that he and his father were partners. The result is that (apart from the question of spelling) the name of the firm was correctly given as M. and B. Taper and the initials of the partners were true.

Before passing from the question of partnership I ought briefly to refer to the

important contention of counsel for the plaintiffs upon s. 137 of the Bankruptcy Act, 1914. That section provides:

> "(1) A copy of the 'London Gazette' containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice. (2) The production of a copy of the 'London Gazette' containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made and of its date."

Counsel contends that the order for adjudication now before me (which duly appeared in the "London Gazette") is conclusive of the existence of the partnership. It is important to remember the distinction between judgments in personam and judgments in rem. The latter deal with status: see Taylor on Evidence (11th Edn.) para. 1674. Adjudications in bankruptcy are adjudications in rem: see Taylor para. 1675 and para. 1748; and *Revell* v. *Blake* (3). Upon the whole (though not without doubt) I think that the receiving order here must be deemed conclusive of the fact that a partnership existed between Meyer Taper and Bernard Taper, and that the remedy of Bernard Taper (if he was an aggrieved person) lay in an appeal from the order of adjudication: see *Re Foulds, Ex parte Learoyd* (4); and s. 108 of the Bankruptcy Act, 1914. Under the adjudication here the provisions and scheme of the Bankruptcy Act caught the whole assets of the firm and transferred them to the trustees for the benefit of the creditors. To hold that the adjudication (if not appealed against) was not conclusive of the existence of a partnership would appear to negative the scheme of the Bankruptcy Act, 1914, and the express or implied results of *Revell* v. *Blake* (3) and *Re Foulds, Ex parte Learoyd* (4). It might cause many and serious difficulties in practice.

I pass now to the argument of counsel for the defendants that Bailhache, J., had no power to grant any relief at all under the Act of 1916 after this action had begun. I need scarcely point out the serious nature of the submission. Ever since the Act of 1916 was passed relief has been many times granted in chambers after action begun and for the purposes of the action itself. The practice is established and has never been challenged till now. Judge after judge of the greatest experience has granted full relief on appropriate terms. If counsel for the defendants be right the whole existing practice will be overthrown. There is as yet no reported decision on the question. I will compress as far as possible my observations on this point and upon the able arguments of counsel. In the first place, I point out that, if the defendants be right, it follows that the powers of the High Court are less than the powers of the county court in actually pending proceedings. Section 8 (2) of the Act of 1916 gives the fullest power to the county court to grant relief—even on the day of trial in respect of a contract before that court. This power may be liberally exercised: see *Weller* v. *Denton* (5). I cannot see why as a matter of good sense the High Court should not possess a power equal to that of the county court. If Parliament thought that a county court should relieve in pending proceedings surely it would take the same view of High Court powers. In the next place I think that the wording of s. 8 (2) seems to assume that the High Court has already been given the powers yielded by the proviso to the county court. The words "without prejudice to the power of the High Court of a judge thereof to grant such relief," are, I think, significant. I hold that the true meaning of s. 8 (2) is that where proceedings are pending in the county court, either the High Court or the county court can give relief in these pending proceedings. Either court possesses, in such case, a right to grant relief. If this be so, then it seems to follow that s. 8 (2) casts a useful light on s. 8 (1) (a) which provides: "The defaulter may apply to the court for relief," and the wording of the paragraph is wide. If Parliament had wished to limit the power of the High Court to cases where no proceedings had been begun, nothing would have been easier than so to enact. Paragraph (a) states that relief may be given either "generally" or as "respects any particular contract." These are very broad

words, and I conceive that the word "generally" should receive a liberal interpretation. In my view, the use of that word helps to show that the power of the High Court is not limited as the defendants suggest.

After carefully considering s. 8 (1) and (2) and the arguments of counsel I venture to say, first, that s. 8 (1) (a) upon the face of it gives the High Court the widest powers of relief; secondly, that there are no express words which limit those powers to relief before writ issued; thirdly, that there is nothing in the scheme of the paragraph or the scheme of the Act which so limits the jurisdiction of the High Court; fourthly, that s. 8 (2) assumes that the powers of the High Court are not so limited; fifthly, that the fair administration of justice as between party and party requires a construction of the Act which gives the High Court a power to grant relief as well after as before action. It is to be noted that the proviso to s. 8 (1) with s. 8 (2) give both the High Court and county court the widest powers to impose all proper conditions. It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant could manage to elicit a trivial and inadvertent breach by the plaintiffs of the Act and thereby defeat the whole action which was otherwise well founded. The defendant would, I suppose, in such case then claim his costs. A further result might be that the plaintiff would be barred by the Statute of Limitations from commencing new proceedings after he had gotten relief. I venture respectfully to hope that such is not the law. The able argument of counsel for the defendants mainly turned on the words,

> "the rights of that defaulter under or arising out of any contract . . . shall not be enforceable by action or other legal proceeding either in the business name or otherwise."

The learned counsel referred to the wording of the Statute of Frauds and also to the wording of s. 4 of the Sale of Goods Act, 1893 [see, as to these Acts, the Law Reform (Enforcement of Contracts) Act, 1954, and Law of Property Act, 1925, s. 40]. The wording of the latter enactment is

> "a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless . . ."

He pointed out that a memorandum for the purpose of s. 4 of the Sale of Goods Act, 1893, must be in existence before action brought, and he relied on *Lucas* v. *Dixon* (6). In view of the fact that the Statute of Frauds and succeeding enactments are evidentiary provisions, the decision in *Lucas* v. *Dixon* (6) is, as FRY, L.J., there said, a singular one. It represents, however, the existing law. But, in my opinion, *Lucas* v. *Dixon* (6) casts no real light on the question before me. The Statute of Frauds, and s. 4 of the Sale of Goods Act, 1893, gives no power to any court to grant relief against non-compliance with these provisions. Here the question is as to the extent of the wide relieving power given by the Act of 1916 itself. I point out also that s. 4 of the Sale of Goods Act, 1893, says that the "contract" shall not be enforceable, whereas s. 8 of the Act of 1916 says that the "rights" of the defaulter under the contract shall not be enforceable. The contract itself is in no way invalidated by the Act of 1916, and provisos (b) and (c) are well worthy of attention. I respectfully hold that the rulings of many of my brother judges in the past are correct, and that the High Court has ample power to give relief under the Act of 1916, not only before but also after action brought. The order of BAILHACHE, J., therefore, stands as a valid and effective exercise of the power of the court.

This ruling renders it unnecessary in strictness to consider the argument of counsel for the plaintiffs that the disability imposed by the Act of 1916 is imposed on the defaulter only, and that it does not extend to his assignees. The arguments, however, were full on the point, and I briefly dealt with it as it is of practical importance. The contention of counsel is largely founded on the observations of the Court of Appeal in *Daniel* v. *Rogers* (7). The facts in that interpleader issue were somewhat different from the present facts. Several dicta, however, are relied on. PICKFORD, L.J., said ([1918] 2 K.B. at p. 231):

"I entertain considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it."

Bankes, L.J., (ibid. at p. 233) expressed a similar view, and pointed to the distinction between the Moneylenders Act, 1900, as compared with the Registration of Business Names Act, 1916. Scrutton, L.J., said (ibid. at p. 234):

"I desire to say, although it is not necessary finally to decide the point, that in my view the application of s. 8 is limited to proceedings between the parties to the contract."

I respectfully think that the above weighty dicta represent the true interpretation of the Act of 1916. That Act, I think, was meant to punish a defaulter (unless he procured relief) rather than innocent third parties. Unless the dicta I have cited be good law the most serious consequences would follow. Innocent holders for value of negotiable instruments might under s. 8 be unable to enforce the rights of a defaulter. The position of innocent assignees of a defaulter's book debts would be equally imperilled. Even purchasers of goods from a trader who was in default under the Act of 1916 might (if the goods were warehoused or held by third persons) be met by a plea of the Act if action was begun against those persons for detention. The position would be still further aggravated if the assignor defaulter in the cases above put either absconded from the country or refused to make any application for relief. Take, moreover, the case of a defaulter who executes a deed of assignment for the benefit of his creditors, and then leaves the country. Is the trustee of the deed of assignment stricken with inability to collect the assets or enforce the claims of the debtor? I cannot think so. I shall hold that the plaintiff trustees in bankruptcy in the present action are not infected by the disability (if any) of M. and B. Taper. I respectfully adopt and apply the views of Pickford, Bankes, and Scrutton, L.JJ., in *Daniel* v. *Rogers* (7).

I merely add that it is still more necessary to take the view I have ventured to express when it is remembered that an argument has arisen before me as to whether a trustee in bankruptcy can as such apply for relief under s. 8 in respect of a bankrupt who was a defaulter under the Act of 1916. The Bankruptcy Act, 1914, does not appear expressly to contemplate such circumstances. In the present case I hold on the evidence before me that the application to Bailhache, J., for relief was in fact made when the joint application of Meyer Taper, Bernard Taper and the two plaintiff trustees was made. If it be necessary to do so I hold that a trustee in bankruptcy is entitled under the joint provisions of the Bankruptcy Act, 1914, and the Registration of Business Names Act, 1916, to apply for relief under the latter Act (see, e.g., s. 38 (b) of the Bankruptcy Act, 1914, and the definition of "property" in s. 167 of that Act).

[His Lordship reviewed the evidence on the merits of the case and concluded:] I am, therefore, satisfied that Duché & Sons committed a breach of contract which caused serious injury to the estate of which the present plaintiffs are the trustees in bankruptcy. The damages are substantial. I find that the plaintiffs have acted reasonably and prudently throughout. I have fully considered the details on the point of damages including the questions of identity, weight, re-sale, and the like. I assess the damages at £750. I should like to say that when application for relief in cases like the present are dealt with in chambers full consideration should be given to the grave consequences which may follow a refusal to grant the desired relief. I give judgment for the plaintiffs for £750 with costs.

Judgment for plaintiffs.

Solicitors: *Carter & Bell*; *Warwick Williams & Marchant.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

SUMNER, PERMAIN & CO. *v.* WEBB & CO.

[Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), October 25, 26, 1921]

[Reported [1922] 1 K.B. 55; 91 L.J.K.B. 228; 126 L.T. 294; 38 T.L.R. 45; 66 Sol. Jo. W.R. 17; 27 Com. Cas. 105]

B

Sale of Goods—Merchantable quality—Compliance with description in contract—Legal saleability of goods in country of sale—"Trade name"—Article sold under—Composite article always of same constitution sold as "Webb's Indian Tonic"—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 14 (1) (2).

Sellers, who were manufacturers of mineral waters, sold to buyers, who carried on business in the Argentine, certain tonic water, under the description of "Webb's Indian Tonic" to be delivered f.o.b., London. The sellers knew that the water was bought for shipment to the Argentine. There was a certain amount of salicylic acid in the water. Under Argentine law the sale of any article of food or drink containing salicylic acid was prohibited, and the Argentine authorities condemned the water as unfit for human consumption. In an action by the buyers against the sellers for breach of the condition in s. 14 (2) of the Sale of Goods Act, 1893, that the goods should be of merchantable quality,

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Held: "merchantable quality" in s. 14 (2) meant that the goods complied with the description in the contract so as to be good tender to a buyer of goods of that description and did not cover legality of the sale of goods, and, therefore, the buyers were not entitled to succeed.

E

Per Scrutton, L.J.: (i) I do not say that there can be no case in which the buyer relies, within s. 14 (1) of the Act, on the seller's skill and judgment with regard to the legality of sale. He may know nothing of the country wherein he wishes to sell the goods and informs the seller that they must be legally saleable in that country. (ii) Where you get a composite article like the tonic water in question, which has always been manufactured of the same constitution and you ask for Webb's Tonic Water and get it of that constitution, the "Webb's Tonic Water" is a trade name within the proviso to s. 14 (1).

F

Notes. Referred to: *Foster* v. *Driscoll*, *Lindsay* v. *Attfield*, *Lindsay* v. *Driscoll*, [1928] All E.R.Rep. 130.

G

As to merchantable quality on a sale of goods and sale under a trade name, see 29 Halsbury's Laws (2nd Edn.) 65–67; and for cases see 39 Digest 447–451. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

H

(1) *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 36 W.R. 20; 3 T.L.R. 541, H.L.; 39 Digest 454, *813*.

(2) *Niblett, Ltd.* v. *Confectioners' Materials Co.*, ante, p. 459; [1921] 3 K.B. 387; 90 L.J.K.B. 984; 125 L.T. 552; 37 T.L.R. 653, C.A.; 39 Digest 432, *610*.

(3) *Randall* v. *Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 313, C.A.; 39 Digest 440, *694*.

I

(4) *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.*, [1896] 2 Q.B. 59; 65 L.J.Q.B. 552; 12 T.L.R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373; 39 Digest 448, *759*.

(5) *Bristol Tramways, etc., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest 418, *512*.

(6) *Gardiner* v. *Gray* (1815), 4 Camp. 144; 171 E.R. 46; 39 Digest 451, *790*.

Appeal by the defendants from an order of Bailhache, J., in an action tried by him without a jury.

The sellers, a firm, manufactured what in the agreement between the parties was described as "their speciality beverage called or known as Webb's Indian Tonic." The buyers were merchants, having an office in London, and carrying on business in Buenos Aires. The parties had been in commercial relations in reference to this commodity for many years, during which the sellers had sold to the buyers and the buyers had bought from the sellers large quantities of this speciality, upon the terms that the buyers should act as the sellers' agents in the Argentine. The goods were not delivered on consignment, or sale or return, but all dealings between the parties was by way of out and out sale f.o.b. London. During the whole time that those dealings continued, one of the ingredients in this speciality was salicylic acid. It appeared at the trial that there was in the Argentine a law which prohibited the placing of salicylic acid in any food substance, and made it an offence for anybody to have possession of any food substance containing salicylic acid. It did not appear from the evidence when that law came into operation, but it appeared to have been assumed that it was in existence at times material for the purpose of deciding the dispute between the parties, but during all these years the buyers had been importing into the Argentine, without any complaint, this speciality containing salicylic acid. The agreement under which the parties had been dealing came to an end in or before 1919, and an agreement was put in evidence, dated Feb. 7, 1919, under which the relations between these parties was either resumed or continued for a further period of five years, and in the late months of 1919 and the early months of 1920 a large quantity of this speciality was sold by the sellers to the buyers. These goods on arrival were analysed by the Argentine authorities and passed as fit for consumption and as not containing any objectionable ingredient, but at some later period, after the goods had passed into the hands of the retailers, owing to some cause of which the court had no information, further examination and analysis of the goods was made. It was then found that they contained salicyclic acid, and fresh certificates were issued by the authorities withdrawing the certificates which stated that they were fit for consumption and condemning them as being unfit for consumption. In those circumstances, the plaintiffs contended that they had established a case entitling them to damages either upon the ground that the goods were not reasonably fit for the purpose for which they were supplied, or that they were not of merchantable quality, or on both grounds.

By the Sale of Goods Act, 1893, s. 14:

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose: (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

Bailhache, J., gave judgment for the plaintiffs on the grounds that (i) the defendants had sold the tonic water for the express purpose of its being consumed in a country where its ingredients are prohibited by law, and that the water was not fit for the purpose of being sold in that particular country; and (ii) that the water

was not of merchantable quality in the Argentine, because it was prohibited from being sold in the Argentine. The defendants appealed. A

R. A. Wright, K.C., and *T. E. Haydon* for the defendants.
Schiller, K.C., and *H. G. Robertson* for the plaintiffs.

BANKES, L.J.—This is an appeal from an order of BAILHACHE, J., in an action in which the buyer sought to recover damages from the seller on the ground that, for a number of reasons, the goods were not in accordance with the contract. A number of complaints were made with regard to their condition, but, having regard to the course the case has taken, it is only now necessary to consider two of those complaints. One was that the goods were not reasonably fit for the purpose for which they were required within the meaning of sub-s. (1) of s. 14 of the Sales of Goods Act, 1893; and the other was that the goods were not of merchantable quality within the meaning of sub-s. (2) of the same section. The learned judge has found in the plaintiffs' favour on both points, and the question is whether, upon the facts of this case, he was right. B C

A number of points have been raised during the argument, but it is not necessary to give any judgment in reference to a number of them, but I will state what I understand them to be, in order to satisfy the parties that they have not escaped attention. Under sub-s. (1) there are certain conditions precedent which have to be fulfilled if a party intends to rely upon that subsection, and there is also a proviso which protects the seller in the event of his establishing that he comes within the terms of the proviso. I will deal with the proviso first. It is that the section shall not apply in the case of a contract for the sale of a specified article under its parent or trade name, and it is said that this was a case of a sale of a specified article under its trade name, namely "Webb's Indian Tonic." In my opinion, it is not necessary to express any opinion upon that point, and, therefore, I say no more about it. In reference to the question whether or not this buyer has fulfilled the conditions precedent, it is necessary to consider those conditions in reference to the facts. The conditions are that the sale must be one from the terms of which, within the meaning of the section, the inference can be drawn that the buyer relied on the seller's skill and judgment, and that the goods are of a description which it is in the course of the seller's business to supply. In order to fulfil the first condition precedent the buyer must make known to the seller the particular purpose for which the goods are required. It is here said for the buyers that the particular purpose for which the goods were required was re-sale in the Argentine, and there is no doubt that that is partially true; but, as I understand the sellers, they say that that is not sufficient compliance with the terms of the section, because the goods must be reasonably fit for the purpose for which the goods are required, the purpose being made known to the seller by the buyer. As I understand the argument of the sellers' counsel, he said that where goods are articles for human consumption, it may be that they are bought for re-sale in some foreign country, but the test whether they are reasonably fit for the purpose is whether they are fit for human consumption and not merely whether they are fit for re-sale in the foreign country. I express no opinion upon that except to say that I notice that in *Drummond* v. *Van Ingen* (1), where the buyer had bought certain cloth goods for re-sale, LORD HERSCHELL, in his judgment (12 App. Cas. at p. 292), did not consider that the test was whether the goods were fit for re-sale, but was whether the goods were fit for making up into coatings, which would correspond in this case to whether the goods were fit for consumption. That is an important point which may have to be closely considered on some future occasion, but I express no opinion about it. The other point, to which again I think considerable importance may in some future case be attached, is this. When the subsection speaks of goods being of a description which it is in the course of the seller's business to supply, the section is dealing with the particular character or quality of the goods, and whether it extends, as is suggested here, to the obligation to supply goods which not only are of the contract description D E F G H I

A and quality, but are goods which, by the law of the country, will be saleable in that particular country. All those questions, it seems to me, are questions which have been raised and discussed in the argument before us, but upon which I do not desire to express any opinion.

I come to the conditions precedent which it is obligatory upon the buyer to comply with, which, in my opinion, in this case he has not complied with, namely, B the condition which requires him to satisfy the court that he relied on the seller's skill or judgment. It seems to me that upon the true construction of this section the implied condition that the goods shall be reasonably fit for the purpose for which they are required must be confined to a condition that the goods should be reasonably fit in respect of some matter upon which the buyer had relied upon the seller's judgment, and in this particular case it seems to me, with great C respect to the learned judge, that the only possible inference is that the particular question whether these goods would, or would not, pass the Argentine Customs, or whether they were, or were not, compounded in such a way as to infringe the Argentine law, is not a matter upon which it can be said that the buyer relied upon the seller's judgment. I come to this conclusion because, as it seems to me, it is the natural business inference from the facts as they are stated to the court, D and those facts are that here is an Argentine buyer who for a long series of years has been buying this particular commodity from the seller, the ingredients of which he does not know, it is true, but he has bought it under the description of "Webb's Indian Tonic." It has been freely admitted into the Argentine without objection of any sort or kind or description, and has been distributed by him to retailers in that country for consumption; and to suggest that in those circum- E stances this buyer relied on the seller's skill and judgment on the question whether or not these goods would pass the Argentine Customs, or would or would not comply with some Argentine law, is an inference which I am unable to draw. For that reason I cannot agree with the learned judge's conclusions on that point as to which he says in his judgment:

F "The only persons who knew what the ingredients were were Messrs. Webb. I am by no means certain that they knew the Argentine law; I will assume they did not, but if persons sell such a thing as tonic water for the express purpose of that tonic water being consumed in a country where its ingredients are prohibited, are the goods reasonably fit for such purpose, that is to say, must one have regard to the country in which the goods are intended to be sold? Is it sufficient to say that they are perfectly fit for that purpose G in some other country, or must they be fit for that purpose in the particular country in which it is intended they should be sold? In my judgment, they must be fit for the purpose in the particular country in which it is intended that the goods should be sold."

I should not disagree with the learned judge at all if the contract was one which H indicated that the buyer was relying upon the sellers' judgment whether the goods were suitable for some particular climate or some particular country, but I am unable to agree with the learned judge if he goes so far as I think he does—to say that where the buyer, under conditions such as these and having regard to the previous relations between the parties, merely gives a repeat order for goods which have been freely introduced into the Argentine for years, he relies upon I the seller's judgment that the Argentine law either permits, or would continue to permit, those goods to be introduced into that country. On those grounds I am unable to agree with the learned judge's view in reference to sub-s. (1) of s. 14, of the Sale of Goods Act, 1893.

Then we come to sub-s. (2) of s. 14. I emphasise the fact that the section does not speak of goods being either "saleable" or "merchantable," but of being of "merchantable quality," and the introduction of the word "quality," in my opinion, qualifies and restricts the meaning which must be put upon "merchantable." But the statute goes further than that because it speaks of "quality of

goods'' in the definition section, which is s. 62, as including their state or condition. I do not propose to attempt any definition which will comprise every case, but all I need say about this subsection is that, in my opinion, it is not really possible to include under that language the contention of the present buyers that the state of the law of the country in which the goods are to be re-sold is a matter which comes under that language at all. Quality or state or condition seem to me to refer to something essentially different in their nature.

Reference has been made to *Niblett, Ltd.* v. *Confectioners' Materials Co.* (2). It is said that that is an authority to support the buyers' contention because there was there a question whether the goods could be dealt with in this country by reason of the law of this country in reference to trade names and trade marks. But that case was not decided on that ground at all. The three present members of the court were the members of the court in that case, and I do not think that SCRUTTON, L.J., referred in his judgment to s. 14 at all; he dealt with the case, or that part of the case, which came under s. 12. Both ATKIN, L.J., and I dealt with the point made under s. 14 in reference to the question whether the goods were of merchantable quality. Apart altogether from the question what the state of the law might be, the question there was what was the condition of the goods, and the passage in my judgment which contained the ground of my conclusion in that case had reference to the packing of the goods, which, in my opinion, was an essential part of the condition of the goods. There is nothing of the kind here; there is no complaint here, either with regard to the quality of the goods, their state, or their condition—they were all perfectly good; and there was no objection which could be taken to them except that by the law of the Argentine the goods which contained one of the ingredients of these goods could not be dealt with in that country. BAILHACHE, J., has dealt with that point shortly as follows:

> ''The quality of the goods was perfectly all right in most countries—nothing the matter with them. Can it be said that because they were prohibited from being sold in the Argentine therefore they were of unmerchantable quality? I agree one must have regard to the place in which the goods are to be sold, and I have come to the conclusion that these goods were of unmerchantable quality in the Argentine.''

He does not elaborate the reasons upon which he comes to that conclusion, but on the ground which I have endeavoured to state I am not able myself to come to the conclusion that, upon the grounds stated, the case falls within the subsection at all.

I have only this other observation to make. We were referred to *Drummond* v. *Van Ingen* (1), and the buyers' counsel insisted upon the point that the speeches of the learned Law Lords in that case assisted him very much in his argument. It seems to me that what was said in that case was said in reference to the facts of that case, and has no real reference to the point which we have to decide here. SCRUTTON, L.J., has referred to *Randall* v. *Newson* (3), and I would only refer to one passage in the judgment of the Court of Appeal, which, of course, was given before the passing of the Sale of Goods Act, 1893. After going through all the cases, or a number of the cases, which dealt with the question of goods being reasonably fit for the purpose for which they are supplied, or the goods being of merchantable quality, the following passage appears (2 Q.B.D. at p. 109):

> ''In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale.''

The judgment goes on to amplify what he said. I read that as indicating that, in my opinion, the lord justice there has exactly hit the point of *Drummond* v.

Van Ingen (1), because after the learned Law Lords had disposed of the question whether the fact that the goods corresponded to the sample excused the seller, they went on to say in terms that the goods were sold as coatings, and were not coatings, or, to adopt the language used in *Randall* v. *Newson* (3) (2 Q.B.D. at p. 109): "The article offered or delivered [did not] answer the description of it contained in the contract."

On these grounds, in my opinion, the appeal must be allowed with costs, and an order must be made that the action shall be referred to the official referee to deal with all outstanding questions.

SCRUTTON, L.J.—The defendants sold f.o.b. out and out in England to the plaintiffs a large quantity of Webb's Indian Tonic Water, the defendants being the manufacturers. They knew that it was going to the Argentine for sale, where the plaintiffs carried on business. The plaintiffs alleged that the article supplied was not in accordance with the contract, and they gave certain particulars of the way in which it did not comply with the contract, the only one with which we are concerned in this case being so expressed in the pleadings: "Of the said 2,000 cases 1,800 cases were not fit for the said purposes and were not merchantable. Particulars: The tonic water contained salicylic acid and was unfit for human consumption." The learned judge has not recorded in his notes an admission that Webb's Indian Tonic Water always had contained salicylic acid, but it appears from the shorthand note that he assented to that. That objection, so expressed, is not the objection on which the learned judge has decided, which is that the tonic water contained salicylic acid, and, therefore, could not be legally sold in the Argentine. That is not, as a matter of fact, pleaded, but apparently the case proceeded on the assumption that that was the plea. It was obviously absurd to say that Webb's Indian Tonic Water was unfit for human consumption when large quantities of it were consumed in England every day without any deleterious effect, and I take the objection as being amended, although no formal amendment was made—it was a pity it was not—to "contained salicylic acid and could not legally be sold in the Argentine."

The buyers' case is put on two grounds. It is said that under s. 14 (1) of the Sale of Goods Act, 1893, they had made known to the sellers the particular purpose for which the goods were required, namely, sale in the Argentine, so as to show that they relied on the sellers' skill and judgment as to whether that article could be legally sold in the Argentine, and that, therefore, there was an implied condition that the goods should be reasonably fit for the purpose of being sold in the Argentine, including a warranty that they could legally be sold in the Argentine. One answer made by the sellers to that was that this was a contract for the sale of a specified article under its trade name of "Webb's Indian Tonic Water," and, therefore, there was no implied condition as to its fitness for any purpose. Secondly, the plaintiffs say that under s. 14 (2) there was an implied condition that the goods should be of merchantable quality; that "merchantable" meant "saleable"; that "saleable" meant legally saleable; that these goods were not legally saleable in the Argentine, for which they were intended, and, therefore, there was a breach of s. 14 (2).

To support a claim under s. 14 (1) it must be shown that the buyer had expressly or by implication made known to the seller the particular purpose for which the goods were required so as to show that the buyer relied on the seller's skill and judgment. I do not find any trace in the learned judge's judgment that he considered that part of the section at all. The facts from which one has to get an express or implied "making known" are these. For a considerable number of years the buyers, who are a firm carrying on business in the Argentine, had bought from the sellers Webb's Indian Tonic Water for sale in the Argentine; Webb's Indian Tonic Water all through was of the same description so far as salicylic acid was concerned; and the water so supplied had always been allowed by the Customs to enter the Argentine after an analysis, and had always been

sold without any legal objection. How, in those circumstances, it can be implied that the buyers showed the sellers that they relied on the sellers' skill and judgment with regard to the law of the Argentine, I cannot understand. That appears to me the most strained implication that I have ever met with in the course of a case like this. I do not say that there can be no case in which the buyer relies on the seller's skill and judgment with regard to the legality of sale; a buyer may expressly say to an export agent: "I am thinking of sending goods to, say, Patagonia; I do not know anything about Patagonia; I want to buy goods of a particular description from you, so, of course, they must be legally saleable in Patagonia." If the buyer says that expressly to the seller, for it can be shown that the buyer relied on the seller's skill and judgment, and a condition may be implied that the goods supplied shall be legally saleable; but how, in the case of a buyer living in a foreign country, and having for years sold this very article in the foreign country without any legal objection, a condition can be implied that he relied on the seller's skill and judgment with regard to whether he could do what he had been doing for years without objection, I am quite unable to understand. Therefore, it seems to me that the case does not get near the implied condition in s. 14 (1), because it cannot be implied that the buyers showed that they relied on the sellers' skill and judgment with regard to whether the goods could be legally sold in the Argentine.

That relieves me from expressing any final opinion on the question whether these goods were sold under a trade name. *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (4) seems to show that a trade name does not apply to substances which are not manufactured such as coal. The *Bristol Tramways Case* (5) appears to show that trade name does not mean merely the name of a manufacturer where there are no constant qualities in the thing sold. If a Fiat omnibus is made by the Fiat company, but of any kind of construction, it is not a trade name; but I am disposed to think at present, though, as I say, it is not necessary to finally decide it, that where you get a composite article like this tonic water, which has always been manufactured of the same constitution, and you ask for Webb's Indian Tonic and get it of that constitution, the "Webb's Tonic Water" is a trade name within the proviso to sub-s. (1). It is not necessary to decide it, because I have found that sub-s. (1) does not apply at all.

Then comes the second string of the plaintiff's bow—an alleged implied condition that the goods are of merchantable quality—that is, saleable quality—that is goods which can be legally sold in the market for which they are intended. In *Niblett's* Case (2) I agree with the result of my brother's view under s. 12 (1) of the Sale of Goods Act, which is as to the vendor's title to sell. As BANKES, L.J., has pointed out, I said nothing about s. 14 (1). I did not discuss s. 14 (2), further than to say this ([1921] 3 K.B. at p. 399):

> "I have not been able to trace the origin or history of the condition that goods shall be of merchantable quality. If I had to express my present opinion, it is that the condition does not touch the title to the goods or the right to sell them."

I have looked a little further into the matter, and I can now finally express my opinion that "merchantable quality" does not cover legal title to goods or the legal right to sell. In my view, "merchantable quality" means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be good tender. It does not mean that there shall be, in fact, buyers of the article. For instance, take the case that I put during the argument. If you sell vestings of a particular fancy pattern for sale in China, you do not warrant that the Chinese buyer will like that pattern and will buy it, when it goes out there. If the goods are vestings, fancy pattern, they are merchantable though nobody likes the fancy pattern when it has got there. Similarly, I do not think "merchantable quality" means that there can legally be buyers of that article. If the goods are of the contract description, the possibility of legally

making a sale of them does not, in my view, come within "merchantable quality" or the word "saleable."

I am still not quite clear when "merchantable quality" began to be used first. I see that the Court of Appeal in *Randall* v. *Newson* (3) think that the first time it appears is in *Gardiner* v. *Gray* (6). There was a count there that the defendant's promise was that the silk should be of waste silk of a good and merchantable quality, and it is in reference to that count that LORD ELLENBOROUGH used the language which has been repeatedly quoted in every other case:

> "The intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

That picturesque passage has been frequently cited in later cases on this point. Now, when LORD ELLENBOROUGH there uses the word "saleable," I do not think he is talking about legally saleable. As explained in *Randall* v. *Newson* (3) the fundamental thing is that the article offered or delivered shall answer the description of it contained in the contract, and as it is expressed in 2 Q.B.D. at p. 109:

> "If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable."

That is to say, as I have already said, shall be a good tender under a contract for sale of goods of that description. The judgment goes on:

> "If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose."

That is the warranty which ultimately made its appearance in s. 14 (1), the first being the warranty which ultimately made its appearance in s. 14 (2). I am quite unable to find that any case since, in which the warranty of merchantable quality was acted upon, has ever dealt with anything but the compliance in fact of the goods with the description in the contract. I cannot find that any case has ever dealt with the possibility of legally selling the goods in the particular market and has treated that as included in the definition "merchantable."

For these reasons I disagree with the view taken by the learned judge. He stated his conclusions. "First of all these goods are not goods bought or sold under a trade name." In the view I take, it is not necessary to decide that, but I incline to disagree with him.

> "Secondly, they are subject to the implied warranty of fitness for the purpose for which they were bought; the purpose for which they were bought was sale in the Argentine Republic."

I disagree with that for the reason that I think there was no evidence upon which it could be either expressly or impliedly held that the buyer relied on the seller's skill and judgment in the matter of legality of sale in the Argentine, and unless he did that, there is no implied warranty.

> "Thirdly, whether the goods are sold under a trade name or not they are subject to the warranty of merchantable quality, and, in my judgment, having regard to the law of Argentina, these goods are not of merchantable quality in Argentina."

I do not agree with that for the reason that I think "merchantable quality" does not cover the legality of sale, but only a compliance in commercial matters with the description in the contract. I think, therefore, that the view of the learned judge that damages should be given on the basis that there are breaches of s. 14 (1) and (2) in the matter of the legality of the sale in Argentina was erroneous,

and that the case must go on to be decided as to the exact amount of damages to follow from the presence of foreign matters in the tonic waters supplied. A

ATKIN, L.J.—I agree. The claim here is made, first, upon a breach of the implied condition which is expressed in sub-s. (1) of s. 14 of the Sale of Goods Act, 1893,

> "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required." B

That was complied with here because the buyers did expressly, or certainly by implication, make known to the sellers that the goods were required for the purpose of sale in the Argentine. That in itself is not sufficient. The buyer must do that "so as to show that the buyer relies upon the seller's skill or judgment." Whether the circumstances are such as to show that the buyer relies on the seller's C skill or judgment is a question of fact to be determined by the tribunal which has to decide the issue whether there is such a stipulation in the contract or not, and I think it is to be regretted that in this case the learned judge below did not advert to that question of fact at all. He made no reference to it anywhere, so far as I can see, in his judgment, and it appears to me that it is precisely in that respect that the buyers here fail. I think the circumstances are not such as to D show that they relied on the sellers' skill or judgment in respect to the question whether or not this tonic water could be sold in the Argentine. I do not wish to deal with the facts which have been already dealt with by my brothers, but I think it is not unimportant to remember that the dealings between the parties took place under an agreement of Feb. 7, 1919, which was only a renewal of former agreements, by which the sellers appoint the buyers to be their sole agents "for the sale E of their speciality beverage called or known as Webb's Indian Tonic in the area comprised in the republics of Argentine and Uruguay." Then there are provisions restricting the sale of what is called "their beverage," or, "the said beverage." As the buyers had been dealing in this product for a great many years in the Argentine and had for years been buying this same beverage for sale in the Argentine and had been able to sell it without any demur and without any difficulty, and as they F had contracted to buy the beverage and were buying it, it appears to me impossible to suggest that they relied upon the skill or judgment of the sellers in respect of this contract to supply them with something which, as it turned out, must be something different from that which they had been supplying in the course of those many years. I think that that question of fact must be resolved in favour of the sellers. G

There is a further question that might arise on the following words of the section, namely, whether the goods are of the description which it is in the course of the sellers' business to supply, whether they be the manufacturers or not. I do not propose to deal with that question now, but I think a question may arise which has not yet been solved, so far as I know, namely, whether that does not imply that the goods so fit for the purpose must be such as it is in the course of H the seller's business to supply, in other words, I am not sure that it would not be necessary for the buyer to establish that it was in fact in the course of the seller's business to supply Indian Tonic Water without salicylic acid, and I doubt very much whether they would have succeeded in proving that fact. I say no more about it, because it is unnecessary to decide it in this case. Nor do I deal with the further question whether or not this case would not come within the proviso I with regard to the sale of the specified article under its patent or other trade name.

The other way in which it was put is that there was a breach of the implied condition in s. 14 (2) of the Sale of Goods Act that the goods shall be of merchantable quality. I agree with what has been said by the two other members of the court that that cannot in itself refer merely to the fact that the goods are unsaleable because there is a law of the place in which they are sought to be sold prohibiting that sale. One has to remember, when one is dealing with this sub-

A ject, that one is clear of all questions with regard to whether the goods are fit for a particular purpose. This is a general obligation applying to all sales, and it appears to me merely to mean that there shall be a warranty that the article delivered is the article described in the contract, not so differing from the normal quality, including state or condition, required by the contract, as to make it unsaleable. In this particular case, the article that was described was the article B contracted for, and it was delivered in its normal state or condition, which would ordinarily be required in performance of a contract for the delivery of these goods f.o.b., and it appears to me impossible to suggest that in this warranty the seller warrants that the goods shall be sold in the particular place to which they are delivered to the buyer—in other words, warrants that there shall be no legislation or that there is no existing legislation prohibiting their sale. A case was put in C argument, which, I think, illustrates fairly clearly what the contention of the buyers in this case amounts to—that where a buyer, resident in America when there was a complete legislative prohibition against the sale of alcohol, ordered from another country goods containing alcohol to be imported into America, the seller must be taken to have warranted that the goods should be capable of being sold in America. I think the proposition need only be stated to show that it is D impossible that the Act of Parliament can have contained a warranty which would have an effect such as that, and, to my mind, the warranty extends no further than I have stated. Reference was made to *Niblett's Case* (2), to which I was a party, and I am quite clear that in that case it was not my intention to go any way beyond what I have said at the present moment. In that case the contract, as I found it, was a contract for delivering so many cases of condensed milk, and in E performance of that contract there was delivered in this country a certain number of cases containing tins, the tins containing labels which were an integral part of that which was delivered, which were of such a misleading character as to expose any buyer to an action for infringement of trade mark, and, indeed, the sellers had been threatened with an injunction. The result of that was that nobody would buy those cases because, if they did buy them, they probably would be F buying a law-suit; and the cases in that state and condition with those labels were unsaleable, and unsaleable precisely in the same sense in which they would have been unsaleable if in fact the tins had been blown, or marked, or in other respects worthless to the buyer. That was the whole point in *Niblett's Case* (2), and it seems to me that that decision is entirely in conformity with the decision which we are giving now. For these reasons I agree that the appeal must be G allowed.

Appeal allowed.

Solicitors: *W. H. Martin & Co.*; *Romer & Skan.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

SUN PERMANENT BENEFIT BUILDING SOCIETY *v.* WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY

B

[Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), June 17, 20, 21, 1921]

[Reported [1921] 2 Ch. 438; 91 L.J.Ch. 74; 125 L.T. 782; 37 T.L.R. 844; 65 Sol. Jo. 734]

C

Building Society—Sale of mortgages—Transfer to another society—Power to transfer rights of enforcement against mortgagors—Unauthorised investment —Purchase of mortgages—Purchase not out of surplus funds—Specific performance of contract of sale—Building Societies Act, 1874 (37 & 38 *Vict.*, *c.* 42), *s.* 25.

D

On May 28, 1919, the liquidators of the plaintiff building society entered into a contract with the defendant building society to transfer to it certain mortgages which were held by the plaintiff society as securities from its members. At that time and at all material times the defendant society had no surplus funds which under s. 25 of the Building Societies Act, 1874, could have been invested in the purchase of the mortgages. The defendant society subsequently refused to complete, and the plaintiff society brought an action for specific performance of the contract, and, alternatively, damages for its breach.

E

Held: (i) the effect of the contract was that the plaintiff society undertook to put the defendant society in the same position with reference to the mortgages transferred, their enforcement, and the benefit to be derived from them, as the plaintiff society themselves enjoyed; while, without the consent of the mortgagors, they could transfer the mortgage debts and the securities for those debts, they could not transfer the right to enforce against the mortgagors the payment of fines and penalties for non-performance of their obligations to which they were entitled partly under the mortgages and partly under their rules; and, therefore, as they could not transfer what they had contracted to transfer, they could not recover at law damages for breach of contract, nor would the equitable remedy of specific performance be granted to enforce the contract in such a case as the present; (ii) even assuming that the contract was not ultra vires the plaintiff society and void ab initio, the society, having no surplus funds as required by s. 25 of the Act of 1874, had no power to invest any of its funds in the purchase of the mortgages, and an order would not be made for specific performance of the contract because the effect of such an order would be to compel it to do what, by implication, under the statute it was forbidden to do.

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Notes. As to advances by building societies and enforcement of terms of mortgages, see 3 Halsbury's Laws (3rd Edn.) 591, 605 et seq.; and as to specific performance of unlawful contracts and where there has appeared a defect in the subject-matter, see ibid., 2nd Edn., vol. 31, 365, 366, 382–393. For cases see 7 Digest 471 et seq., 492, and 42 Digest 463, 464, 487, 488, 489 et seq. For Building Societies Act, 1874, see 2 Halsbury's Statutes (2nd Edn.) 623.

I

Cases referred to:

(1) *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H.L.Cas. 331; 24 L.J.Ch. 601; 25 L.T.O.S. 318; 3 W.R. 609; 10 E.R. 928, H.L.; 11 Digest (Repl.) 180, *473*.

(2) *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1889), 44 Ch.D. 412; 59 L.J.Ch. 34; 62 L.T. 678; 6 T.L.R. 25; 7 Digest 471, *111*.

A (3) *Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch.D. 431; 59 L.J.Ch. 403; 62 L.T. 596; 38 W.R. 475; 6 T.L.R. 129; 7 Digest 492, *228*.

Appeal from an order made by P. O. Lawrence, J., in a witness action for specific performance of a contract between the liquidators of the plaintiff society and the defendant society, by which the defendant society agreed to purchase B thirty-seven freehold and leasehold mortgages held by the plaintiff society as securities for advances made to borrowing members.

The agreement was contained in letters dated May 26 and 28, 1919, passing between the liquidator of the plaintiff company and the defendant's chairman, and the purchase price was £6,400, being the amount then outstanding on the mortgages after allowing a discount of 6 per cent. C After the date of the agreement, objections were taken by the defendant's legal advisers to the completion of the agreement, on the ground that it was ultra vires the defendant society, and on Aug. 28, 1919, the plaintiff society issued a writ for specific performance. After the delivery of pleadings, a Special Case was stated by the parties upon certain agreed facts for the opinion of the court. This case came before P. O. Lawrence, D J., and he decided (inter alia) that the contract was not rendered ultra vires the defendant society on the ground that it had not sufficient funds to pay for the investments at the date of entering into the contract. The question whether the court would decree specific performance was left open, and the defendant society, after the hearing of the Special Case, delivered an amended defence by which they pleaded, inter alia, that both parties to the agreement had entered into it in the mutual, but mistaken, belief that the transaction was a transfer of the engagements E of the plaintiff society under the Building Societies Act, 1874, s. 33; that they had no intention of entering into an agreement which was not authorised by the Building Societies Acts and the defendant society's rules, or which would involve a breach of trust; and that they were entitled to be relieved from the agreement on the ground of mutual mistake. They also contended that by the Building Societies Act, 1874, s. 25, a society might from time to time, as the rules of the F society permitted, invest any portion of the funds of the society "not immediately required for its purposes" upon real or leasehold securities, except under the section they had no power to enter into the agreement, and that at the date of the agreement the funds of the defendant society not immediately required for its purposes did not exceed £400. Further, that the plaintiffs were unable to assign the defendant society the benefit of the covenants by the mortgagors in their G respective mortgages to pay the plaintiff society "all subscriptions, fines, fees, and other engagements," and that these fines were a material inducement to the defendant society to enter into the agreement. P. O. Lawrence, J., held that all the various points taken by the defendant society failed, and that the plaintiff society were entitled to a decree for the specific performance of the contract. The defendants appealed.

H *Tomlin*, *K.C.*, *Owen Thompson*, *K.C.*, and *Jennings* for the defendants.
Jenkins, *K.C.*, and *E. A. Wurtzburg* for the plaintiffs.

LORD STERNDALE, M.R.—This case arises out of an action by the Sun Permanent Benefit Building Society against the Western Suburban and Harrow Road Permanent Building Society for specific performance of, or, in the alternative, I for breach of, a contract by the plaintiffs to sell and the defendants to buy and take a transfer of certain mortgages. I need not particularise the nature of the mortgages; they were the ordinary building society mortgages granted to the plaintiff society by its members in the ordinary way. The defendant society entered into the contracts under an idea which existed in their chairman's mind that they were getting, not only a transfer of the mortgages, but also particularly a transfer of the members and the business of the plaintiff society, which was in liquidation or dissolution. Its business, therefore, was being carried on by liquidators; the liquidators had been directors before, and no question arises here as

to their authority to enter into the contract. The case comes before us in rather an unsatisfactory manner, because, with a laudable desire to save time and expense, it was agreed between the parties that certain preliminary questions should be decided in the hope that there would be no more litigation. Unfortunately those questions were decided in a way that did not put an end to the litigation or to the dispute between the parties, and the case had to go to trial. There is no question that, to a certain extent, the decision upon the preliminary points does hamper the consideration of the points which we have now to decide.

As I have said, the chairman of the defendant society, in agreeing to buy the benefit of these mortgages, was under the impression that he was getting a great deal more than he was. He thought he was getting a transfer of the membership of the mortgagors, as well as the transfer of their mortgages, and he thought he was getting, in fact, the benefit of the transfer of the business, speaking generally, of the plaintiff society. But he did not get that under the contract; all that he got was the benefit of the mortgages so far as the plaintiff society had the power of carrying out that contract when it was made. Perhaps I ought to refer just for a moment to the powers of a building society before I say any more on the matter. Under the Building Societies Act, 1874, the powers of a building society are strictly limited. Their purposes are thus defined in s. 13:

> "for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage."

Under s. 15 they have the power to borrow money which is only, for the purpose of the Act, to be applied to the purposes of the society. Those borrowing powers are limited to a certain amount in proportion to the subscriptions and the other moneys of the society. By s. 15, para. 2:

> ". . . the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members."

Those are the only borrowing powers which the society has. Under s. 25 they have power to "invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities or in the public funds," or other specified securities. Under s. 33 [repealed by Societies (Miscellaneous Provisions) Act, 1940, Sched.]:

> "A society under this Act may transfer its engagements to any other society upon such terms as shall be agreed upon by three-fourths of the members."

The chairman of the defendant society thought that he was getting the transfer of the engagements of the plaintiff society which had to be carried out under s. 33; but he was not getting anything of the sort. The plaintiffs never agreed to sell him anything of the sort.

The first point—and this was one of the preliminary points which was taken—was that this agreement was ultra vires the defendant society altogether and a Special Case was stated for the decision of that and two other questions, only one of which was of real importance. The only allegation that was made of the circumstances in which the question of ultra vires arose was that at the date of the making of the contract they had not surplus funds within the meaning of s. 25 available for the transaction. So the first question was whether the agreement was ultra vires the defendant society, and, if not, whether it was capable of being enforced by the plaintiffs against the defendant society. On that point the learned judge gave a very strictly limited decision, and I point this out because I think it has a bearing upon one of the very forcible arguments addressed by counsel for the plaintiffs upon the objection made by the defendants to the decree of specific performance. The learned judge said:

> "The sole point I am now considering is whether the mere fact that at the date of the contract to purchase authorised investments the society had not in

A hand sufficient surplus funds to pay for the investments in full renders the contract ultra vires, and void ab initio. I am not now considering the question whether the court would exercise its extraordinary jurisdiction in granting specific performance of a contract by a building society to purchase an investment if it were shown at the trial that no surplus funds were available to complete the contract, whether such want of available funds had arisen by B reason of there never having been any, or by reason of such available funds having been diminished or exhausted after the date of the contract. It may well be that the court, in such circumstances, would decline to make a decree for specific performance. Nor am I considering whether the court would, in such circumstances, grant anything more than nominal damages for a breach of the agreement."

C

I point out the very limited nature of the decision for the reason that the defence at the trial was this: Granted that this was not ultra vires in its inception for the reason alleged, a decree of specific performance ought not now to be granted because it would involve an order to do what were ultra vires acts, and I mention the limited nature of the decision because a very powerful argument was addressed D to us to the effect that once you have got a decision that the contract is intra vires the society, no act that can be necessary to perform that intra vires contract can be ultra vires. If the learned judge had decided, and we were bound by the decision, that the contract was not assailable as being ultra vires upon any ground, that argument would have much greater force and I do not say what might be the result if that were the position, but the learned judge, as I have pointed out, E decided nothing of the sort, and for that reason I think it was quite open for the defendants to raise the defence that they did—that an order made to perform this contract would be an order upon them to perform ultra vires acts, in the first place upon the ground suggested by the learned judge, that, although the contract might be intra vires although they had not at that moment of making it sufficient surplus funds, still if, when they came to be ordered to perform it, they had not F sufficient surplus funds, they would be ordered to carry out a contract providing for the investment of their moneys, which were not surplus funds, in securities in which they had no right to invest them, because the society had no power to apply its money for ordinary investments except under s. 25, which simply applies to the surplus funds not required for purposes for which it is established.

It was said, and to my mind said truly, that, although the plaintiff society G might be entitled to say that the contract was not absolutely bad and ultra vires ab initio, still the court, in considering whether it would grant a decree of specific performance, which after all is a matter of discretion and not only a matter of jurisdiction, must have regard to the question whether the result of such an order upon the society would be that it would have to invest funds in paying for these mortgages which it had no power so to invest. Also it was said it would involve H another ultra vires act, and for this reason, if it has no surplus funds, in order to complete the purchase, it would have to borrow money, and its borrowing powers, whether its funds are exhausted or not, cannot be applied except for borrowing for the purposes of the society, and buying these mortgages as an investment is not one of the purposes of the society. The answer to that was: That is a fallacy because all that the society would be ordered to do would be to pay a debt incurred I by a contract which had been held to be a valid contract, or at least a contract intra vires. I am not satisfied with that answer, but it seems to me there is another difficulty in the way of the plaintiffs on that point, and it is this: As far as I can see, according to the powers of the defendant society, they have no power to hold such an investment as this—it is not an investment for the purposes of the society —and the order upon them is not only to pay, it is to perform the contract and to take over the mortgages. If those are mortgages that they cannot take over, because they have no power to invest in investments of that description—I am not speaking now of the question whether it was a safe investment—they have no

power to hold investments of that description at all; and if the order were that they should do so, it would be again, in my opinion, an order upon them to do an ultra vires act. A

I think that is enough to dispose of the question of whether there ought to be a decree of specific performance. In my opinion there ought not, and I think it is a fallacy to say that the decision of the learned judge, limited as was its nature, amounts to this—that the contract is intra vires, and, therefore, every act done to carry it out must be intra vires. As I have already pointed out, the learned judge did not consider that his decision amounted to anything of the sort, and I do not think it did, nor do I think that the case which was very much impressed upon us, *Eastern Counties Rail. Co.* v. *Hawkes* (1), decides anything to the contrary. The circumstances were quite different, and I do not think it in any way decides anything contrary to the opinion which I hold upon this matter. I think, therefore, that the defendants are entitled to say that a decree of specific performance in this case ought not to be granted because it would involve their doing ultra vires acts, even granting that on the sole ground argued before the learned judge the contract itself should not be held to be ultra vires in its inception. B C

There is another question on which I do not intend to say much, and that is whether the contract was ultra vires or whether it could not be performed because the plaintiff society have no right to transfer these mortgages without the consent of the mortgagors. The learned judge has decided that, but again in a distinctly limited manner. He has held that the power is given to the plaintiff society by the terms of the mortgages themselves; and he does not decide the question whether, speaking generally, apart from something specific in the mortgage itself, there is such a power to transfer without the mortgagors' consent, but he did say this: D E

> "It is possible that difficulties as to the rights of the parties after the transfer may occur in certain events, but none that have been suggested appear to me to be insuperable."

He also says this, which is to the same effect and shows the limited nature of his judgment on that point also: F

> "Lastly, it is said that there may be some difficulty in the way of the defendant society obtaining the benefit of the fines imposed upon the mortgagors by the plaintiff society's rules although they are expressly secured by the terms of the mortgages. The liquidators of the plaintiff society have by their counsel stated that they are willing to do all in their power to give the defendant society the full benefit of the mortgages including the fines, and I cannot help thinking that the ingenuity of counsel will find some way of enabling the defendant society to obtain this benefit. The transferee of a building society's mortgage is notoriously in a somewhat difficult position in a case like the present where the mortgage itself contains no provision regulating the rights of the parties after transfer. I do not, however, intend on the present occasion to determine what form the documents, which may be necessary to give the defendant society the full benefit of the mortgages, ought to take, these documents will have to be settled by the court under the decree I propose to make in the event of any disagreement between the parties as to their contents." G H

The learned judge, therefore, does not decide the point—a very important point indeed—which has been argued before us. It is whether, assuming everything else in favour of the plaintiffs, they are in a position to transfer to the defendants the whole of the rights which they themselves have under the mortgages. Unless they can do that, it seems to me that they are not in a position to perform their contract, and this is a point which goes much deeper than the former one, because the former one was merely an objection to a decree of specific performance and might have left the defendants open to a judgment for damages for not performing the contract which it was held it was intra vires to them to make. This goes I

A much deeper than that, because if the plaintiffs are not in a position to give to the defendants all the benefits which they themselves had under the mortgages, they are not ready and willing to perform their part of the contract, they cannot enforce it upon the other party, therefore this goes to the right to damages as well as a decree of specific performance. It is a matter upon which I confess I have had doubt from time to time in the course of the argument, but upon the B whole I have come to the conclusion that the plaintiffs are right upon this point, and that, although it may be intra vires to make a contract for the transfer of the mortgages without the mortgagors' consent, a decision that such is the case does not involve a decision that, under that transfer when made, the transferor is in a position to do all that he has to do in order to enforce his contract against the transferee. I do not propose to read the whole of this form of mortgage, but I C think there are in it clauses which contain agreements and covenants that the mortgagor will pay to the society—that is, the transferor society, the plaintiffs—subscriptions, fines, fees, and other payments whatsoever, which under the rules and regulations for the time being of the society shall from time to time become payable, and so on, and it also contains an agreement that they will comply with the rules. When you come to look at the rules, there are certain provisions and D remedies given to the society in consequence of certain actions on the part of the mortgagor which will become almost impossible, if not quite impossible, to enforce because the plaintiff society is in course of dissolution. It is quite true that the plaintiffs at the Bar both here and below have offered to do all they can to confer these benefits upon the defendants; they have offered to undertake that the plaintiff society shall not be dissolved until all these matters have been wound-E up, and to give a power of attorney to the defendants to enforce these matters. But they are not in a position to hand over to the defendants the rights which they, a society in course of dissolution, have under their mortgages and rules combined—the mortgagor covenanting to obey the rules. If this be so, they cannot enforce the contract at all, because, as I have said, they are not willing and ready to perform their part of it, and that goes to the root of the whole action, and F does so, in my opinion, without in any way interfering with the decision of the learned judge upon the preliminary point. For these reasons, I think the appeal should be allowed, and that judgment should be entered for the defendants with costs here and below.

WARRINGTON, L.J.—I am of the same opinion. The action is one brought G by one building society against another for specific performance of a contract for sale and purchase, or, in the alternative, for damages for breach of that contract. The contract on the breach of which the action is founded is for the purchase by the defendant society and a sale by the plaintiff society of the mortgages granted to the plaintiff society by its members in the course of carrying on its business as a building society. Two main defences have been raised by the defendants. The H first is this. It is contended by the defendants that the vendor society, having regard to the nature of the mortgages in question, mortgages by its members to itself, is unable to transfer to the purchasing society the full benefit of those mortgages. This defence, if made good, goes to the whole action, and would entitle the defendant society to judgment in their favour. The second defence is this, that even though the defendants may be liable to an action for breach of I the contract in question, the equitable relief by way of specific performance ought not to be granted because the effect of ordering the defendants specifically to perform this contract would order them to do that which, having regard to the statutory provisions regulating them and the conduct of their business, be outside their statutory powers. That defence, if made good, would merely mean that no decree for specific performance could be made, but they would be left to their legal remedy, which is to recover damages for breach.

The contract in question was made in May, 1919. It was made by the directors of the defendant society acting in the conduct of the business of their society and

the liquidators of the plaintiff society. The plaintiff society having passed a resolution for dissolution, in accordance with the provisions of the Building Societies Acts, the chairman of the defendant society thought that in making the purchase he was not merely purchasing the mortgages and entitling the society to a transfer of the mortgages, but he was arranging for what, in the Building Societies Act, s. 33, is called a transfer of its engagements—a very different thing, because a transfer of the engagements of the society means that the members of the one society become the members of the other society and the mortgages are transferred, not merely as separate items of property, but as part of the transfer of the entire business. The difficulties in the present case would not have been raised if that had been the nature of the transaction. Unfortunately, the chairman misunderstood the effect of the letters which passed between the two societies, and the contract must be treated now as one merely for a transfer—purchase and sale of the mortgages by themselves. Regarded in that way, the transaction is, to me, one which, if justified at all, can only be justified as an investment by the purchasing society pursuant to the provisions of s. 25. A building society is not a financial society; it is not one of its purposes or objects to invest money. The sole purpose of a building society is that which is expressed in s. 13 of the Act of 1874—that is,

> "for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage."

Investment, therefore, is not one of its purposes.

There is contained in the Act a further material provision with regard to borrowing money, and when it receives those loans they are to be applied for the purposes of the society—that is, the purposes which have been already defined; and further, the power to obtain loans is limited to the amount for the time being secured by the society by mortgages from its members. Therefore, to acquire these mortgages would not increase its power of obtaining loans and in no way facilitate the carrying out of its objects; and, as I have said, could only be justified if it were an investment such as is contemplated by s. 25. Section 25 is, so far as material, in these terms:

> "Any society under this Act may from time to time, as the rules permit, invest any portion of the funds of the society not immediately required for its purposes . . ."

There, again, is a reference to the purposes of the society which I have already described; and the only funds which the society can invest in pursuance of this provision are such funds as are not immediately required for its purposes. Such funds the society is authorised to invest "upon real or leasehold securities" and certain other securities which are mentioned in the section. Much, therefore, of this power of investment is extremely limited—limited first, by the description of the fund to which it applies; limited, secondly, to the subjects which can be obtained as investments. The list of those subjects in the Act of 1874 is very considerably increased by the Act of 1894, because it authorises investment in what are commonly called trustee securities, but the limitation to surplus funds remains the same, and the statutory powers of the society in reference to investments are strictly limited, therefore, by the provision of s. 25.

I think there is nothing more to which it is necessary to call attention before proceeding to deal in turn with the two defences. The first is that the vendor society cannot effectually transfer to the purchasing society the full benefit of that which it has been agreed to transfer. This matter has been dealt with to some extent by P. O. Lawrence, J., in dealing with the preliminary points raised by the Special Case. I refer first to the formal order which he pronounced on this point when, on April 19, 1920, he declared "that the plaintiffs can sell and transfer the said mortgages pursuant to the said agreement without the concurrence of the

mortgagors." That was an extremely limited decision, and when the reasoned judgment is looked at, the effect of which is expressed in this order, it seems to be more limited even than the words of the formal judgment would lead one to suppose. What the learned judge really decided, and the only point that was argued before him, was that a transfer of the plaintiff society's mortgages could be made without the consent of the mortgagors because the mortgagors were bound to allow such a transfer as valid by the terms of the mortgage deeds. He did not decide what would be the nature of the property that such a transfer would convey to the purchaser, or whether such a transfer as the vendor company could make would satisfy the contract into which they have entered. It is, therefore, quite open to this court to consider and decide whether the vendor could or could not give to the purchaser the full benefit of that which he has contracted to give. They have contracted to sell these mortgages. What does that mean? I think it means clearly that they have contracted to put the purchasing society in the same position in reference to these mortgages and the enforcement of them, and the benefit to be derived from them as they, the vendors themselves, enjoyed. Can they do that? They can, of course, transfer the mortgage debt; nobody denies that. They can transfer the security for the mortgage debt too—that is, these freehold or leasehold hereditaments, as the case may be, which were granted or assigned as security. That they can give. But a mortgage from a member to a building society is a great deal more than an obligation to pay the mortgage debt, and a conveyance of certain property by way of security. It purports to give to the society—which, in that case, is the mortgagee, rights and advantages derived from the Act of Parliament and from its own rules and regulations—the nature of the main advantages so given being the right of the society to enforce, as against the mortgagor, the payment of fines and penalties for non-performance of their obligations, partly under the mortgage itself, and partly under the rules and regulations of the society. Those are advantages which, as between an ordinary mortgagor and mortgagee, cannot be claimed, because it is perfectly familiar to those who are acquainted with the mode in which a court of equity deals with the position of the mortgagor that no penalty can be enforced upon a mortgagor for non-payment at a particular time of money payable under the mortgage. If it is required, in the interest of the mortgagee, to enforce a punctual payment, whether of interest or instalment of principal, the mortgage deed must provide, not for a penalty if the payment is made otherwise than punctually, but for an advantage upon payment being made punctually. Therefore, except for the position which obtains between mortgagee and mortgagor, when a building society is the mortgagee, these particular advantages under a building society's mortgage could not be enforced. For this purpose, although the transferee is itself a building society, the mortgagees are not its members, and it would be in no better position, for the purpose of enforcing these particular obligations of the mortgagor than would be an ordinary individual. There is another reason why it would not get that advantage, if the first be a bad one, and that is that the right of the vendor society to enforce these peculiar advantages would be gone. This vendor society is in the course of winding-up for the purpose of dissolution; it is no longer carrying on its business as a building society. If, ex hypothesi, it makes this transfer, it is doing it for the purpose of realising its property, and putting an end to its business, and dividing what remains among its shareholders. How, after that, could it enforce any of these fines or penalties against these mortgagors, either for the benefit of the supposed transferee or for its own benefit? It seems to me it would be hopeless. The conclusion, therefore, on this part of the case, at which I have come is that the defendant society is right in contending that, although a building society may transfer its mortgages either to an individual or to another society, if it agrees to sell those securities to a purchaser and there is no stipulation as to what it is a purchaser shall take under such a sale, the only conclusion to be drawn is, that it intends to transfer and agrees to transfer such benefit as it itself enjoys, and that it cannot do. This reason, as I have already pointed out, extends

to both the claims for specific performance and to the claim for damages; and if, as I think it is, the defence is a good one, the action fails altogether. A

But supposing I am wrong in that view, it remains necessary to consider the second of the two defences. It is a perfectly well-known principle of the exercise by the old Court of Chancery, and now by a court administering equity, of the special jurisdiction of specific performance, that it was a relief, added by the Court of Chancery in certain particular cases to the relief to which a person was B entitled to recover at law against him who had broken a contract. But being a special equitable relief, the Court of Chancery would not always grant it. In particular cases, and in such cases where it was not, according to the principles on which the jurisdiction was exercised, right to grant that special relief, the plaintiff, though not deprived of all remedy, would be left to his strict remedy at law. The question is whether this is one of the cases in which it is right to refuse C special equitable relief by way of specific performance? The position is this. The contract in question is a contract for the investment of the funds of the society. The only funds of the society which it is capable of investing are those not immediately required for its purposes. In the preliminary discussion before LAWRENCE, J., to which the Master of the Rolls and I myself have already referred, the question whether or not the contract for this investment was ultra vires the D society was determined, and was determined in favour of the plaintiffs, but on an extremely limited ground, and with extremely limited scope. The learned judge was careful to confine his decision to the exact point before him, and that was the question whether or not the mere fact that at the date of the contract there were no surplus funds available for making this purchase made the contract one which was ultra vires the society. He decided that that fact did not render the contract E ultra vires. Not only did he confine himself to that point, but he expressly reserved the question whether at the hearing the plaintiffs would be entitled to insist upon specific performance. What he said was that the performance of the contract would involve the commission by the defendants, the purchasers, of acts which were ultra vires the society; and, that being so, that the court would not make an order which would either be futile because the society could not, having F no legal power to do so, obey it, or would be compelling the society, if they did obey it, to do that which the statute did not authorise, and, therefore, impliedly forbade, them to do.

If that is made out, in my judgment, that is a good ground for refusing this specific remedy and leaving the party to his remedy at law. It turns again upon s. 25, the limited power of investment. As I have already pointed out, this is G limited, first, as regards the funds that can be invested, and, secondly, as to the securities which can be purchased. I think it is further limited by this, that inasmuch as the purposes of the society are expressly declared in the Act, the investment must be one which is at all events consistent with due attainment of those purposes. There are two ways in which, as it seems to me, the performance of this contract would involve the doing of that which would be an ultra vires act. H Neither at the date of the contract nor at any material time since has this society had in its hands any funds not immediately required for its purposes. If it were ordered to pay this purchase money it would be compelled to resort to moneys which are required for its purposes, a thing which it is not authorised to do; or it would be necessary for it to create a fund which is not required for its purposes. It could only do that by borrowing, and it is not authorised to borrow for any I such purpose as that. It seems to me, therefore, that it has no funds which it can invest; there is no prospect of its having any funds, and it can only obtain them by doing an unlawful act. But then it is said that the contract has been held not to be a void contract, and, therefore, the defendants are under an obligation to perform it, and the obligation is merely to pay money, and to pay money is ultra vires. In my judgment, it is intra vires, not ultra vires. But, in my judgment, that is only to look at this transaction in one, and not its most important, aspect. The answer to it, as it seems to me, is that the order for specific

performance, if made, is not merely an order for payment of money, it is an order for payment of money for the purpose of carrying out a particular transaction, and it is that transaction which it is not within the power of the society to carry out. To pay the money without carrying out the transaction would be to pay money for no consideration, and on that ground would be improper. It seems to me, therefore, that that ground, on which it is said the court ought to refuse specific performance, is sufficient. But there is a second ground which has been mentioned by the Master of the Rolls, and which seems to me perfectly sufficient ground also. Although these mortgages may be described as real and leasehold securities, it seems to me that the purchase of these securities, the investment of the funds of the society in these securities, cannot be said to be an investment which is within, or consistent with, the due performance of the purpose of the society. You are to invest money upon mortgages the repayment of which can only be obtained by, I believe, monthly instalments, and the purposes of the society may require, and do require, the advancement to their members of money in very much larger sums than these monthly instalments. It seems to me, not only would it not be consistent with the due performance of the purposes of the society but it might prevent, or very seriously interfere with, the due performance of those purposes if so large a sum as that which would have to be invested if the contract were carried into effect were locked up in these particular securities.

For all these reasons, therefore, it seems to me that the action fails, and that the judgment ought to be for the defendants with costs both here and below.

YOUNGER, J.—This is an action brought by the Sun Permanent Benefit Building Society and its liquidators for the specific performance of an agreement to take for an agreed sum the transfer of outstanding mortgages on real and leasehold properties granted by the advanced members of the society. The action is brought against the Western and Suburban and Harrow Road Permanent Building Society, who are said to have agreed to take such transfer. There can be no doubt that while that agreement was being negotiated on behalf of the Western and Harrow Road Society by its chairman he supposed that he was negotiating an agreement under and by virtue of which the mortgages which were to be taken over by his society would, when the whole matter was completed, represent advances made by that society to that society's own members, the mortgagors, in effect, becoming members of the Western Suburban and Harrow Road Permanent Building Society instead of being, as they were prior to the transfer, members of the Sun Building Society. The learned judge finds as a fact that that was the basis upon which the chairman of the defendant society conducted the negotiations, and that it was because of the advantages which it seemed to him would accrue to his society by the consequent increase of its membership that the transaction appeared to him to be one which the defendant society might properly undertake. The learned judge has not gone on to find that that impression was the impression also of the chairman's co-directors, and he arrives at his conclusion, I think, merely as a matter of inference. The inference I draw from the transaction, as one sees it set forth in the correspondence, was that that was always the impression on the part of the defendant society as to the nature of the transaction with reference to which the negotiations were taking place, and I have no doubt that, if they had had any idea that the effect of the transaction would not be that which they supposed it was going to be, they would not have thought it was within their competence to entertain it at all. We now know the agreement which was in fact concluded had no such effect. The contract by which the defendant society is bound—and in a sense it is bound by that contract by reason of the finding on the Special Case by the learned judge that it was not in its inception ultra vires the defendant society—is a contract by the defendant society to take over those securities of the plaintiff society as they stand, as between the mortgagors who granted the securities and the plaintiff society who took them. The effect of the contract is no other

than this, that the defendant society became transferee of the securities as they exist in the hands of the Sun Society immediately prior to the agreed transfer. A

I pause at this point to state that it is, I think, not to be doubted that at least the defendant society was to obtain in respect of these securities all the rights and all the advantages as against the mortgagors which the Sun Society possessed, and that it was an essential part of the transaction, well understood, as it seems to me, by both parties to it, that that should be the result. Regarding it from B that point of view, it is, I think, very obvious that there are many objections to such a transaction from a building society point of view, and I am not surprised that the defendant society should be ready to take any objection to this transaction that they feel is open to them. It is not an investment of surplus funds or of any funds in the ordinary sense at all. The action of the building society in making advances to its own members on the security of the freehold or leasehold property C of those members is, I am quite satisfied, governed by entirely different considerations—considerations of a much more generous character than those which are permissible for a building society when it is proceeding to invest its surplus funds. It is an object—in fact, in this case it is the only object—of the building society here in question to make advances to its members, and, in considering the propriety of making such advances and the sufficiency of security which may be D obtained in respect of them by the society, I think, taking the words from *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (2), it may be correctly said that the directors of a building society may properly advance on classes of securities forbidden to ordinary trustees and are not precluded from making advances on securities of a speculative nature. But, as was explained by NORTH, J., in *Re National Permanent Mutual Benefit Building Society* (3), it is not E the object of a building society to invest its moneys, and, accordingly, when you find that the direct trustees of a building society are engaged in the investment of their surplus funds, it appears to me that, in considering the propriety of such investments, their attitude towards the transaction is of a totally different character. In this instance the chairman of the defendant building society saw and inspected none of the mortgages in question. Regarding the transaction as he did from the F point of view of a building society making advances to its own members, he was content. From that point of view it seems to me he was reasonably content with such care as the plaintiff society had themselves taken in connection with the advances to members represented by the securities which he and his society were about to take over. But when, contrary to his and the directors of the defendant society's original belief, they found themselves bound by contract to take over these G mortgages, accepted on these terms, as an investment of their own surplus funds, the transaction then appears, and must necessarily appear, in their eyes, to be of a totally different character. I think that it is not too much to say that, regarding these mortgages as investments of surplus funds, they are characterised by almost every disadvantage which you would suppose would be incident to them in the hands of a building society. They are, first of all, for this purpose, treated as an H investment of moneys not immediately required; nevertheless the repayment of the advances is to be made over substantial periods of time by small instalments which cannot be anticipated without the consent of the mortgagors, so that the investment of these moneys not immediately required becomes an investment which remains outstanding, however necessary it may be for the society to receive back the money in order that it may apply it in ordinary course for the proper I purposes of the society. I repeat what I said earlier. When one finds that the transaction in which the defendant society finds itself involved is a transaction of the description which I think I have quite fairly given it, one cannot be surprised that they are desirous of escaping from it if they can. There are many grounds, if the whole matter were open to us, on which I think it might be possible for this court to say that this contract was not binding upon the defendant society. I do not say so by way of decision, because we were precluded as we thought, by the previous decision of the learned judge on the Special Case, from going into

A that question. Therefore I do not say that I have arrived at a conclusion, if the matter had been open for my consideration, that the transaction might have been impeached on grounds which were dealt with by the learned judge on the earlier hearing of the case, but there are still at least two grounds not affected by that decision upon which, as it appears to me, the case may be dealt with by us, and I propose to rest my judgment entirely upon the first of the grounds which were B dealt with by WARRINGTON, L.J., and the Master of the Rolls. I do so for two reasons—first, that, if it be well founded, it disposes of the case altogether, and, secondly, because I think that it may be made the basis for the decision of this court without trenching in any way, in the view of any of the parties to the litigation, on any point which may be said to have been decided by the learned judge on the first hearing before him.

C In my judgment, the plaintiffs fail in this litigation altogether because I think it is clearly shown that they are not in a position to give to the defendant society that which under their contract they have agreed to transfer, i.e., they are not in a position to place the defendant society, as against their own mortgagors, in the same position as they themselves stand to-day, or as they would have stood immediately prior to the transfer of the mortgages. I know that it has been D decided by the learned judge that these securities are transferable without the consent of the mortgagors, and by that decision we are bound in this litigation, but that does not decide, nor does it appear to me to touch on, the question whether that which can be or is transferred will give to or confer upon the transferee that which, under his contract with the plaintiff society, he is entitled to have. I need not repeat the grounds upon which the opinion rests, because they have been fully E stated, in language much clearer than I could use, by the lord justice who has just preceded me. I agree, if I may respectfully say so, with all that he has said upon that subject, particularly with reference to the question of the fines. I would only add this further point, because I believe also that this is highly important. As I read the specimen mortgage deed which has been put before us as representing the others, on its true construction the transfer of this security to a transferee F would not enable that transferee to exercise the powers of realisation which is conferred by the deed, and added to the loss of the fines which would be suffered by the transferee after transfer in the manner stated by the lord justice, that seems to me to reduce the value of these securities in the hands of the transferee to a point which makes them practically altogether different from those securities in the hands of the plaintiff society. Accordingly, in my opinion the plaintiff G society are not in a position, without the consent of the mortgagors, or even with their consent, to give to the defendants the rights which, under their contract, they are entitled to have if they fail, and, in my opinion this appeal ought to be allowed.

Solicitors: *Naunton & Sons*; *Graham Gordon.*

[*Reported by* H. LANGFORD LEWIS, ESQ., *Barrister-at-Law.*]

Re DUKE OF WESTMINSTER'S SETTLED ESTATES. DUKE OF WESTMINSTER *v.* EARL OF SHAFTESBURY

[Chancery Division (Sargant, J.), January 13, 14, February 24, 1921]

[Reported [1921] 1 Ch. 585; 90 L.J.Ch. 305; 125 L.T. 82; 37 T.L.R. 529]

Settlement—Capital or income—Apportionment between—Sale of freehold reversions—Income from purchase price—Purchase of surrender of leaseholds—Increase in rents received.

Settled land—Tenant for life—Powers—"Exchange of settled land for other land"—Exchange for further interest in land already comprised in settlement—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38), *s.* 3 (*iii*).

A settlement, which included a large number of freehold reversions subject to building leases, contained powers given to successive tenants for life "in addition to and in aid of the statutory powers." One of these powers was a power to "exchange for other manors, lands, or hereditaments . . . all or any of the said premises hereby assured," and another was a power "in case any . . . lessee . . . of any part of the said hereditaments . . . shall be willing to sell or dispose of . . . his subsisting interest . . . to purchase the same . . . at such price or prices in money or for such other equivalent as" to the tenant for life should seem reasonable, "but so that the terms or interests which shall be purchased or otherwise acquired under the power shall be merged in and consolidated with the freehold and inheritance of the said premises." By two deeds of even date the tenant for life conveyed to transferees some of the freehold reversions belonging to the settled estate, and by two further deeds of the same date received in exchange the surrender and merger of leaseholds, having less than sixty years to run, to which other parts of the settled estates were subject, a sum being paid to the trustees of the settlement by way of parity of exchange which the trustees applied in paying off incumbrances on the estate. The transactions resulted in a large increase of the annual income of the estate.

Held: (i) there was no power either under s. 3 (iii) of the Settled Land Act, 1882, or under the settlement to take in exchange leaseholds with less than sixty years to run or leasehold interests already comprised in the settlement, but the transactions could be regarded as cross sales or purchases, and as such were valid; (ii) in view of the provisions of the Settled Land Act, 1882, and the decisions in *Cottrell* v. *Cottrell* (1) (1885), 28 Ch.D. 628, and *Re Bowyer's Settled Estate* (2) (1892), 8 T.L.R. 441, the tenant for life would be entitled to receive during the residue of the term of the unexpired leases of the properties of which the freehold reversions had been sold a sum equivalent to the amount of the rents received from those properties before the sale, and the residue of the income of the purchase price of the reversions should be accumulated and added to capital until the expiration of that term; in view of the special power contained in the settlement to apply the proceeds of ordinary freeholds in possession in the purchase and surrender of leases, the rights of the tenants for life and remaindermen would be adequately preserved as regards the sum applied in acquiring the surrender of the leases if, during the residue of the term of the leases of the property of which the freehold reversions had been sold, there was retained out of the increased rents of the surrendered property and accumulated for the benefit of capital an annual sum representing interest on the sum as applied; (iv) on the basis that the leases to which the conveyed reversions were subject had all the same length of term unexpired, a sum calculated at four per cent. on the sum applied in acquiring the surrender of the leases must be accumulated as capital at compound interest from the increased rents of the surrendered houses during the

unexpired term of the leases to which the conveyed reversions were subject, plus the annual benefit to the estate arising from the discharge of incumbrances over and above the rentals previously received from the houses the subject of the last-named lease.

Per SARGANT, J.: The words in s. 3 (iii) of the Settled Land Act, 1882 [now s. 38 (iii) of the Settled Land Act, 1925], "an exchange of the settled land, or any part thereof, for other land" would appear to be inapplicable to an exchange for a further interest in land already comprised in the settlement.

Notes. As to statutory powers in relation to settled land, see 29 HALSBURY'S LAWS (2nd Edn.) 691 et seq.; and for cases see 40 DIGEST (Repl.) 818 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

(1) *Cottrell* v. *Cottrell* (1885), 28 Ch.D. 628; 54 L.J.Ch. 417; 52 L.T. 486; 33 W.R. 361; 40 Digest (Repl.) 823, *2996*.

(2) *Re Bowyer's Settled Estate* (1892), 8 T.L.R. 441; 36 Sol. Jo. 347; 40 Digest (Repl.) 712, *2071*.

(3) *Re Duke of Westminster's Settled Estates, Duke of Westminster* v. *Earl of Shaftesbury*, [1920] 2 Ch. 445; 90 L.J.Ch. 31; 124 L.T. 236; 65 Sol. Jo. 61; 40 Digest (Repl.) 841, *3186*.

(4) *Re Brotherton's Estate*, [1908] W.N. 56; 77 L.J.Ch. 373; 98 L.T. 547, C.A.; 40 Digest (Repl.) 838, *3158*.

Originating Summons to determine questions between tenant for life and remainderman as to distribution between income and capital.

By a deed of settlement, dated Feb. 15, 1901, made upon the marriage of the plaintiff, Hugh Richard Arthur, Duke of Westminster, the family estates known as the Grosvenor estates, which included the London estates, were limited in the events which had happened to the use of the plaintiff for life with remainder to Lord Arthur Hughes Grosvenor for life with divers remainders over. Gerald Hugh Grosvenor, who was born on Feb. 13, 1907, was the first tenant in tail in remainder. By the settlement it was declared:

> "That in addition to and in aid of the statutory powers of leasing and of sale, enfranchisement, exchange, partition, and other dispositions and of investment or other applications of capital money in or for improvements and of mortgage and charge and of contract for any of the above purposes the said Hugh Richard Arthur Duke of Westminster during his life and every other person hereby made tenant for life of the said premises hereby assured when he or she shall be entitled to the possession or the receipt of the rents and profits of the same premises... shall have the following powers...."

Then came powers of sale, enfranchisement, exchange, and partition, it being provided that the trustees of the settlement, who had previously been appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, should receive all moneys which might become payable upon any such sale, enfranchisement, exchange, or partition upon trust to invest the same as capital money arising under the Settled Land Acts. The power of exchange was expressed in these terms:

> "Power to ... exchange for other manors, lands, or hereditaments in England and Wales all or any of the said premises hereby assured ... and upon any such exchange ... to give or receive any money for equality of exchange."

It was also provided that

> "In case any present or future lessee of any part of the said premises hereby assured or to be purchased under the power in that behalf hereinbefore contained shall be willing to sell or dispose of or to give up or otherwise part with his subsisting interest in his lease or leases then and in every such case it shall be lawful for the person or persons exercising the said powers to purchase

the same respectively at such price or prices in money or for such other equivalent as to them or him shall seem reasonable, and to direct the application in the purchase of the same accordingly of any money to arise by any such sale or enfranchisement or exchange or partition as aforesaid or (according to the circumstances) to accept a surrender of any such lease or leases upon any such terms as may be agreed upon. But so that the terms and interests which shall be purchased or otherwise acquired under the power shall be merged in and consolidated with the freehold and inheritance of the said premises or shall otherwise be disposed of in such manner as that the same shall go to and be held in trust for the person or persons for the time being entitled to the hereditaments comprised in or effected by the same respectively according to the nature and quality of the same terms and interests. . . ."

The plaintiff, as tenant for life, arranged two exchanges with Lord Ashcombe and trustees of Lord Ashcombe's settled property (hereafter call the Cubitt estate) respectively. Both exchanges took effect as from Sept. 29, 1916, although they were only completed by deeds all dated Mar. 19, 1920. The first exchange was effected as follows. By deed dated Mar. 19, 1920, the plaintiff "by virtue of the powers vested in him under the said Settled Land Acts and of every other power enabling" conveyed freehold herditaments in Pimlico belonging to the London estate, subject to the leases and agreements for leases affecting the same, to Lord Ashcombe in fee simple in exchange for leasehold premises belonging to Lord Ashcombe and held by him of the Grosvenor estates under leases granted by the plaintiff's predecessors in title for terms of years, which would expire not later than Michaelmas, 1937, and were subject to underleases or agreements for tenancy. The freehold reversions on some of these leases were vested in the plaintiff, and by a deed of even date Lord Ashcombe surrendered these to the plaintiff to the intent that the terms of years granted by the leases might merge and be absolutely extinguished in the freehold reversion and inheritance of the premises or otherwise go to and be held in trust so far as the rules of law and equity and circumstances might permit for the person or persons for the time being entitled to the freehold of the same premises. By the same deed the remainder of the leases agreed to be exchanged were assigned by Lord Ashcombe to the trustees upon the trusts of the settlement. The second exchange with the Cubitt estate was effected in exactly the same manner. The combined value on Sept. 29, 1916, of the freehold reversions conveyed by the plaintiff to Lord Ashcombe and the Cubitt estate was £284,143, and the combined value on the same date of the leaseholds conveyed by Lord Ashcombe and the Cubitt estate by way of exchange was £228,224. The total sum of £55,919 was paid by Lord Ashcombe and the Cubitt estate by way of equality of exchange to the trustees of the settlement of Feb. 15, 1901, and applied by them in discharging incumbrances on the settled estates. The net rents formerly received by the plaintiff from the freehold reversions amounted in the whole to £1,785 per annum, and the net rents formerly received by him from the leasehold premises comprised in the surrenders to £547. On the merger of these leases the rack-rents of the property comprised in the surrenders became payable to the plaintiff. They amounted together to £13,875, but in some cases the tenants from whom these rack-rents were received were not or were only partially responsible for repairs and insurance. It was estimated that the net annual increase of rents produced by the exchange amounted to £11,000 or thereabouts.

The present summons was taken out by the plaintiff for the determination (among other questions) of the question whether he was entitled to receive and retain for his own use and benefit the whole of the increased rental derived from this portion of the settled hereditaments the leases whereof had been surrendered and assigned to the plaintiff in part exchange for other portions of the settled hereditaments conveyed and assured subject to the leases affecting the same to Lord Ashcombe and the Cubitt estate as above stated, or whether the whole or

A any, and, if so, what part, of such increased rental ought to be set aside and paid to the trustees of the settlement as capital moneys or otherwise dealt with.

Maugham, K.C., and *Baden Fuller* for the plaintiff.
Cleveland-Stevens for the second tenant for life.
Bryan Farrer for the trustees of the settlement.
B *Grant, K.C.*, and *Harman* for the remainderman.

Cur. adv. vult.

Feb. 24. **SARGANT, J.,** read the following judgment.—The answer to the question raised by the summons depends, in my judgment, partly on the general provisions of the Settled Land Acts and partly on the special provisions of the settlement of Feb. 15, 1901. While in my previous decision *Re Duke of Westminster's* C *Settled Estates, Duke of Westminster* v. *Earl of Shaftesbury* (3) I came to the conclusion that the power then in question was a power apart from and independent of the Settled Land Acts, the contrary seems to be the case with the powers of sale, exchange, and surrender which have now to be dealt with. As regards these powers, the settlement proceeds on the footing, not of substituting a new or independent scheme for that contained in the Acts, but of adopting the general D framework of the Acts and then introducing modifications into this framework. These modifications are, no doubt, for the most part in favour of the settlor as the first tenant for life and of the subsequent tenants for life, and are in some cases important, but they are modifications only and not independent provisions. It is unnecessary and would be tedious to point out all the passages in the settlement which have led me to this conclusion, and it will be sufficient if I refer first to the E appointment of the settlement trustees to be the trustees for all the purposes of the Settled Land Acts; secondly, to the direction that the settlement trustees are to invest money payable on enfranchisement, sale, exchange, or partition as capital money arising under the Settled Land Acts; thirdly, to the provisions that leases or contracts for leases may be made without previous notice to any trustee; and, fourthly, to the very special provision that capital money arising under the Settled F Land Acts may be applied for improvement by the direction of a tenant for life and without a scheme. All these provisions seem to me to recognise the general application of the Settled Land Acts to the settled property, and to proceed accordingly to take advantage of the Acts either with or without modification or (in the last case) to give a new and independent power in addition to a power for the same purpose which is assumed to be already existing under the Acts. It G follows, then, that in dealing with the transactions referred to in the summons it is necessary to start with the presumption that ss. 34 and 53 of the Settled Land Act, 1882 [see now ss. 79 and 107 of Settled Land Act, 1925], apply, and then to consider how far, if at all, the settlement itself modifies the effect of those sections.

These transactions, viewed in relation to the settlement in question, amount in substance to a transfer to Lord Ashcombe and the Cubitt trustees (whom I will H refer to collectively as the Cubitt estate) of the freehold reversion (valued at a total sum of £284,143) in a number of houses subject to leases owned by the Cubitt estate and in the acquisition of the leases belonging to the Cubitt estate (valued at a total sum of £228,224) of other houses the freehold reversion in which was already comprised in the settlement. The net rents (without deducting income tax) which were received by the Duke of Westminster before the transaction I amounted in the case of the first set of houses (hereafter called "the conveyed houses") to about £1,785 per annum, and in the case of the second set of houses (hereinafter called "the surrendered houses") to about £547; and on the surrender of the leases of the surrendered houses the like net rents receivable by the duke in respect of the surrendered houses amounted to about £13,875. There was thus an increase in net rental of over £11,500 per annum on the whole transaction beyond and in addition to the income derived from a sum of £55,919 paid by the Cubitt estate to the settlement trustees for equality of exchange and applied by them in the discharge of incumbrances on the settled estates. The question is

whether the whole of this increased rental (to which must be added, in my view, the relief to income derived from the discharge of these incumbrances) is receivable and retainable by the duke as income, or whether any and what part of this increase should be set aside and paid to the trustees as capital money or otherwise dealt with.

There are obviously two different and clearly distinguishable ways in which the transaction in question has benefited income at the expense of capital. In the first place the freehold reversion in the conveyed houses, which previously yielded only a net rental of £1,785 per annum, has been converted into a present sum of £284,143 capable of yielding immediate income. And, in the next place, the greater part of this large sum—namely, a sum of £228,224—has been applied in the acquisition and merger of short leases, so as to convert the previous freehold reversion in the surrendered houses, which yielded only a net annual rental of £547, into a freehold in possession producing a net annual rental of £13,875 per annum. And on the expiration of these short leases without any provision being made in the replacement of capital there will be an out and out loss to the capital of the settled estates of the whole of this sum of £228,224. The result is a startling one, and is obviously incapable of justification except under some special provisions of the settlement. The counsel for the plaintiff, as I understand their argument, justify the whole transaction under the power of exchange in the settlement, coupled with the power to apply capital in acquiring the surrender of leases of parts of the settled estates. They urge that there is nothing in the latter power to restrict it to the acquisition of leases having not less than sixty years to run, as in the case of purchases of leaseholds under the Settled Land Acts, and, indeed, that any such restriction would be quite inappropriate having regard to the ordinary lengths of the unexpired leases on the duke's London estates at the date of the settlement. Then they say that, this being so, the power of exchange in the settlement must be given a correspondingly wider effect, and, although under the power of exchange in the Settled Land Acts it would be inadmissible to receive in exchange terms of less than sixty years, yet under the power of exchange in the settlement this restriction is removed at any rate as regards leases acquired for the purpose of surrender. Accordingly, they argue that the duke has a definite right as tenant for life to direct an exchange of the freehold reversion in part of the settled estates for a leasehold interest capable of surrender and merger in other parts of the settled estates.

To the first part of this argument I assent. In the provisions as to the acquisition and surrender of leases I can find no restriction or condition as to the lengths of the leases to be acquired and surrendered, and, though the result of any such transaction must be to diminish capital for the purpose of accelerating the enjoyment by the tenant for life of the rack-rentals of the houses in question, the words are fairly clear and unequivocal, and there is nothing repugnant, or, indeed, manifestly unreasonable, in a stipulation of this kind for the special benefit of the duke and the successive tenants for life. The loss of capital on any such acquisition would probably be far more than counterbalanced by the general increase in the capital of the settled estates as subsisting building or repairing leases of other parts of the estate were falling in. But with the second part of the argument I cannot agree. It was admitted by the counsel for the plaintiff that the power of exchange in s. 3 (iii) of the Settled Land Act, 1882 [now s. 38 (iii) of Act of 1925], could not be exercised for the purpose of taking in exchange any leaseholds having a shorter term than that authorised for the investment of capital moneys—namely, sixty years [see s. 21 (vii) of the Act of 1882, now s. 73 (1) (xiv) of Act of 1925]. Further the phraseology of the Act, which speaks of "an exchange of the settled land or any part thereof for other land," would appear to be inapplicable to an exchange for a further interest in land already comprised in the settlement. The power of exchange in the settlement is couched in language almost identical with, and practically indistinguishable from, the power in the Act, and was, no doubt, intended to operate on the same general lines as the statutory power, and it

would, in my judgment, be unsound to extend the power in the settlement beyond that in the Act and to hold that it would include the acceptance in exchange of short leasehold terms in land already comprised in the settlement, merely because of the subsequent power to purchase such terms out of capital. It will be observed that this last power is a special and carefully limited one, and is in terms addressed to a purchase for money or some other equivalent only, whereas in the previous provisions the alternatives of purchasing or taking in exchange are expressly distinguished. And there is the less reason for straining the language of the settlement to enable a transaction of the kind in question to be carried out in this particular way, because it can readily be effectuated (apart from the special benefit to the tenant for life which the plaintiff is claiming) by cross sales and purchases. I may add here that if, contrary to my view, the settlement does on its true construction enable a tenant for life to exchange part of the settled land for the surrender of short leases on a different part of the settled land, it by no means follows that he can give in exchange a part of the settled land which is subject to a short residue of a building lease or other beneficial lease, and retain for himself the whole advantage resulting both from the conversion of reversionary value into present value and from the conversion of present value into a short terminating interest. The advantage accruing from the second part of the transaction, the settlement has, in my view, given him. But as regards the first part of the transaction I am of opinion that under s. 53 of the Settled Land Act, 1882 (which does not seem to me in any way excluded by the settlement), the tenant for life would be bound to allow the account to be adjusted between income and capital, on the same lines as those which ought to be adopted by the trustees had this part of the transaction been effected by a sale for cash. It would, in my view, be a breach of the statutory trust imposed on the tenant for life under s. 53, to utilise his power of exchange so as to substitute, for lands yielding little immediate income and whose main value was reversionary, other lands yielding a full rental in possession.

I now turn to consider what the result would be if the transaction were effected, in the way in which I think it must be deemed to have been effected, by a double and not a single process—namely, by a sale of the freehold reversion in the conveyed houses and an investment of the greater part of the proceeds in the purchase for surrender of the leases of the surrendered houses. Before doing so I would point out that the form of the documents does not preclude this effect being given to them. For although they indicate an exchange as what is primarily intended, if possible, and this would no doubt be the preferable course from the point of view of stamp duty, yet they carefully provide for the exercise by the parties of all or any of the powers under the settlement or the Settled Land Acts which are necessary to carry out the transaction. It is, of course, clear that what is in substance an exchange may be perfectly well arrived at by the double process in question: see *Re Brotherton's Estate* (4). So far, then, as the sale of the freehold reversion of the conveyed houses for total consideration of £284,143 has to be considered, it is clear that under s. 34 of the Act and in view of the decisions in *Cottrell* v. *Cottrell* (1) and *Re Bowyer's Settled Estates* (2) the duke and the other successive tenants for life would be entitled to receive during the residue of the term of the unexpired leases of the conveyed houses the annual sum of £1,785 only, and that the residue of the income of the purchase price of £284,143 should be accumulated and added to the capital thereof until the expiration of that term. This is simple enough as regards the sum of £55,919, received for equality of exchange and applied in discharging incumbrances on the capital of the estate and so relieving the duke from payment of interest on that amount. If, for example, these incumbrances carried interest at 4 per cent., as they seem to have done, the result would be that income would obtain an annual relief of some £2,236 15s., and would, accordingly, have to be charged with an annual difference of some £451 15s. to be accumulated in the hands of the trustees.

But what as to the £228,224 applied in acquiring the surrender of the leases

of the surrendered houses? Had that sum represented ordinary capital moneys not subject to any accumulation, it might on the view above stated have been sunk in this acquisition for the benefit of those entitled to income during the residue of the term of the leases of the surrendered houses. In fact, however, the £228,224 differed from ordinary capital moneys by being liable to have its income accumulated during the residue of the term of the conveyed houses instead of being paid to the tenant for life, and this liability must be provided for. But, if this is done, there seems no sufficient reason for saying that the capital of the £228,224 must also be preserved or replaced, and cannot be sunk or treated as sunk in the purchase of the leases in question. In other words, the rights of the tenants for life and remaindermen under the settlement will be adequately preserved as regards this sum of £228,224 if, during the residue of the term of the leases of the conveyed houses, there is retained out of the increased rents of the surrendered houses and accumulated for the benefit of capital an annual sum representing interest on this £228,224. The present case is a much more special and complicated one than either *Cottrell* v. *Cottrell* (1) or *Re Bowyer's Settled Estate* (2); and the words of s. 34 of the Settled Land Act do not lead so precisely and obviously to the result above stated as they did to the comparatively simple result in each of those two cases. But I think that under the words of s. 34 it is permissible to take into account, as has been done in arriving at the above result, that this particular settlement allows the proceeds of ordinary freeholds in possession to be sunk in the purchase and surrender of these leases. And, further, the words of the section are permissive and discretionary rather than imperative: see per KAY, J., in *Cottrell* v. *Cottrell* (1); and do not force the court to direct an accumulation both of capital and income which would deprive the tenants for life of a right to have capital sunk for their benefit in the purchase and surrender of short leases.

On the argument before me, counsel for the plaintiff, as the first tenant for life, claimed as income the whole excess rental from the surrendered houses, in addition apparently to the whole relief given by the application of the £55,919 in discharge of capital incumbrances. On the other hand, counsel for the infant claimed an accumulation of the whole excess rents of these houses, on the principle of *Cottrell* v. *Cottrell* (1), without giving the plaintiff any credit for his special right to have ordinary capital moneys applied in procuring the purchase of the leases of the surrendered houses. Accordingly, there has been no full consideration of any such immediate view as has been indicated above, or of the precise consequences to which that view leads. The manner may, for instance, be complicated to some extent by the circumstance that the leases of the conveyed houses were due to expire at different dates; and some question may arise as to the rate at which interest should be calculated. But, as at present advised, and on the basis that the leases of the conveyed houses had all the same length of term unexpired, the figures should be worked out as follows. Take interest at 4 per cent. per annum on £228,224, which I calculate as being £9,128 19s., and add to this the sum of £451 15s., being the excess of the relief afforded by the discharge of incumbrances over and above the rentals previously received from the conveyed houses. The resulting annual sum of £9,580 14s. is the annual amount of income which should be accumulated at compound interest from the rents of the surrendered houses during the unexpired term of the conveyed houses; and the residue of the rents of the surrendered houses during the same term should be paid and applied as income.

Solicitors: *Boodle, Hatfield & Co.*; *Withers & Co.*; *Nicholl, Manisty & Co.*

[*Reported by* L. MORGAN MAY, ESQ., *Barrister-at-Law.*]

A

BURROUGHES *v.* ABBOTT

[Chancery Division (P. O. Lawrence, J.), November 8, 21, 1921]

[Reported [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 38 T.L.R. 167; 66 Sol. Jo. 141]

B

Income Tax—Annual payment—Order of Divorce Court to secure by deed a payment free of income tax—Deed executed securing payment "free of all deductions whatsoever including income tax"—Validity—Income Tax Act, 1842 (*5 & 6 Vict., c.* 35), *s.* 103—*Income Tax Act*, 1918 (*8 & 9 Geo.* 5, *c.* 40), *General Rules applicable to Scheds. A to E, r.* 23 (2).

C *Deed—Rectification—Order of court to secure by deed annual payment free of income tax—Form of words in deed inappropriate to secure freedom from tax.*

In 1907 the Divorce Court ordered the husband of the plaintiff to secure, by deed to be settled by conveyancing counsel of the court, the payment to her of annual sums and that all payments under the order should be free of income tax. In 1909, by a deed drawn by conveyancing counsel of the court, D expressed to be made by way of compromise of disputes between the husband and wife as to what security ought to be given, and in pursuance of the order of the Divorce Court, the husband settled property on trust that the trustees should pay out of the yearly income thereof an annual sum free of all deductions, including income tax, to the plaintiff. The wife was paid the annual sum free of income tax until her husband's death, and now claimed a declaration E that the trustees must continue to pay the annual sum free of income tax, and, alternatively, that the deed should be rectified, so that the annual payment might be made free from income tax without thereby contravening the prohibitions contained in r. 23 (2) of the General Rules applicable to Scheds. A to E to the Income Tax Act, 1918.

Held: the provision in the deed relating to the payment by the trustees of F the annuity free from income tax contravened the prohibitions of s. 103 of the Income Tax Act, 1842 (replaced by r. 23 (2) of the said General Rules) and was void, but the wife was entitled to have the deed rectified so as to provide that the annuity should be payable free from income tax without thereby contravening the prohibitions of the Income Tax Acts.

Blount v. *Blount* (1), [1916] 1 K.B. 230, and *Re Pecks' Settlement, Peck* v. G *Hamilton* (2), [1921] 2 Ch. 237, applied.

Notes. The Income Tax Act, 1918, General Rules applicable to Scheds. A to E, r. 23, was replaced by the Income Tax Act, 1952, s. 506.

Considered: *Re Gordon's Settlement, Hunt* v. *Mortimer*, [1924] 1 Ch. 146. Distinguished: *Whiteside* v. *Whiteside*, [1949] 2 All E.R. 913. Considered: *Jefferson* v. *Jefferson*, [1956] 1 All E.R. 31. Referred to: *Smith* v. *Smith*, [1923] H All E.R.Rep. 362; *Fredensen* v. *Rothschild*, [1941] 1 All E.R. 430; *Stokes* v. *Bennett*, [1953] 2 All E.R. 313.

As to avoidance of agreements for payment without deduction of tax, see 20 Halsbury's Laws (3rd Edn.) 366 et seq.; and for cases see 28 Digest (Repl.) 177 et seq.

I Cases referred to:

(1) *Blount* v. *Blount*, [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176; 28 Digest (Repl.) 178, *716*.

(2) *Re Peck's Settlement, Peck* v. *Hamilton*, [1921] 2 Ch. 237; 90 L.J.Ch. 491; 125 L.T. 756; 65 Sol. Jo. 735; 28 Digest (Repl.) 196, *818*.

(3) *Brooke* v. *Price*, [1917] A.C. 115; 86 L.J.Ch. 329; 116 L.T. 452; 61 Sol. Jo. 334, H.L.; 28 Digest (Repl.) 196, *817*.

(4) *Re Shaw, Smith* v. *Shaw*, [1918] P. 47; 87 L.J.P. 49; 118 L.T. 334, C A.; 28 Digest (Repl.) 197, *821*.

(5) *Stone* v. *Godfrey* (1854), 5 De G.M. & G. 76; 2 Eq. Rep. 866; 23 L.J.Ch. 769; 23 L.T.O.S. 289; 18 Jur. 524; 43 E.R. 798, L.JJ.; 28 Digest (Repl.) 537, *518*.

Also referred to in argument:

Floyer v. *Bankes* (1863), 2 New Rep. 7; 32 L.J.Ch. 610; 8 L.T. 483; 9 Jur.N.S. 684; 11 W.R. 630; reversed 3 De G.J. & Sm. 306, L.C.; 28 Digest (Repl.) 195, *812*.

Re Cain's Settlement, Cain v. *Cain*, [1919] 2 Ch. 364; 88 L.J.Ch. 513; 121 L.T. 496; 28 Digest (Repl.) 172, *695*.

Re Barry's Trusts, Barry v. *Smart*, [1906] 2 Ch. 358; 75 L.J.Ch. 676; 95 L.T. 165; 54 W.R. 621; 50 Sol. Jo. 615, C.A.; 28 Digest (Repl.) 179, *727*.

Wake v. *Harrop* (1862), 1 H. & C. 202; 31 L.J.Ex. 451; 7 L.T. 96; 8 Jur.N.S. 845; 10 W.R. 626; 1 Mar.L.C. 247, Ex. Ch.; 35 Digest 116, *205*.

Welman v. *Welman* (1880), 15 Ch.D. 570; 49 L.J.Ch. 736; 43 L.T. 145; 35 Digest 115, *199*.

Action.

James Samuel Burroughes was married to the plaintiff, Agnes Vivienne Vincent Burroughes, then Agnes Vivienne Vincent Jackson, spinster, on Oct. 26, 1893. On Sept. 11, 1907, a decree nisi for the dissolution of that marriage, pronounced by the Probate, Divorce, and Admiralty Division, was made absolute. By an order dated Nov. 25, 1907, made by the Divorce Court, it was ordered that James Samuel Burroughes should secure by deed to be settled by one of the conveyancing counsel of the court the payment to the plaintiff during their joint lives of the annual sum of £1,400, and should secure the payment of the annual sum of £1,000 to the plaintiff for her life on the death of James Samuel Burroughes, and it was further ordered that all payments under that order were to be free of income tax. By an indenture dated July 20, 1909, expressed to be made in pursuance of the order of Nov. 25, 1907, and by way of compromise of certain disputes between J. S. Burroughes and the plaintiff, his wife, as to what security ought to be given by J. S. Burroughes for the purpose of complying with the order, certain trust premises were settled on trust that the trustees should out of the yearly income pay to the plaintiff the annual sum of £1,400 free of all deductions whatsoever, including income tax during the joint lives of herself and J. S. Borroughes, and after his death of the annual sum of £1,000 free of all deduction whatsoever, including income tax during her life. Clause 16 provided that if J. S. Burroughes should transfer into the name of the trustees investments of a nature authorised by law for the investment of trust funds by trustees producing at the time of such transfer sufficient annual income to pay if such transfer should be made during the joint lives of J. S. Burroughes and the plaintiff the yearly sum of £1,400 free of income tax, and if such transfer should be made after the death of J. S. Burroughes the yearly sum of £1,000 free of income tax thenceforth all the trust premises should be held in trust for J. S. Burroughes, his executors and administrators, absolutely, and the trustees should stand possessed of the investments so transferred to them on trust out of the annual income thereof to pay to the plaintiff the said respective sums of £1,400 and £1,000 free of income tax, and that if the income of the investments as transferred should at any time and from any cause whatever prove insufficient for the payment of such yearly sums respectively in full, resort might be had to the capital thereof from time to time to make good such deficiency. J. S. Burroughes died on Jan. 29, 1912, having paid the annual sum of £1,400 to his wife, without any deduction therefrom of income tax. At the request of the trustees of the settlement the executors of J. S. Burroughes on Jan. 28, 1914, transferred into the names of the trustees investments of a nature authorised by law for the investment of trust funds of an amount sufficient to produce an income after deducting income tax at 1s. 2d. in the £ of £1,000 per annum. The residue of the trust premises were thereupon assigned to the executors, and by a deed dated July 7, 1914, the executors released the trustees of the deed of July 20, 1909, from

all liability in respect of the property subject to the trusts of the deed of 1909, and of their dealings therewith. The executors of J. S. Burroughes paid to the plaintiff the annual sum of £1,000 free of income tax up to the date of the transfer by them of the investments to the trustees of the deed of 1909, and since that time the trustees up to and shortly before the commencement of this action paid the annual sum of £1,000 free of income tax to the plaintiff, but to enable them to do this, in exercise of the powers vested in them by cl. 16 of the deed of 1909, they raised a certain sum by sale of a sufficient part of the annuity fund. This action was brought against the defendants, the present trustees of the deed of July 20, 1909, and the executors of J. S. Burroughes, claiming (i) a declaration that on the true construction of the deed of July 20, 1909, the trustees thereof held the trust funds and securities now subject to the trusts thereof as security for the payment to the plaintiff of the annual sum specified and defined by the order of Nov. 25, 1907, namely, the sum of £1,000 free of income tax, and (ii) in the alternative rectification of the said deed so as to provide that the trust funds and securities now subject to the trusts of the said deed should be held by the trustees thereof as security for the payment to the plaintiff of the annual sum specified and defined by the said order, namely, the sum of £1,000 free from income tax. The executors of J. S. Burroughes pleaded that having regard to the provisions of the Income Tax Acts the agreement in the deed of July 20, 1909, for the payment of the annual sum of £1,000 to the plaintiff in full without deducting income tax was void, and that the plaintiff was only entitled to the payment of the annual sum of £1,000 less income tax.

During the course of the hearing the question was raised by his Lordship as to the jurisdiction of the court to rectify the deed of July 20, 1909, and whether since the deed was executed in compliance with an order made by the Divorce Court, application for such rectification ought not to have been made to the Probate, Divorce, and Admiralty Division, but all parties desiring to avoid the delay and expense of such an application, his Lordship communicated with the President of that Division, who acquiesced in his Lordship's determining the question of rectification, and said that off hand he thought that his Lordship had jurisdiction to deal with the matter as an incident of the cause tried before him.

Rule 23 of the General Rules applicable to Scheds. A, B, C, D, and E to the Income Tax Act, 1918, was as follows:

> "(1) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of £50. (2) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction is void."

By cl. 18 of the deed of July 20, 1909, referred to in his Lordship's judgment, the plaintiff, in consideration of the payment to her of the yearly sums of £1,400 and £1,000 free of income tax, released J. S. Burroughes of his covenant in the deed of separation between them to pay her certain annual sums, and covenanted to accept the provisions thereby made for securing to her the payment of the yearly sums of £1,400 and £1,000, free of income tax, in full discharge and satisfaction of all claims and demands which she then had against J. S. Burroughes in respect of the order of Nov. 25, 1907, so far as it was thereby ordered that J. S. Burroughes should secure by deed to be settled by one of the conveyancing counsel of the court the payment to her during their joint lives of the annual sum of £1,400, and the annual sum of £1,000 to her for her life on his death, and further that she would not at any time thereafter bring or take any action or proceeding whatsoever against J. S. Burroughes for the purposes of enforcing such provision of the order of Nov. 25, 1907, or any of them or otherwise in respect of such provisions or any of them. The tenth recital in the deed of release, dated July 7, 1914, referred to in the judgment in this case, stated that disputes had arisen between J. S. Burroughes and the plaintiff as to what security ought to be given by J. S. Burroughes for the purpose of complying with the provisions of the lastly recited order of

Nov. 25, 1907, relating to the said annual payments of the £1,400 and £1,000 respectively mentioned in the said order.

Ward Coldridge, K.C., and *Mossop* for the wife.

Jenkins, K.C., and *J. N. Gray* for the defendants, the trustees of the deed of July 20, 1909.

Owen Thompson, K.C., and *Bryan Farrer* for the defendants, the executors of the husband.

Cur. adv. vult.

Nov. 17. **P. O. LAWRENCE, J.,** read the following judgment.—The facts of this case, none of which are in dispute, are sufficiently stated in the agreed statement of facts, and I need not recapitulate them. The first question to be decided is whether the provisions contained in cl. 16 of the deed of July 20, 1909, purporting to confer on the plaintiff the right to receive the annuity of £1,000, free of income tax, are void so far as they relate to the tax on the ground that they contravene the prohibitions of s. 103 of the Income Tax Act, 1842, which is now replaced by r. 23 (2) of the General Rules applicable to Scheds. A, B, C, D, and E to the Income Tax Act, 1918.

The solution of this question depends on whether the deed of 1909 falls within the class of permissible agreements of which the settlement dealt with in *Brooke* v. *Price* (3) is an example, or whether it falls within the class of prohibited agreements of which the settlements dealt with in *Blount* v. *Blount* (1) and *Re Peck's Settlement*, *Peck* v. *Hamilton* (2) are examples. It appears from *Brooke* v. *Price* (3) that it is permissible for persons beneficially entitled to the net balance of the income of a trust fund after the income tax thereon has been deducted to make a contract to divide such net balance between themselves, so that one of them receives thereout a fixed annual sum free of income tax, provided that such contract does not purport to affect the right of the trustees, as the persons primarily liable for the tax, to deduct the tax against all their beneficiaries. On the other hand, *Blount* v. *Blount* (1) and *Re Peck's Settlement* (2) show that if the agreement is one to which the trustees in whom the capital of the trust fund is vested are parties, and provides for the payment by the trustees of an annuity free of income tax out of the gross income of the fund, such agreement contravenes the prohibitions of the Income Tax Acts, and the annuitant must submit to a deduction of the tax. If I have correctly stated the result of these decisions it is obvious that the deed of July 20, 1909, falls within the class of agreements governed by the decisions in *Blount* v. *Blount* (1) and *Re Peck's Settlement* (2), and not within the class of agreements governed by the decision in *Brooke* v. *Price* (3). The trustees of the deed of 1909 in whom the capital of the trust fund is now vested are the persons legally entitled to receive the whole income of the fund, and are primarily liable for the income tax payable in respect thereof; they are parties to (or are otherwise bound by the provisions of) the deed of 1909, and by that deed it is agreed that the annuity of £1,000 shall be paid by them to the plaintiff free of income tax out of the gross income, and in case of deficiency, out of the capital. The deed therefore purports directly to affect the right of the trustees to deduct the income tax from the plaintiff's annuity, and consequently contravenes the prohibitions of the Income Tax Acts. The fact that the deed was executed in supposed obedience to an order of the court does not, in my opinion, prevent it from being an agreement which contravenes the prohibitions of the Income Tax Acts, nor does such fact take it out of the mischief aimed at by those Acts. There can, I think, be no doubt that the Divorce Court had ample power to order the payment of the annuities free of income tax and to direct such payment to be secured by deed. The prohibitions of the Income Tax Acts do not apply to such an order (see *Re Shaw*, *Smith* v. *Shaw* (4)), and it is admitted that a deed securing the payment of the annuities free of income tax could have been settled in such a form as not to contravene these prohibitions. In my judgment the order of Nov. 25, 1907, does not operate as an authority to the parties to enter into a contract contravening

the prohibitions of the Income Tax Acts, nor has it the effect of validating those provisions of the deed which do in fact contravene such prohibitions. In the result, for the reasons stated, I hold that the contention of the executors of J. S. Burroughes must prevail, and that the attempt to secure the payment to the plaintiff of an annuity of £1,000 free of income tax pursuant to the order of Nov. 25, 1907, has failed.

The question then arises whether the plaintiff is entitled to have the deed of 1909 rectified. This deed was executed by the testator purporting to act in obedience to the order of Nov. 25, 1907. The order was made against the testator in invitum and is unambiguous in its terms. It is suggested that because, after the order was made, disputes arose between the parties as to what security ought to be given by the testator for the purpose of complying with the order, and because such disputes were ultimately compromised, and such compromise was embodied in the deed, the deed ought to be treated as a contract entered into by the parties in substitution for the security ordered by the Divorce Court. I cannot accede to that suggestion. The disputes and compromise related solely to the nature and amount of the security to be given by the testator on which subject the order was silent. After the making of the order there never was any question as to the amount or character of the annuities; these were fixed by the order, and were throughout the subsequent negotiations treated as definitely settled. If any corroboration of this fact be required, it is to be found in the tenth recital contained in the release of July 7, 1914. In these circumstances I have no hesitation in holding that the deed of 1909 was executed by all parties with the sole intention of complying with the order of Nov. 25, 1907, and in the full belief that it had the effect of securing the payment to the plaintiff of the annuities free of income tax. I am further of opinion that neither the direction in the order that one of the conveyancing counsel to the court should settle the deed nor the fact that the deed of 1909 was settled by such counsel constitutes any bar to the relief now sought by the plaintiff. The conveyancing counsel had no authority or power to vary the amount or character of the annuities. His duty was strictly limited to the settling of a deed to secure the payment of the annuities specified in the order, and judging from the contents of the deed of 1909 I have not the slightest doubt that the conveyancing counsel (as well as the parties) believed that the deed as settled by him did in fact comply strictly with the order. But then it is said that the mistake made by the parties was a mistake in law and that the court has no power to relieve against the consequences of mistakes in law. In my judgment the general proposition that the court has no such power is unsound (see, e.g., *Stone* v. *Godfrey* (5)), but, be that as it may, the proposition, in my opinion, has no application to the facts of this case. I have no doubt whatever that according to the established rules of this court there is ample jurisdiction to rectify the deed of 1909, so as to make it conform to the order of Nov. 25, 1907, and carry out the clear intention of the court and of all the parties to it. Although laches, or even mere delay, may disentitle a plaintiff to rectification of an instrument, yet the period of twelve years which has elapsed in the present case since the deed of 1909 was executed is, in my judgment, sufficiently explained by the fact that the testator during his lifetime, and his executors after his death up to shortly before the commencement of this action, have treated the deed of 1909 as validly securing the payment to the plaintiff of the annuities free of income tax, and both the testator and his executors have accordingly paid (or treated the plaintiff as entitled to the payment of) such annuities in full. In these circumstances the delay in my judgment affords no defence to the claim for rectification.

It was further contended that the plaintiff is precluded from obtaining the relief which she seeks by reason of the provisions of cl. 18 of the deed of 1909. In my judgment this contention cannot prevail. It is obvious (and I shall assume it to be the fact) that cl. 18 was inserted and agreed to by the plaintiff on the footing, and in the belief that by the earlier clauses of the deed the payment of the annuities free of income tax had been secured to her in accordance with the order of Nov. 25,

1907. In these circumstances I am clearly of opinion that cl. 18 does not operate so as to preclude the plaintiff from enforcing her right to have the earlier clauses put into proper form in order to make them conform to the order and effectuate the intention of the court and of the parties. In the result I hold that the plaintiff is entitled to the relief claimed by the second paragraph of the prayer to the statement of claim. In the course of the trial I intimated to the parties that I entertained serious doubts as to whether this court was the proper tribunal to make an order for the rectification of the deed of 1909. My reason for those doubts was that as the Divorce Court was the tribunal which had ordered the deed to be settled and executed it might be said that the Divorce Court was the proper tribunal to deal with any question of rectification. Counsel for the executors did not seriously contest that this court has jurisdiction to entertain and determine the claim for rectification, but even so, the question remained whether it was proper that such jurisdiction should be exercised by this court. As, however, all parties were desirous of avoiding the expense and delay of making an application to the Divorce Court I allowed the case to proceed on the footing that before giving judgment I would consult the President of the Probate, Divorce, and Admiralty Division, and ascertain his views on the point. This I have now done and the learned President has informed me that he thinks that it is very desirable that the parties should not be put to the cost of a separate application to the Divorce Court for the purpose of rectifying the mistake which seems to have been made in carrying out the order of Nov. 25, 1907, and that off-hand he thinks that I have jurisdiction to deal with the matter as an incident of the cause tried before me; he also added that, if any consent of his were thought to be useful, he gave it. In view of the opinion expressed by the learned President, I no longer feel any hesitation in dealing with the claim for rectification. Accordingly I propose to make first a declaration that the provisions of cl. 16 of the deed of 1909 purporting to secure the payment to the plaintiff of the annuity of £1,000 free of income tax, contravene the prohibitions of the Income Tax Acts, and are void so far as they relate to the tax, and secondly, a declaration that the plaintiff is entitled to the rectification of cl. 16 so as to provide that the trust fund now subject to the trusts of that clause shall be held by the trustees as security for the payment to the plaintiff of the annual sum of £1,000 free of income tax, and there will be an order that the deed of 1909 be rectified accordingly.

I have throughout this judgment dealt only with the provisions of cl. 16, because that is the clause which is now in operation, but my judgment applies with equal force to the provisions of the earlier clauses of the deed of 1909 in so far as they purport to secure the payment to the plaintiff of the annuities of £1,400 and £1,000 therein mentioned, free of income tax. As, however, these annuities were paid in full, there seems to me to be no object in going through the form of rectifying these earlier provisions. It follows, however, that in my judgment all payments made to the plaintiff in respect of her annuities by the testator during his lifetime and by his executors up to the date of the transfer of the trust fund to the trustees as well as all payments made by the trustees since that date were rightly made.

There remains the question how the costs of the action ought to be borne. None of the parties is in any way responsible for the unfortunate mistake which has been made. In these circumstances I think that the proper course to adopt is to make an order that the trustees of the deed of 1909 do raise and retain their own costs of this action (to be taxed as between solicitor and client) out of the capital of the trust fund, and to make no order as to the costs of the plaintiff or of the executors; the latter will, no doubt, be entitled to take their costs out of the testator's estate, as in my opinion they were fully justified in defending this action, but as I am not administering that estate I can make no order to that effect in this action.

As to rectification it seems to me that the best form of order would be that the deed of 1909 be rectified by striking out cl. 16, and by substituting in place thereof the clause set forth in the schedule, and wherever the annuities of £1,400 or £1,000

is mentioned in it, to describe it as such an annual sum as, after the deduction of income tax, would leave the fixed sum of £1,400 or £1,000 as the case may be, adopting LORD PARKER's definition of what is permissible in *Brooke* v. *Price* (3).

Solicitors: *B. Trayton Kenward*; *W. J. Fraser & Son*; *Elkin, Henriques & Harford*, for *W. T. de B. Barwell*, Seaford.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SIMPSON AND ANOTHER *v.* CROWLE AND OTHERS

[KING'S BENCH DIVISION (Bray and Lush, JJ.), April 11, 12, 20, 1921]

[Reported [1921] 3 K.B. 243; 90 L.J.K.B. 878; 125 L.T. 607; 37 T.L.R. 658]

County Court—Jurisdiction—Ancillary relief—Injunction—Need for money claim in same proceedings—County Courts Act, 1888 (51 & 52 *Vict.*, *c.* 43), *s.* 56.

The county court has no jurisdiction to entertain a claim for an injunction unless there is also a money claim within the jurisdiction of the court, since an injunction is only a remedy ancillary to a cause of action.

County Court—Jurisdiction—Enlargement—Consent of parties—Want of jurisdiction appearing on face of proceedings—No objection by parties—County Courts Act, 1888 (51 & 52 *Vict.*, *c.* 43), *ss.* 64, 114.

Section 114 of the County Courts Act, 1888 [now s. 66 of the County Courts Act, 1959], **held** not to confer a general power on the county court to enlarge its jurisdiction by consent of the parties, but to be limited by s. 64 of the Act [s. 42 of the Act of 1959]. Where want of jurisdiction appeared on the face of the proceedings and the parties proceeded with the trial without raising the question of jurisdiction, this did not confer jurisdiction on the county court judge.

County Court—Appeal to Divisional Court—Right of respondent to raise points not taken by him in county court.

The respondent to an appeal to the Divisional Court from an order of the county court, unlike an appellant, is not prohibited from raising points not taken by him at the trial.

Notes. The County Courts Act, 1888, was repealed by the County Courts Act, 1934, which is now replaced by the County Courts Act, 1959. Section 39 of the latter Act replaces s. 56 of the Act of 1888 and the maximum amount claimable in the county court has been raised to £400, after set off. Sections 42 and 66 of the Act of 1959 replace respectively ss. 64 and 114 of the Act of 1888.

Since the Administration of Justice (Appeals) Act, 1934, s. 2 (18 HALSBURY'S STATUTES (2nd Edn.) 524), appeals from the county court lie to the Court of Appeal and not as formerly to a Divisional Court of the High Court except that in certain cases appeals still lie to the High Court, i.e., in bankruptcy matters; appeals from orders made by a county court under the Settled Land Act, 1925 (ibid., vol. 23, p. 12) and the Land Registration Act, 1925 (ibid., vol. 20, p. 940); certain enactments which provide for appeal from the county court to the High Court saved by s. 2 (2) of the Act, Administration of Justice (Appeals) Act, 1934, which subsection has been replaced by s. 205 (5) of the County Courts Act, 1959.

As to jurisdiction of county court to grant an injunction, see 9 HALSBURY'S LAWS (3rd Edn.) 142 et seq.; and for cases see 13 DIGEST (Repl.) 381, 382. For the County Courts Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 102.

Considered: *Upton* v. *Farmer* (1930), 142 L.T. 526. Referred to: *De Vries* v. *Smallridge* [1927] All E.R.Rep. 613; *Olive* v. *Paynter*, [1932] 2 K.B. 666; *Westminster Bank, Ltd.* v. *Edwards*, [1942] 1 All E.R. 470.

Cases referred to:

(1) *R.* v. *Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone*, [1921] 2 K.B. 694; 90 L.J.K.B. 772; 125 L.T. 588; 65 Sol. Jo. 552; sub nom. *R.* v. *Parsons, Ex parte Malone*, 37 T.L.R. 546, C.A.; 13 Digest (Repl.) 381, *104.*

(2) *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152; 58 J.P. 495; 42 W.R. 306; 10 T.L.R. 240; 9 R. 202, C.A.; 13 Digest (Repl.) 491, *1199.*

(3) *Taylor* v. *National Amalgamated Approved Society*, [1914] 2 K.B. 352; 83 L.J.K.B. 1020; 110 L.T. 696; 78 J.P. 254; 12 L.G.R. 525, D.C.; 13 Digest (Repl.) 468, *921.*

Also referred to in argument:

Kelly v. *National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236; 113 L.T. 1055; 31 T.L.R. 632; 59 Sol. Jo. 716, C.A.; 13 Digest (Repl.) 381, *101.*

Stiles v. *Ecclestone*, [1903] 1 K.B. 544; 72 L.J.K.B. 256; 88 L.T. 294; 51 W.R. 411; 47 Sol. Jo. 257; 67 J.P. Jo. 76, D.C.; 13 Digest (Repl.) 381, *103.*

Appeal from Whitehaven County Court.

The facts appear sufficiently from the judgments.

Cyril Atkinson, K.C., and *Cremlyn* for appellants.

F. P. M. Schiller, K.C., and *C. Herbert-Smith* for the respondents.

Cur. adv. vult.

April 20. The following judgments were read.

BRAY, J.—This was an appeal from the judgment of the learned county court judge at Whitehaven, dismissing with costs an action brought by the appellants in which they claimed an injunction restraining the defendants from interfering with the enjoyment by the plaintiffs of the use and benefits of the Hound Trailing Association. The plaintiffs and the defendants were members of this voluntary association, and the defendants were the members of the committee and, acting under r. 20, had expelled the plaintiff Simpson and suspended the plaintiff Latton from their membership of the association. The plaintiffs claimed that the proceedings of the committee were contrary to natural justice, that they had no notice, or no sufficient notice, of the charge or charges against them, and no fair opportunity of meeting them, and that two of the defendants, Jefferson and Jackson, adjudicated on the matter although they were interested in the competition and in the hounds concerning which the dispute arose and were disqualified by r. 19. The county court judge decided against the plaintiffs, and they appealed on the ground that the judgment of the county court judge was bad in law and that there was no evidence to support the learned judge's findings of fact. The defendants, the respondents in the hearing before us, in addition to disputing the grounds of appeal, raised the further point that the judge had no jurisdiction to try the case. These contentions of the parties raised interesting and difficult points, and we therefore took time to consider our judgment.

I want to deal with the further point first. If the judge had no jurisdiction to try the case on its merits, neither have we. The claim, in the particulars of claim, was for an injunction only, but before the hearing the plaintiffs' solicitors wrote on Nov. 22, intimating that they should claim £50 damages. They did not, however, at the trial, ask for any amendment, and no evidence was given of damage. The point as to the jurisdiction of the learned judge to try the case was never raised in any way at the trial, and the learned judge was never asked to give, nor did he give, any decision on this question. The trial proceeded throughout on the footing that the learned judge had jurisdiction. The defendants' con-

tentions before us were that the county court has no jurisdiction in an action (not on the equity side) for an injunction alone, and that it can only be given where there is a cause of action within s. 56 of the County Courts Act, 1888; that in the present case the plaintiffs had no cause of action at all which fell within s. 56, first because no action would lie for damages against the members of the committee, and secondly, because if such an action did lie there was nothing to show that the damages would not exceed £100. Reliance was placed by the defendants on the judgment of the court in *R.* v. *Cheshire County Court Judge, Ex parte Malone* (1). I have come to the clear conclusion that in that case the court decided that when the only claim in the plaint is for an injunction the judge in the county court has no jurisdiction, at all events unless it is shown that there can be a cause of action for damages and for damages not exceeding £100. The right to an injunction is only a remedy ancillary to a cause of action within s. 56. In my opinion, therefore, the learned judge had no jurisdiction to try this case.

The appellants, however, contended that there was conduct on the part of the defendants which was equivalent to a consent, such as would give jurisdiction, or that their conduct created an estoppel which prevented their raising this point, that there was a want of jurisdiction. Section 64 of the County Court Act, 1888, undoubtedly gives jurisdiction where the parties sign a memorandum agreeing that the judge shall have jurisdiction, but this is expressly confined to cases in the King's Bench Division. Here there was no such memorandum. But s. 114 has also to be considered. It was much relied upon by the appellants. It is in these words:

> "Whenever an action or matter is commenced over which the court has no jurisdiction, the judge shall, unless the parties consent to the court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the court had jurisdiction therein, and the plaintiffs had not appeared, or had appeared and failed to prove his demand or complaint."

This section does not in terms give jurisdiction, but it appears to absolve the judge from the obligation to strike the case out. I can hardly think that this consent, which need not be in writing, gives the judge jurisdiction to try any cause of action, whatever it might be, and whether in the King's Bench Division, or any other division. Perhaps it is not necessary to decide this question, because I think in any event it applies only when an actual assent is given after the question of jurisdiction has been raised. Here it was not raised, nor was there any actual assent. I do not think that the mere fact that the parties proceeded with the trial without the point being raised at all comes within this section. Lastly, I have to deal with the question of estoppel by conduct. Can estoppel by conduct give jurisdiction? We were referred to *Farquharson* v. *Morgan* (2). I think that that case is distinguishable on its facts. No court could have given the relief claimed, but the principle is laid down very broadly by the court. LORD HALSBURY says ([1894] 1 Q.B. at p. 556):

> "In this case, with every disposition to decline to interfere with the proceedings in the county court on the ground that, if it is possible for a person to render himself incapable of applying for a prohibition in such a case as this, the appellant has done so, I feel nevertheless constrained to decide that the writ must issue to prohibit further proceedings on the order of the county court so far as it is applicable to that portion of the award which is in respect of matters outside the Agricultural Holdings Act. It has been long settled that, where an objection to the jurisdiction of an inferior court appears on the face of the proceedings, it is immaterial by what means and by whom the court is informed of such objection. The court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case

depend on some matter of fact as to which the inferior court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the judge of such court, therefore must know, or ought to have known that he was acting beyond his jurisdiction. I find no authority justifying the withholding of a writ of prohibition in such a case."

In this case the want of jurisdiction appeared on the face of the proceedings. The plaint as it stood claimed relief which the county court could not give. I have come to the conclusion that here there was no estoppel. It follows, therefore, that in my opinion, the county court judge had no jurisdiction to try this case.

Then it was said that the point cannot be raised on an appeal which was not raised in the county court. But the respondents are not prohibited, like the appellants, from raising points not raised at the trial. Our attention has been called to *Taylor* v. *National Amalgamated Approved Society* (3), but it was the appellants there who were trying to raise the want of jurisdiction, and it was quite different in its facts. This makes it unnecessary and perhaps as impossible for this court as it was for the county court judge to go into the merits of the appeal, and as these questions may come before another court I think we ought to refrain from expressing any opinion on them. It was open, of course, to the respondents to raise this point before us, and we must give them the benefit of it. If raised at the trial, and the judge decided that he had no jurisdiction, and dismissed the action on this ground, I think the judgment should make it plain that the ground of the judgment was want of jurisdiction. I think it should have run: The judge, being of opinion that he has no jurisdiction to try the action, doth dismiss it. This will make it plain that the plaintiffs, if they care to do so, can bring the action in the High Court, and that the judgment cannot be pleaded as an estoppel. I think we should alter the judgment in this way.

We have now to deal with the costs of the trial and of this appeal. Following the precedent in *Farquharson* v. *Morgan* (2), where LORD HALSBURY said ([1894] 1 Q.B. at p. 557):

> "Considering the course of the litigation, I think the appellant ought not to have any costs of the proceedings except in this court, where he has succeeded."

Therefore, I think there should be no costs in the court below. Now as to the costs of the appeal. The circumstances here, of course, are different. In that case the appellant had to go to the court to ask for a prohibition. In this case the case comes before us at the instance of the plaintiffs, and not the defendants. The appellants have obtained a distinct advantage by their appeal. They have got rid of a decision on the merits. If they bring an action in the High Court the judgment, as I have said, can no longer be pleaded as an estoppel. They have not, of course, gained all they wanted, but they have gained something. I think there should be no costs of the appeal.

LUSH, J.—It is, in my opinion, clear, from the judgment of the Court of Appeal in *R.* v. *Cheshire County Court Judge, Ex parte Malone* (1), that the learned county court judge had no jurisdiction in fact to try this action. The plaintiffs not only did not claim damages, but they could not have claimed them successfully. They sued the committee, it is true, and not the association of which they were members. But the committee were acting as arbitrators, and having acted bona fide were not liable. As the Court of Appeal have held, an injunction can only be granted or such a claim entertained in the county court where the relief is ancillary to the relief to which a plaintiff establishes his right in accordance with s. 56 of the County Court Act, 1888. In other words, a plaintiff cannot make a claim in a county court for an injunction unless he proves that he is entitled to payment of a debt or damages or a demand in the nature of a debt, and that the amount of the debt or damages is within the county court limit. But it was contended that the defendants (the respondents in the appeal)

A could not take this point, and it was so contended on two grounds. First on the ground that the point was not taken in the court below, and secondly on the ground that the defendants consented to the exercise of jurisdiction by the learned judge. I do not think that the answer which counsel for the defendants made to the first of these two grounds, namely, that it is open to a respondent to support a judgment on any ground, is a good answer. That contention involves, I think, B a misconception. If a successful defendant (respondent on the appeal) raises the contention that the injunction or whatever the relief may have been was rightly refused by the county court judge because he had no jurisdiction to grant it, he is not supporting the judgment; he is asserting that the judge was wrong in giving any judgment at all. But there are other answers to the contention. In the first place the point could not then have been successfully taken. The Divisional C Court had decided in *R.* v. *Cheshire County Court Judge, Ex parte Malone* (1) that there was jurisdiction, and the case had not then gone to the Court of Appeal. The county court judge was bound by that decision, and to take such a point and ask the judge to give effect to it would have been idle. But apart from that we should be obliged when the absence of jurisdiction was pointed out to us, to hold that there was none. We could not affirm a judgment and ignore the fact that D the action ought not to have been heard. The question of jurisdiction is one for the court, and it would be our plain duty to hold that there had been an absence of jurisdiction, if we were satisfied that it was so. I wish to add, with regard to this point, that a case which was not cited to us in argument—we have had our attention called to it—*Taylor* v. *National Amalgamated Approved Society* (3), may seem to show that if no objection is taken to the jurisdiction in the county court, E this court cannot take notice of the fact that there was no jurisdiction when that fact is brought to our notice. In my opinion, that case has no real bearing on the question before us. The point there was this: The National Insurance Act, 1911, provides that disputes shall be decided according to the rules of the society, and the society's rules provide for arbitration. The dispute, therefore, ought to have gone before an arbitrator. The appellant (the defendant), who had never raised F that point in the county court, sought to upset the judgment on the ground that the county court judge had no jurisdiction. It was held that, not having relied on this in the county court, he could not rely upon it in this court; but the want of jurisdiction there was not a want of jurisdiction of the county court as such; there was no question of the county court judge having exceeded his limited statutory jurisdiction—he had jurisdiction so far as the County Courts Act was con- G cerned. There was no excess of jurisdiction. All that the court held was that as the arbitration had not been insisted on, it was too late to insist on it when the case came before the Divisional Court by way of appeal. Then, did the defendants consent to the learned judge trying the action? And if so, did he obtain a jurisdiction which otherwise he would not have possessed or are the defendants estopped from asserting that there was none? In my opinion, there was no consent, in fact, H to any enlargement of the learned judge's jurisdiction—no enlargement of jurisdiction was suggested. The defendants were submitting to the judge trying the action—not consenting to it.

But even if there was consent, that does not, in my opinion, get rid of the difficulty. The jurisdiction is limited by statute, and power is given to the judge in some cases, and in some cases only, to try actions which are outside the I jurisdiction if consent is given, and given in a formal way. Section 64 of the Act enables a county court judge to try certain actions if the parties consent, and that consent is signified by a memorandum in writing. If it had been intended that, whatever the nature of the case was, the parties might consent to its being tried in a county court, the legislature would not have provided that in this limited class of cases consent might be given. Section 67 which confers equity jurisdiction on a county court judge, makes no corresponding provision. It was said that s. 114 implies that parties may consent to any kind of case being tried in a county court. I do not think that one can extract that meaning from the section. One must

read it in connection with s. 64 to which I have referred. It does not purport to confer a general power to enlarge jurisdiction by consent. It deals with the power to award costs and nothing more. The section would really be satisfied by confining it to cases in which express power to consent has been properly given under s. 64, or possibly to cases where the action has been brought in the wrong district. A very large consequence would follow if we were to hold that any kind of action can be tried and a binding judgment given in a county court provided the parties to the proceedings consent to the court trying it. Actions for a mandamus, or for a mandatory order to compel the performance of a public duty; actions to prevent the infringement of a patent; actions involving questions of franchise, are instances of cases with which a learned county court judge could lawfully deal if consent, express or implied, was given. In my opinion, no general power to enlarge jurisdiction by consent is given by s. 114, and there is no such power. Although not identical with this case, I think that the judgments of the Court of Appeal in *Farquharson* v. *Morgan* (2) support this view. The court there held that a county court judge who had, under an erroneous view, assumed jurisdiction in proceedings under the Agricultural Holdings Act ought to be prohibited from further proceedings, although the party applying for prohibition had consented to what had been done. It is true that that was a case of prohibition, but, in my opinion, the same principle applies to an appeal. I think that it applies to proceedings regulated by the County Courts Act as well as the proceedings under the Agricultural Holdings Act when the subject-matter of the proceedings was altogether outside the jurisdiction of the court. For these reasons I think we ought to hold that the judgment was wrong and to enter judgment for the defendants in the form stated by my Lord, whose judgment I have had an opportunity of reading. I agree also as to costs. I would just add this: that if further proceedings are taken—I have said nothing about the merits as we cannot deal now with them—I would suggest that the parties might agree to a fresh investigation by an agreed tribunal. The plaintiffs, upon whom a serious stigma has been imposed, know now what the precise charge is, and that difficulty has now been remedied.

Preliminary objection upheld.

Solicitors: *William Charles Crocker*, for *Wood, Lord & Sumner*, Whitehaven; *Helder, Roberts & Co.*, for *H. Braithwaite*, Whitehaven.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

WESTWOOD *v.* HEYWOOD

[Chancery Division (Astbury, J.), May 26, 27, June 13, 14, 15, 1921]

[Reported [1921] 2 Ch. 130; 90 L.J.Ch. 515; 125 L.T. 761; 37 T.L.R. 851; 65 Sol. Jo. 753]

Easement—Water—Implied grant—Farms in common ownership—Enjoyment by tenant of one to water from other—Purchase by defendant of farm providing water—Sale of farm to plaintiff—Right of plaintiff to water—Conveyancing Act, 1881 (44 *& 45 Vict., c.* 44), *s.* 6 (2).

Two farms, R. and E., were in common ownership and the tenants of R. had for many years enjoyed a supply of water from a spring on E. without interruption from the tenants of E. The owner granted the defendant a tenancy of E. from year to year and during its currency sold the freehold of R. to the plaintiff. Subsequently the defendant purchased the freehold of E. There had been no mention of water rights in either the tenancy agreements or in the conveyances, nor any reservation from the general terms of the grant.

Held: a reservation of water right must be implied in the tenancy agreement of the defendant, and, as the owner was enabled to grant the full benefit of such water right, it passed under s. 6 (2) of the Conveyancing Act, 1881, to the plaintiff when he acquired the freehold of R.

Notes. Section 6 (2) of the Conveyancing Act, 1881, has been replaced by s. 62 (2) of the Law of Property Act, 1925; see 20 Halsbury's Statutes (2nd Edn.) 561.

As to implied grant of an easement, see 12 Halsbury's Laws (3rd Edn.) 538; and for cases see 19 Digest 38 et seq.

Cases referred to:

(1) *Watts* v. *Kelson* (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.JJ.; 19 Digest 45, *250*.

(2) *Quicke* v. *Chapman*, [1903] 1 Ch. 659; 72 L.J.Ch. 373; 88 L.T. 610; 51 W.R. 452; 19 T.L.R. 284, C.A.; 19 Digest 37, *191*.

(3) *Thomas* v. *Owen* (1887), 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162; 52 J.P. 516; 36 W.R. 440, C.A.; 19 Digest 34, *166*.

(4) *Coutts* v. *Gorham* (1829), Mood. & M. 396, N.P.; 19 Digest 38, *201*.

(5) *Davies* v. *Marshall* (*No. 1*) (1861), 1 Drew. & Sm. 557; 4 L.T. 105; 25 J.P. 548; 7 Jur.N.S. 720; 9 W.R. 368; 19 Digest 39, *202*.

(6) *Cable* v. *Bryant*, [1908] 1 Ch. 259; 77 L.J.Ch. 78; 98 L.T. 98; 19 Digest 175, *1256*.

(7) *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; 69 L.J.Ch. 618; 83 L.T. 155; 48 W.R. 684; 31 Digest (Repl.) 590, *7092*.

Witness Action in which the plaintiff, the owner of Roxwell Farm and cottages, asked for a declaration that he was entitled to a supply of water from Elm Farm, on which a spring was situated, which was owned by the defendant, as the same appertained or was reputed to appertain thereto and was enjoyed therewith at the date when Roxwell Farm was conveyed to him on June 14, 1915.

The relevant facts as stated by his Lordship in his judgment were as follows. There was a spring on the part of the property now owned by the defendant which, prior to 1905, overflowed, and the overflow water ran in an easterly direction through an open ditch in the fields towards the property now owned by the plaintiff where it was stored in a holding-up tank from which Roxwell Farm and the cottages were supplied. Originally the spring had simply overflowed without obstruction. Some years before 1905, Luckin, the then tenant of the defendant's farm, in order to get a better supply of water, put in a ram close to the spring to force up the water to Elm Farm, which was situated on slightly higher ground than the spring. After the ram had been installed the water in the spring worked the ram, but the overflow still continued to supply Roxwell Farm as before,

subject to the slight diminution in the quantity of water taken by the ram which was inappreciable. Prior to the tenancy of Luckin, Roxwell Farm and the cottages had been occupied for many years, and there was no evidence to show that the supply of water enjoyed therewith had ever been interfered with by the tenants of Elm Farm. In 1905 the sanitary authority objected to the water supply coming through an open ditch and directed it to be protected. Thereupon the common owner of both farms constructed a line of pipes from the spring, along the site of the old ditch, to Roxwell Farm and the cottages, the outlet pipe at the spring being at nearly the same level as the outlet pipe to the ram. On the Roxwell Farm side of the spring a stopcock was placed in the pipe by which the water could be cut off from Roxwell Farm. The ram would not work unless there was about a two foot head of water in the spring, and the defendant suggested that the stopcock was put in to cut off the water supply to Roxwell Farm should the head of water get so low as to endanger the sufficient feeding of the ram. In 1908 Webb, the then tenant of Roxwell Farm, obtained a written tenancy agreement from year to year from the new owner, Shaw, which made no reference to any water supply. In 1911 the defendant, who had succeeded Luckin as tenant of Elm Farm, also obtained a tenancy agreement from year to year, in which no reference was made to the spring, nor was there any reservation in favour of the landlord and tenants of Roxwell Farm of water rights. In June, 1915, the plaintiff bought the freehold of Roxwell Farm, and in the conveyance there was no mention of water rights. In October, 1915, the defendant bought the freehold of Elm Farm, and in the conveyance there was no mention of water rights nor any reservation from the general terms of the grant.

Luxmoore, *K.C.*, and *Henry Johnston* for the plaintiff.
Micklem, *K.C.*, and *Lavington* for the defendant.

ASTBURY, J., stated the facts and continued: The plaintiff contends that at the date of the conveyance to him there was enjoyed with Roxwell Farm, which he bought, a formed and regular piped water supply, and that the right has passed to him under s. 6 (2) of the Conveyancing Act, 1881. The defendant has raised a number of points, some of which are interesting and difficult. He contends that prior to 1905, when the pipes were put in, the Elm Farm tenant was in sole possession of this spring, he having put in the ram, and there being no reservation from his tenancy of any rights in favour of anyone else. He contends that the alterations in 1905 must have been made with the consent of Luckin, then tenant of Elm Farm, and that it should be inferred that the stopcock was put in for his protection, and that the fact of its presence made the Roxwell Farm water supply precarious and dependent on the person in control of the stopcock, which could not be operated without the consent of the tenant of the land on which it was situated; and he asks me to infer from the existence of the stopcock that the water supply to Roxwell Farm was subject to the prior rights in the Elm Farm tenants, which must have existed and been then recognised.

Before dealing with these points, I think it is necessary to refer shortly to the conditions under which these parties purchased, because a great deal of the trouble which has led to this dispute has been caused by the action of the solicitors who acted for the vendor when the plaintiff and the defendant purchased their farms. The facts relating to the plaintiff's purchase with regard to the water supply are somewhat lengthy, and I do not propose to go through them in detail. A requisition was made, demanding the right to the water, which was contested for some time. On Mar. 16, 1915, the plaintiff's solicitors wrote to the vendor's solicitors:

> "With regard to our requisition, the question of the water supply is a very serious one for our client who purchased the property with the present supply, and this must be assured to him."

To that letter the vendor's solicitors replied:

A "The vendor has no knowledge that the water supply is defective, and it is in precisely the same state as when your client agreed to purchase."

That is not a very candid answer. The plaintiff's solicitors then wrote on Apr. 19:

"We are sorry you do not appreciate the question we have raised; it is, that the purchaser wishes to be assured that he will always have the right to B the supply of water from the present source which was in existence at the date of his purchase, and that the vendor, and persons deriving title under him, will not deprive the purchaser of that right."

That is answered by a letter on Apr. 23, in which the following passage occurs:

"We have seen the agents with regard to your previous letters, and they assure us that your client will be entitled to a continuance of the present C water supply."

In consequence of that letter, the plaintiff's solicitors put in the draft conveyance the words: "Together with the existing rights or easements of the supply of water to the said hereditaments," which were struck out by the vendor's solicitors. After that had been done the vendor's solicitors, on May 11, wrote as follows:

D "It is distinctly understood as between the purchaser, the vendor, and ourselves that the existing easement for the supply of water at present enjoyed in connection with Roxwell Farm and premises shall pass with the conveyance of the property, and no express words need appear in the conveyance, particularly as Messrs. Pike and Corfield, on Mr. Shaw's behalf, object."

These letters were written on behalf of the equitable owner who had agreed to E purchase from Shaw, and who had not yet taken his conveyance. The plaintiff's solicitors then wrote that before they could complete the purchaser must be assured of the supply of water, and on May 14, the vendor's solicitors confirm their statement that the present supply of water is assured, and that it passes by conveyance to the purchaser. There is not the slightest doubt that the plaintiff purchased these premises with the existing water supply, and in the belief, and F with the assurance of the vendor's solicitors, that it would pass to him under his conveyance. When the defendant came to purchase a few months later, he was treated, if anything, even worse than the plaintiff. He expressly asked if there was any easement known to the vendor's solicitors affecting this property, and, they replying that there was not, he took his conveyance in the belief that it was made to him free from any reservation, easement, or restriction of this character. G On these facts the defendant contends that the plaintiff really relied on the solicitors' assurance, and did not in fact obtain any grant of this water supply. He also contends that at the date of the indenture of conveyance to the plaintiff, the defendant was, and had for some time been, in possession of Elm Farm, including the field in which the spring is situated, under his tenancy agreement of 1911. To that the plaintiff has replied that Webb was for many years before 1905 tenant H of Roxwell Farm, that by a tenancy agreement of September, 1908, Roxwell Farm was re-let to Webb on a yearly tenancy, and that any right of the defendant under his tenancy agreement of 1911 was subject to the prior rights of Webb under his agreement of 1908.

The plaintiff relies on the rule, exemplified in *Watts* v. *Kelson* (1), that his conveyance, coupled with s. 6 (2) of the Conveyancing Act, 1881, assured to him the I right to the water supply then in fact used and enjoyed by the tenants of Roxwell Farm. In answer to this the defendant sets up primarily his tenancy agreement of 1911, and relies on the decision in *Quicke* v. *Chapman* (2). I do not propose to go through the facts of that case, because they are wholly different from those of the present, but it is laid down that the general words in a grant are to be restricted in equity, as well as in law, to that which the grantor has then power to grant; and it is contended that in 1915, having already leased the unrestricted right in this spring to the defendant, Shaw, the owner or reversioner of these premises, had no right to convey, expressly or by implication, to the plaintiff this

water easement; the defendant also contends that the easement ought in fact to be inferred to be a precarious one, having regard to the existence of the stopcock and the circumstances under which the ram was put in by the tenant of Elm Farm. It is clear that until this dispute the tenants of Roxwell Farm had enjoyed a water supply through the pipes without interruption since 1905, and prior to that date they enjoyed without any appreciable interruption the flow of water from this spring down the channel in the field. The late tenant, Webb, says that in 1905 he complained to the sanitary authorities and the common owner laid the pipes and did the work, notwithstanding the fact that there was a tenant in possession of the field in which this spring was situated. There was never any stoppage or interruption of this water supply, apart from that caused by dry weather. The agent of the late owner was called, and said that the key of the stopcock was always kept by him, and was under his control, and not under the control of the tenant of the field where the spring was. He said that he had cut off the water by means of the stopcock on certain occasions, principally in the interest of Roxwell Farm. He said that occasionally there was an airlock in the pipes supplying Roxwell Farm, and the stopcock was used in order to get rid of it. He also said that the stopcock was used when it was necessary to clean the filter beds, and occasionally to help the ram, the effect on the ram of turning off the stopcock being to raise the head of water, as none was drawn off for Roxwell Farm. It is impossible to draw the inference the defendant asks me to draw from the presence of the stopcock, which was never put in until the tenant of Roxwell Farm, owing to the action of the sanitary authority, insisted on his water supply being made right. The stopcock was put in the pipes supplying Roxwell Farm as part of the work for the benefit of those premises. I am, therefore, unable to draw any inference in favour of the defendant from the presence of the stopcock, nor do I think it is really material to the point on which the case must be decided.

With regard to the defendant's next point, upon the rule in *Quicke* v. *Chapman* (2), I am not satisfied that in 1915 the vendor to the plaintiff was in any way prevented or restricted in his right to grant this water supply to the purchaser of Roxwell Farm. In the first place, when the lease from year to year was granted in 1911 to the defendant, the landlord had already granted a similar lease to the tenant of Roxwell Farm which, in my judgment, carried the right to the enjoyment of this water and, under the rule laid down in *Thomas* v. *Owen* (3), I think the tenancy agreement of 1911 granted to the defendant must be read with an implied reservation of this right of water which had previously been granted and assured to the tenants of Roxwell Farm. If I am right on that point, the case is at an end, because there was nothing in 1915, when the conveyance was made to the plaintiff, to prevent the owner granting the use with the full benefit of the existing water supply then enjoyed, which, with the absence of this tenant right in the defendant, clearly brings the case within *Watts* v. *Kelson* (1), and other authorities of that character.

An alternative point, however, has been taken, which I shall only mention because it is an interesting one. Assuming that the defendant, as tenant from year to year under his agreement in 1911, was, contrary to what I believe, entitled to interfere with this water supply, then the plaintiff contends that the rule in *Quicke* v. *Chapman* (2) has no application, but that, on the contrary, the rule in *Watts* v. *Kelson* (1) applies, even if the quasi-servient and quasi-dominant tenements were in lease at the date of the grant, and for that purpose the plaintiff relies on *Coutts* v. *Gorham* (4), which is referred to in extenso in GALE ON EASEMENTS (9th Edn.) at p. 124 [see 13th Edn. at p. 96], *Davies* v. *Marshall* (5), and upon the recent case of *Cable* v. *Bryant* (6). Here again I am not going to spend any time in dealing with this point, because I have already decided the case upon the earlier one, but it is clear from those authorities that the fact that the quasi-servient tenement was in lease, at the date of the grant to the plaintiff, does not entitle the grantor subsequently to derogate from that grant by passing any interest in his reversion, dependent upon the defendant's existing lease, to any other person

A in derogation of the rights granted to the plaintiff on the termination of the lease. The grant does not operate against the lessee, but it takes effect immediately on the determination of his interest.

The defendant, however, is not satisfied to let the matter rest there because he says *Coutts* v. *Gorham* (4) was a case at law, and in the other two cases relied on by the plaintiff there was an actual surrender of the leasehold interest. In the B present case the defendant was tenant from year to year at the date when he took his conveyance on Oct. 8, 1915, and his counsel contends that *Coutts* v. *Gorham* (4) does not apply, because, since the Judicature Act, 1873, the equitable right to keep the tenant interest on foot, notwithstanding the merger at law, must now prevail. It is a startling proposition, but it has been contended without hesitation that the defendant, when he took his conveyance in fee simple, was C entitled in equity to keep alive his tenant interest under his yearly tenancy, I suppose, in perpetuity. I presume that is more to his benefit in the circumstances of this case than to rely on the fee simple, which, granted in derogation of the plaintiff's rights is of no use to him. The merger rule relied on is conveniently referred to by FARWELL, J., in *Ingle* v. *Vaughan Jenkins* (7) where he approves of the proposition in LEWIN ON TRUSTS (10th Edn.), p. 889 [see 15th Edn. at D p. 665] and is as follows:

> "The principle by which the court is guided is the intention; and in the absence of express intention, either in the instrument or by parol, the court looks to the benefit of the person in whom the two estates became vested."

It is quite true, as FARWELL, J., points out, that the rule is not confined to charges, E but can be extended as he described, but whether it has any application to the present case is, I should think, extremely doubtful.

Assuming that the point upon which I decide this case, under *Thomas* v. *Owen* (3), were out of the way, I am not disposed to hold that, in the circumstances of the present case, the defendant can rely on any equitable non-merger of his yearly tenancy. It is contended that, after acquiring the fee simple, he can control, as F it were, the reversion in equity, which he thus acquires, from being bound in equity to recognise the water rights of Roxwell Farm, by which it is plainly bound on the hypothesis I have referred to. I doubt whether there is any continuing relationship of landlord and tenant in equity, any more than at law, in this particular case, and further, having regard to the circumstances which took place prior to the acquisition of the defendant's interest and his conveyance, I think he expressly G intended to acquire the fee simple in lieu of his tenant interest, and also intended, in taking the fee simple, as he did, to rely on the representation of the vendor's solicitors that the fee simple itself freed him from any liability to any easement or restriction such as the plaintiff in this case contends for. For these reasons, I think the plaintiff succeeds in this case, and there must be judgment for him with costs, and a declaration in the terms asked for in the statement of claim.

H Solicitors: *Sweetland & Greenhill*; *W. Hilliard & Ward.*

[*Reported by* J. B. B. MACMAHON, ESQ., *Barrister-at-Law.*]

FRENCH MARINE *v.* COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ

[House of Lords (Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor, and Lord Wrenbury), May 5, 6, July 18, 1921]

[Reported [1921] 2 A.C. 494; 90 L.J.K.B. 1068; 125 L.T. 833; 37 T.L.R. 923; 15 Asp.M.L.C. 358; 27 Com. Cas. 69]

Shipping—Charterparty—Frustration—Payment of hire in advance—Charter period extended through voyage not being completed—Applicability of advance payment of hire clause to extended period—Charter terminated by requisition of ship—Right of charterers to repayment of part of hire paid by them.

By cl. 1 of a charterparty shipowners chartered to charterers a ship for four months, hire to be £9,250 per month, and pro rata for any fractional part of a month until re-delivery of the ship to owners as therein stipulated. Payment of hire was to be made monthly in advance. Should the ship be on a voyage at the expiration of the period fixed by the charter, the charterers were to have the use of the ship at the rate and on the conditions therein stipulated to enable them to complete the voyage, provided always that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. In the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, damage to hull, or other accident preventing the working of the vessel for more than twenty-four hours, the hire was to cease until the ship was again in an efficient state to resume her service, but should the vessel be driven into port, or to anchorage by stress of weather, and in certain other events, the time so lost and expenses incurred were to be for the charterers' account. In the event of the vessel being lost or missing, the hire was to cease from the date when she was lost or last spoken or seen, and hire paid in advance and not earned was to be returned to the charterers, who were to have a lien on the ship for all moneys paid in advance and not earned. The period fixed by the charter expired on Aug. 10, 1919. In the previous July the charterers had loaded the ship at Antwerp with a cargo of coal for Toulon, intending that she should return to Great Britain with a cargo of mineral, but on July 14 the Shipping Controller notified that after completion of her discharge at Toulon the ship was required to go to Australia. On Aug. 10 the charterers paid a month's hire in advance. The ship proceeded to Toulon, but the discharge of her cargo was not completed until Aug. 16. On that day the owners took delivery of the ship at Toulon without prejudice to their rights, and under the requisition she was sent to Australia. On a claim by the charterers that in these circumstances they were only liable for a fractional portion of a month's hire, namely, from Aug. 10 to 16, when they re-delivered the ship to the owners,

Held: (i) the frustration of the charter due to the requisition of the ship resulted, not in the charter being rescinded ab initio, but in its being terminated; both parties were thereupon released from its further performance, but accrued rights remained untouched and enforceable and any payment previously made under the charter would not be disturbed; therefore, the charterers were not entitled to the reimbursement of the payment made by them on Aug. 10, less the sum for which they admitted that they were liable.

(Viscount Finlay and Lord Wrenbury dissented on this point on the construction of the charter.)

(ii) the provision for payment of the hire in advance applied where, as in the present case, the period covered by the charter was exceeded.

Tonnelier v. *Smith* (1) (1897), 77 L.T. 277, approved and applied.

Notes. By s. 2 (5) of the Law Reform (Frustration of Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662), it was provided that that Act should not apply to charterparties.

Referred to: *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122.

As to charterparties, see 30 HALSBURY'S LAWS (2nd Edn.) 272 et seq.; and as to frustration of contracts generally see 8 HALSBURY'S LAWS (3rd Edn.) 185 et seq. For cases see 41 DIGEST 316 et seq., 12 DIGEST (Repl.) 436 et seq.

Cases referred to:

(1) *Tonnelier* v. *Smith* (1897), 77 L.T. 277; 13 T.L.R. 560; 8 Asp.M.L.C. 327; 2 Com. Cas. 258, C.A.; 41 Digest 358, *2066.*

(2) *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (1917), 33 T.L.R. 390; affirmed 34 T.L.R. 70, C.A.; 41 Digest 661, *4931.*

(3) *Elliott* v. *Crutchley*, [1904] 1 K.B. 565; 73 L.J.K.B. 406; 90 L.T. 497; 20 T.L.R. 286; affirmed, [1906] A.C. 7; 75 L.J.K.B. 147; 94 L.T. 5; 54 W.R. 349; 22 T.L.R. 83, H.L.; 12 Digest (Repl.) 435, *3330.*

(4) *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K.B. 756; 72 L.J.K.B. 933; 89 L.T. 429; 52 W.R. 181; 20 T.L.R. 10; 47 Sol. Jo. 877; 9 Asp.M.L.C. 477, C.A.; 12 Digest (Repl.) 463, *3459.*

(5) *Chandler* v. *Webster*, [1904] 1 K.B. 493; 73 L.J.K.B. 401; 90 L.T. 217; 52 W.R. 290; 20 T.L.R. 222; 48 Sol. Jo. 245, C.A.; 12 Digest (Repl.) 463, *3461.*

Appeal from an order of the Court of Appeal, affirming a decision of BAILHACHE, J., upon a Case stated by an arbitrator.

The question in the Case referred to the amount due from the French Marine to the respondent company in respect of the hire of the steamship *Ardoyne* under a charterparty, dated March 13, 1919. BAILHACHE, J., and the Court of Appeal (BANKES, WARRINGTON and SCRUTTON, L.JJ.) held, on the authority of *Tonnelier* v. *Smith* (1), that no part of the hire was returnable. The charterers appealed.

Leck, K.C., and *G. P. Langton* for the charterers.

R. A. Wright, K.C., and *Jowitt* for the shipowners.

The House took time for consideration.

July 18. The following opinions were read.

VISCOUNT FINLAY.—The question in this case is as to the amount due from the French Marine to the respondent company in respect of the hire of the steamship *Ardoyne* under a charterparty dated Mar. 13, 1919. The dispute was referred to arbitration, and the arbitrator made his award in the form of a Special Case, raising three questions, of which the third alone is now material. It is:

> "Whether the French Marine were bound on Aug. 10, 1919, to pay a full month's hire of the said steamer, or whether they were bound to pay only a fractional part of a month's hire for the period from Aug. 10, 1919, until the steamer was re-delivered to the chartered owners."

The arbitrator awarded as follows:

> "The French Marine are not and were not on Aug. 10, 1919, liable to pay a whole month's hire on that date, but are and were only liable to pay to the chartered owners a fractional part of a month's hire from Aug. 10, 1919, up to the date when the steamer was re-delivered to the chartered owners. . . . But this award is subject to the opinion of the court on the following Special Case, which is stated at the request of the parties."

The Special Case incorporated the charterparty. The charterparty was between the respondent company as owners of the steamship *Ardoyne* and the appellants, the French Marine, charterers. Clause 1 states that the owners agreed to let, and the charterers to hire, the steamer for the term of four calendar months from

the time when the steamer was placed at the disposal of the charterers. The following are the other clauses material to the present question: A

"5. That the said charterers shall pay as hire for the said steamer 25s. per ton deadweight, say £9,250 per calendar month, commencing from the time the steamer is placed at the disposal of charterers, and pro rata for any fractional part of a month (the days to be taken as fractions of a month of thirty days) until her re-delivery to owners as herein stipulated. The payment B of the hire shall be made as follows: In London, in cash, without discount, monthly in advance to Ernest Bigland & Co., Ltd. In default of such payment or payments, as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter. C

"7. That the steamer (unless lost) shall be re-delivered on the expiration of this charterparty, in same good order as when delivered to the charterers (fair wear and tear excepted) . . . at a United Kingdom coal port. Charterers giving disponents of steamer seven days' notice of expected date of re-delivery between the hours of 6 a.m. and 6 p.m., but the day of re-delivery shall not be a Sunday or legal holiday, always unless owners agree to take re-delivery D earlier. The charterers to give the owners not less than ten days' written notice at which port and on about which day the steamer will be re-delivered. Should the steamer be on a voyage at the expiration of the period fixed by this charter, the charterers are to have the use of the steamer at the rate and on the conditions herein stipulated to enable them to complete the voyage, provided always that the said voyage was reasonably calculated to be com- E pleted about the time fixed for the termination of the charter. Money in dispute to be deposited in the joint names of the parties to this charterparty with approved bankers at the place of payment of the hire until the dispute has been settled by the arbitrators.

"12. That in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing F the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through ground- G ing or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.

"18. That should the steamer be lost or missing, the hire shall cease from the date when she was lost or last spoken, or, if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the charterers. H

"21. That the owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter and charterers to have a lien on the steamer for all moneys paid in advance and not earned.

"31. Should steamer be in a position to give re-delivery under this charter within ten days before the expiration of the stipulated charter period of four I months, disponents agree to accept re-delivery then. If the steamer should be in a position to give re-delivery at an earlier date than ten days before the expiration of the stipulated charter period, charterers have the right to arrange for the steamer to perform a voyage reasonably calculated to be completed within ten days after the expiration of the charter period."

The Special Case then proceeds to make a statement of the facts, which may be summarised as follows. The steamer was placed at the disposal of the charterers

on April 10, 1919. In consequence of a letter from the British Shipping Controller of June 16, 1919, the charterers caused the *Ardoyne* to be loaded at Antwerp with a cargo of coal for Toulon with the intention that she should return to Great Britain with a cargo of minerals. After the vessel was so loaded there was correspondence between the British Ministry of Shipping and the charterers by letters of July 9, 10, and 14, 1919, all of which are set out in the Case. What ensued is stated in paras. 5 and 6 of the Case:

"5. On July 14, 1919, the Shipping Controller issued his licence in respect of the *Ardoyne* for a voyage from Antwerp to Toulon with a cargo of coal, and endorsed the licence with the following words: 'Thence Australia to load for Royal Commission on Wheat Supplies.' 6. The *Ardoyne* accordingly proceeded from Antwerp to Toulon and delivered her cargo of coal at the latter place, and the French Marine gave notice to the chartered owners that on completion of the discharge of her cargo at Toulon the *Ardoyne* would be redelivered to the chartered owners as they were prevented by the action of the Shipping Controller from bringing the ship back to the United Kingdom with a cargo of ore as had been intended. The chartered owners disputed this view, but in order to save waste of tonnage and without prejudice and reserving their rights, took delivery of their steamer at Toulon from the French Marine on Aug. 16, 1919. The steamer then proceeded on her Australian voyage pursuant to the directions of the Shipping Controller."

In para. 10 of the Case Stated the arbitrator says:

"I am of opinion and, so far as questions of fact are involved, find as follows: (a) That the commercial adventure contemplated in the charterparty of Mar. 13, 1919, was frustrated as from Aug. 16, 1919, by the direction of the Shipping Controller that the said steamer should proceed to Australia to carry from there a cargo of wheat for account of the Royal Commission on Wheat Supplies. . . . (d) That the French Marine were, therefore, justified in redelivering the steamer to the chartered owners at Toulon on completion of the discharge of the coal cargo. (e) That the French Marine are not and were not on Aug. 10, 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of a month's hire from Aug. 10, to Aug. 16, when the steamer was re-delivered as aforesaid."

The question for the opinion of the court is stated as being whether his opinion, so far as it involves questions of law, is right.

It is obvious that the arbitrator's finding means that the owners of the vessel are entitled, in respect of the period from Aug. 10 onwards only, to hire from the days from Aug. 10 to 16, and I shall deal with the case on this footing. The question cannot be read as relating only to a provisional payment on Aug. 10, subject to liability to account. The real question is as to the rights of the parties with regard to the final payment. The answer to the question raised by the Case must depend upon the construction to be put upon the charterparty.

The term of the charterparty is four calendar months (cl. 1). The hire (cl. 5) is £9,250 per month and pro rata for any fractional part of a month until her re-delivery to owners as stipulated. The payment is to be in London in cash, payable monthly in advance, and in default of such payment the owners may withdraw the steamer. The first question that arises is whether the provisions of cl. 5 for payment of the monthly hire in advance apply in cases of an extension of the charterparty beyond the four months certain. That this was a very debatable point is shown by the fact that while LORD ESHER and RIGBY, L.J., answered this question in the affirmative, two judges of wide commercial experience (A. L. SMITH, L.J., and MATHEW, L.J.) answered it in the negative: *Tonnelier* v. *Smith* (1). Whatever view I might have been disposed to take upon this point, if it were a new one, I think we ought to follow the decision of the majority of the Court of Appeal given in that case nearly a quarter of a century ago. It has

no doubt been acted upon since then, and, apart from the fact that it was given by a court of very high authority, I do not think it would be right to depart from the practice as settled by that case, as innumerable charterparties must have been entered into on the view that that decision was good law. For these reasons I think we ought to hold, as the Court of Appeal held in 1897, that the whole of the monthly hire was payable in advance on Aug. 10, but it appears to me clear, upon the charterparty and on authority, that any such payment is provisional merely, and if, at the end of the period, it is found that less hire has been earned, the owner must account for the excess to the charterer. This was so held in express terms by the Court of Appeal in *Tonnelier* v. *Smith* (1), and it was on this basis that the Court of Appeal arrived at the conclusion that the monthly hire was payable in advance under such an extension.

Apart from authority, how does this question stand upon the terms of the charterparty? The hire for a calendar month was £9,250 and for any fractional part of a month pro rata. If the use under the charterparty is only for a portion of a month, the hire is according to the number of days computed pro rata on the basis of £9,250 for the whole month. Whenever there is a broken month the hire is less in proportion. It would be extraordinary if when during any month the hire earned under the charterparty is, say, £2,000, being pro rata, the owner should be entitled to retain the whole month's hire, £9,250, which has been paid in advance. There might be a bargain to this effect, but very clear words would be necessary to compel such a construction. If it appears when the month in question ends that the user has been for a week only, surely the reasonable view is that the owners must pay back three-fourths of the whole month's hire which they received in advance. Payment in advance is highly expedient, for in many cases if the money be not paid in advance it may be very difficult to enforce payment by the charterer, who may belong to a foreign country and not be amenable to English law. The payment in advance is really intended to secure the owner. The right of the charterer to repayment of the amount paid in advance in excess of what is earned does not rest merely upon special provisions in the charterparty as to particular cases. It rests upon the provision of cl. 5 that, if there has been less than a month's use, the payment is to be in proportion only. Certain special cases are particularly dealt with in the charterparty, but the enumeration is not exhaustive. Wherever there has been a provisional payment in advance for a month, if it be found that less has been earned during the month, the recipient must account for the excess. One of the commonest cases in which the vessel is used for a fraction of a fresh month after the expiration of the period of the charterparty would be when from some accidental cause she does not reach the home port for re-delivery to the owner till some time, say, a week after the time fixed in the charterparty has expired. A whole month's hire is paid in advance when the month begins, but the owner can keep only what represents a week's hire. The right to the return on this case is not expressly given in the charterparty, but it follows from the terms of cl. 5.

A second case receives special treatment. If a vessel is on a voyage at the expiration of the period fixed by the charterparty the charterers are to have the use of the steamer to complete the voyage on the chartered terms, which include payment pro rata, provided the voyage was reasonably calculated to be completed by the time of the termination of the charter (cl. 7). It is obvious that this is intended to provide for voyages other than the mere voyage home for re-delivery, which requires no special provision. A third case is that dealt with by cl. 12. If there is loss of time from deficiency of men or owner's stores, breakdown of machinery or accident preventing the working of the steamer and lasting for more than twenty-four hours, the hire ceases till she is in an efficient state to resume her services. A corresponding amount would have to be accounted for when the amount of hire up to the end of the month is settled. The right is obvious, though there is no express provision for it. On the other hand, the concluding part of cl. 12 provides that in case of loss of time owing to the vessel's being driven into

port or having to anchor by reason of bad weather or detention by bars in shallow water, &c., the time lost is to be for the charterers' account. A fourth case is dealt with in the charterparty, that of the steamer's being lost or missing, and it is provided that the hire is to cease from the time she was last seen or spoken to. This is the case dealt with by cl. 18, and it is only here that the words are added, "and hire paid in advance and not earned shall be returned to the charterers." We were informed during the argument that this form of charterparty has grown gradually and has been altered from time to time. We do not know how these words came to be inserted here and here only, but it cannot be seriously contended that this is the only case in which the owner is to account for hire which he received in advance but has not earned. I think that this sufficiently appears from the scope of the clauses to which I have already referred. Further, the terms of cl. 21 show that the charterers have, under the charterparty, this right to a return of moneys paid in advance and not earned. I have endeavoured to show that cl. 5 and other clauses preceding cl. 21 conferred this right in all cases. Clause 21 recognises the existence of this right and gives a special remedy for its enforcement by providing that the charterers "are to have a lien on the steamer for all moneys paid in advance and not earned."

A good deal of confusion had been introduced into this case by the argument put forward for the respondents that it is a case of "frustration," and that it is to be governed by rules laid down in some cases where there has been "frustration of the adventure" owing to some unexpected event. The truth is that this is simply a case in which the action of the British government in requisitioning the vessel prevented the owner from being able to give to the charterers after Aug. 16 the use of the vessel. The case need not be encumbered by the discussion of rules which have been laid down for cases in which some supervening event so profoundly modifies the circumstances affecting a contract as to justify its being treated as at an end. All that has happened here is that, as the British government took the vessel out of the hands of the owner, he could not go on giving the charterers the use of it. As he could not give the use of the vessel after Aug. 16, the freight ceased to be payable. After Aug. 16 no freight could be earned by him with the *Ardoyne* from the French Marine for the reason that the vessel was employed by orders of the British government in earning freight for the owner, by carrying wheat from Australia at remuneration given by the British government. That remuneration may be adequate or inadequate. With that we are not concerned. What is certain is that this employment of the vessel prevented the owner from giving the use of the vessel under the charterparty to the French Marine for more than a fractional period of the month. The freight ceased with the cesser of the use of the ship.

I have endeavoured to show that upon the construction of the charterparty the payment of the month's hire, £9,250, on Aug. 10 was purely provisional and subject to account at the end of the user during the month ending Sept. 10. This very point was decided in *Tonnelier* v. *Smith* (1). In that case the charterparty provided that the charterer should pay for the hire of the vessel at the rate of £709 per calendar month from the time she came on hire and at the same rate for any part of a month, hire to continue until her re-delivery to the owners unless lost, payment of the said hire to be made in cash in London monthly in advance. The term of the charterparty was for the time required for performing a round voyage out and home with an option to continue the charter for a further period of one second round trip. This option was exercised, and the vessel arrived at Middlesbrough, her final port of destination on the second round voyage, on Jan. 13. A fresh month of hire was begun on Jan. 19, and the shipowner demanded payment on that date of £709, a whole month's hire. The charterers tendered a sum representing hire up to Jan. 28, by which time he reckoned the vessel would be discharged and ready for delivery. Mathew, J., held that the charterers' contention was right. He said:

"The charterer must calculate what the sum is likely to be, and pay it to the owners; if too little the charterer is liable for the balance." A

The case went to the Court of Appeal. A. L. SMITH, L.J., agreed with MATHEW, J., but the majority of the court, LORD ESHER, M.R., and RIGBY, L.J., were of the contrary opinion, and held that the shipowners were entitled to have full payment of a month's freight made on Jan. 19. They give as a reason that the payment was provisional only and subject to adjustment according to the time actually taken. RIGBY, L.J., in delivering the judgment of LORD ESHER and himself, after referring to the terms of the charterparty (which are very similar to those of the charterparty in the present case), went on to say as follows: B

"The last provision that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid—a right which would effectually secure prompt repayment of those amounts. The special provision for repayment in case of loss is intended to fix readily the actual amount to be repaid, and cannot be construed, regard being had to the lien on ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss. The provisions in favour of the owners, first, for advance payment of freight, and, secondly, for lien on cargo and subfreights, were plainly intended to relieve the owners as far as possible from the necessity of having to bring a personal action against the charterer, and may have the more importance when, as here, the charterer is a foreigner and might have to be sued, if at all, in his own country. At no time during the term of the charterparty could it be ascertained with certainty on one of the days fixed for monthly payments how much freight would actually be earned during the month. The ship might be disabled or even lost just after the date fixed for the monthly payment, and then only a day's freight might be earned. Even when it appears probable that only a day's freight will be earned some circumstances—as, for instance, a strike—may intervene to delay the date of discharge and delivery up, and in the result a whole month's freight may, after all, be earned. The greater or less degree of probability of the happening of the events which will determine how much freight is to be earned is nowhere referred to in the contract, and can scarcely afford a rule for construing it." C D E F

The whole of this last passage from the judgment of the Court of Appeal is exactly in point upon the construction of the charterparty in the present case. The judgment of the Court of Appeal proceeds on the ground that the payments in advance are provisional only and not final, and that the charterer would be entitled to postpone delivery of the ship until the unearned payments were repaid, and that the special provision for repayment in case of loss cannot be considered, regard being had to the lien on the ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss. I have given my reasons for thinking that this conclusion is correct, and that it is so appears to me to follow not merely from the provisions specially referred to by RIGBY, L.J., but from the whole frame of the charterparty under which, when the hire is for a fractional part of a month, the payment is to be proportionately reduced. It would require a very strong case to justify us in departing from the practice sanctioned by the decision of the Court of Appeal in 1897. G H I

I desire to add a few words as to one suggestion which was thrown out in argument—namely, that there had been no delivery of the ship as stipulated in the charterparty, so that the right to hire would run on after the requisition. It is true that payment of hire was by the terms of cl. 1 to go on until re-delivery of the ship to the owners, as stipulated in the charterparty. The requisitioning of the *Ardoyne* by the British government, however, would obviously, on possession being taken under the requisition on behalf of the British government, amount

to a determination of the possession of the charterers and a transfer of possession to the British government on the terms of their requisition and under any liability to the owners which the requisition entailed. The owners themselves took delivery of the steamer at Toulon, but without prejudice, and reserving their rights, and the vessel proceeded from Toulon on her voyage to Australia under the orders of the Shipping Controller on behalf of the British government. It seems to follow that with this delivery the hire under the charterparty must have stopped running. I have already referred to the use that has been made of the phrase "frustration" with reference to the cesser of the user of the *Ardoyne* as an argument for leaving the owner in possession of the whole £9,250. It was said that when an adventure is "frustrated" things must remain as they are, that the money remains with the man who has it, that the contract is gone, and, therefore, that there is no right to have any part of the month's hire returned. The distinction between the present case and such "frustration" as was deemed to have occurred in the group of cases called the Coronation Cases is obvious. In those cases the payments had been made, not provisionally but absolutely, and the person who had received the money was held entitled to keep it after the "frustration." In the present case the payment was provisional and subject to adjustment according to the time during which the hire might last. "Frustration" cannot convert a provisional payment into an absolute one. If it did, it would not leave the parties in statu quo, but would make a most material alteration in the position of the person who had paid the money. The very act of requisition relied on as a "frustration" put an end to the hiring, as the ship was taken from the charterer and handed over to the British government. The requisition made it impossible that the hiring under the charterparty should continue beyond Aug. 16, and it follows that the charterers are liable only for six days in August. In my opinion, the French Marine were bound to pay a full month's hire of the steamer on Aug. 10, 1919, but this payment would have been provisional only, and in the events which happened they are only liable to pay a fractional proportion of a month's hire—namely, from Aug. 10 to Aug. 16, when the steamer was re-delivered in the circumstances I have stated. In my opinion, the charterers substantially succeed, and should have their costs on this appeal and in the courts below.

LORD DUNEDIN.—Strictly speaking, the question put by the umpire is limited to the determination of whether the charterers were liable on Aug. 10 to pay a month's hire in advance. *Tonnelier* v. *Smith* (1) decided, in a case for all practical purposes the same as the present as regards the phraseology of the charter, that the payment must be made. I agree with your Lordships that, though not technically binding, *Tonnelier* v. *Smith* (1) has ruled practice so long that it ought not to be disturbed unless we thought it was clearly wrong. I cannot say that. Further, I think it is unavailing to distinguish *Tonnelier's Case* (1) from the present on the ground of the provision in cl. 7 that money in dispute should be deposited in a bank. On Aug. 10 there was no reason to hold that any money was in dispute, and further, the clause has ample justification in regard to disputes as to coals and other matters of the same sort.

The case, however, has not been confined within these strict limits. Assuming that the full month's hire ought to have been paid in advance on Aug. 10, yet upon the doctrine which is conveniently expressed by the brocard of the civil law, frustra petis quod mox es restiturus, if it can be shown that the charterers would have been entitled to get repayment of that portion of the month's hire which corresponded to the period after Aug. 16 when the ship was taken away from them by the action of the government, then it would be useless to give judgment to the owners for more than the sum corresponding to the period from Aug. 10 to 16. And it is on these lines that the courts below have proceeded, though they have held that inasmuch as no such right would have accrued to the charterers, judgment ought to be given for the full amount. I do not shrink from saying that I have found this question one of extreme difficulty, as to which my opinion has

repeatedly wavered. It has been rendered all the more difficult by the very slight assistance which is to be derived from the opinions of the learned judges below. I do not say this by way of criticism; it is rather a piece of evil fortune. As to the first point, they were bound by the decision in *Tonnelier* v. *Smith* (1), and so far there is no more to be said. As to the second point, it is not mentioned in two of the judgments, but I assume that the learned judges proceeded on the ground explicitly stated by SCRUTTON, L.J., namely, that they were bound by *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2). They were so bound, and that prevented them doing what they would otherwise have done—arguing the case on its merits. When I consider *Stathatos* (2), I am scarcely better satisfied. There is, indeed, a carefully argued judgment by ATKIN, J., but when I turn to the Court of Appeal the judgment is put on a ground which is either ill reported, or is, I think, clearly erroneous. That ground is that you could only recover under the contract, and that, as the contract is no longer existent owing to what is termed frustration, there is no basis on which you can reach re-payment. It is useless to cite the numerous cases which have recently arisen and have been decided, several of them in this House, as to what happens when the performance of a contract according to its terms is rendered impossible by a vis major. It is nowhere laid down that the contract is non-existent. There is no liability in respect of non-performance in the future; but accrued rights remain untouched and enforceable. There is no better reductio ad absurdum of the other proposition than is to be found in the present case. If the contract is non-existent for all purposes of recovering money under it, then, inasmuch as the charterers here did not de facto pay anything on Aug. 10, the shipowners can get nothing from them now and no question of repayment arises.

The question must therefore, in my opinion, be thus approached. On Aug. 10 the charterers were bound to pay a month's hire; on Aug. 16 the further performance of the contract became impossible. Was there or was there not an accrued right on the charterers' part to get repayment of such portion of the hire paid on Aug. 10 as did not, as we conveniently term it in Scotland by a word which is wanting in English, "effeir" to the period from Aug. 10 to 16. The sheet anchor of the charterers' argument is the expression used by RIGBY, L.J., and the Master of the Rolls in *Tonnelier's Case* (1), that the payment in advance is "provisional"; coupled with the admission which had to be given by the shipowners' counsel that had there been a delivery at a coal port in the United Kingdom in the ordinary course on Aug. 16 that sum would have been recoverable. I confess I was much moved by that argument, but on further consideration it appeared to me that the word "provisional" might be too hard pressed. I do not think that by terming the payment "provisional" the learned judges meant to say that the payment in advance was not really a payment, but only a deposit, leaving over the question of payment. The payment in advance is truly payment, but it can only be a payment of what the contract says is earned. The payment earned by the contract is freight for use till re-delivery of the ship in terms of the contract; on delivery, freight ceases; consequently, the money paid in advance in so far as it does not represent freight earned, became mere money had and received, and, as such, recoverable. This was the result in *Tonnelier's Case* (1). Now, in the present case there was no re-delivery in terms of the contract, and consequently freight in terms of the contract never ceased. In each and every case that was thought of there is a substantive provision for the ceasing of freight. There is the case of re-delivery (cl. 5), there is temporary inefficiency (cl. 12), there is loss of the steamer (cl. 18). The addendum to cl. 18, that hire not earned shall be returned, neither helps nor hinders the argument, for the right to get return is conceded when there is re-delivery, and I take it would have to be conceded when there was a partial operation of cl. 12. The case that has happened was not thought of, and consequently there is no provision for the cessation of hire in that event. No doubt, the inability to re-deliver is due to no fault of the charterers: that, however, has no effect one way or the other on accrued rights. The Coronation Cases

here come to be in point. The situation, therefore, stands thus. The payment in advance has accrued and has been made good. A right to stop the hire after re-delivery or during such temporary inefficiency, or after loss, has not accrued, for none of these events has happened, and no right has accrued in respect of an event which was not mentioned. I proceed entirely on the words of the contract. The general consideration that hire is primâ facie the consideration for use does not move me; the same might be said of bill of lading freight when payment stipulated for and made in advance cannot be recovered though the goods are never delivered owing to loss at sea. For these reasons, I think that the appeal falls to be dismissed, and I move accordingly.

LORD SUMNER.—In strictness, the umpire's question, which has now to be answered, is concluded by *Tonnelier* v. *Smith* (1). He states his opinion to be

> "that the French Marine are not, and were not on Aug. 10, 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of month's hire from Aug. 10 to Aug. 16,"

and leaves it to the decision of the court to say whether this was right in law or not. Further, in reciting the issues raised between the parties and the submission made by the charterers, he confines himself to the words "were not on Aug. 10," omitting any reference to present liability. Now *Tonnelier* v. *Smith* (1) decided that, if payment was not made, the remedy by lien was exercisable by the ship-owner on the day on which payment of a month's hire was due in advance; that is to say, that the full month's hire was then due and payable. So far that decision would conclude the matter. The first question, therefore, is whether *Tonnelier* v. *Smith* (1) is either distinguishable or wrong; but the courts below have allowed the case stated to be treated loosely, so as to raise the further question, whether by reason of events happening after Aug. 10 and involving what the umpire calls "frustration" of the commercial adventure, only the sum to be paid can be reduced to an amount representing the time from Aug. 10 to Aug. 16, and this, accordingly, forms the second question.

Tonnelier v. *Smith* (1) has so long been acted upon in the time-chartering business and has been followed in such a multitude of settlements of ships' accounts, that, unless it is manifestly wrong, it ought not to be overruled. Personally, I think the issue in that case was rightly decided, but some sentences in the majority judgment—incautious perhaps and wanting in clearness—have been, as it seems to me, much misunderstood. In that case the ship had reached the port of re-delivery, and there it was that a dispute arose in view of the high probability that the discharge would not occupy a month. The case of "frustration" of the further performance of the adventure was not before the minds of the Court of Appeal at all. To read the words "the payments in advance were to be provisional only and not final" as deciding, that in all events whatever, in the event of frustration as well as in that which was the origin of the actual dispute, a repayment could be claimed, if the use of the ship was not enjoyed for a full month, is, in my view, to disregard both the reasoning of the judgment and the occasion on which it was delivered. The charter contained express words applicable to the particular case and the Court of Appeal construed them. They were "at and after the same rate for any part of a month, hire to continue till her re-delivery." They were held to be an express provision for a payment in advance, which was not final. True it was that in terms repayment was only stipulated for in that charter once, in another clause and in another event, namely, loss of the ship, but to give the charterer the security of a lien on a ship which was lost would be meaningless. Other cases of repayments to the charterers were evidently contemplated, and the case before the court, covered by the words above quoted, was one of them. The difficulty of reading this lien as meaning that the charterer can refuse a re-delivery of the ship and yet not be under a continuing liability for further hire is obvious, and lien on the ship in the strict sense he had none. In the present case also the ship never was out of the possession of the owners, whether chartered or actual.

There may have been no demise to the chartered owners; there certainly was none to the charterers. The ship sailed for Australia in the same unchanged possession as that in which she arrived at Toulon. I reserve any opinion as to the meaning and effect of the so-called lien, but the use made of it by the Court of Appeal in *Tonnelier's Case* (1) is simple enough. The judgment goes on to dismiss the charterer's contention, that in the event which had happened all he had to pay was hire estimated pro rata on the ground that the charter contained no provision for any estimate, clearly showing that the court held the rights of the parties to depend on the actual provisions of the contract. If the court had meant that in a time-charter all advance payments of hire are provisional or conditional, they need not have dwelt on the lien clause or have explained the object of the loss clause. To say that, apart from the circumstances of that dispute, the court then held that any such payment is provisional merely, and that, if at the end of the period a less amount of hire proves to have been earned, the owner must account for the excess to the charterer, to my mind imputes to ESHER, M.R., and RIGBY, L.J., a proposition equally irrelevant and wrong, for it means that they did not consider the rule expressum facit cessare tacitum applicable to a time-charter. Payment means payment. Without some provision, expressed or necessarily to be implied from the expressions used, there is no right to repayment except such as the law gives. Here there was no total failure of consideration, but a partial failure only, for which in law no pro rata repayment could be claimed. The right to repayment, in the events which happened, has to be found in the charter, and the fact that, in one form of words or another, the charter provides for repayment in certain named events is good ground for saying that in other events repayment is not provided for. This, in my view, is all that RIGBY, L.J., said or was warranted in saying, and it fails to carry the charterers home. It was ingeniously argued that *Tonnelier* v. *Smith* (1) might be distinguished from the present case, because this charter contains a provision that money in dispute is to be deposited in joint names, but I think there is no substance in that point. If a dispute arises, it must go to arbitration, and the party from whom a payment is claimed must, so to speak, pay it into court. This is the most that can be made of the clause; perhaps it means no more than this, that, if there is a sum received from strangers by one party, to which both lay claim, it is to be deposited in medio to abide an award. In no case can it mean that if one party disputes his liability to pay money to the other, he can deposit the money in joint names and so discharge himself from an actual obligation to pay according to the contract. The clause refers to security and procedure only, not to liability.

It will not be disputed that the charter and the charter alone must be the source from which any right to a repayment or reduction of hire is to be derived. The umpire has found as a fact that on Aug. 16 further performance on either side was frustrated. The term may not be the best, and it has been doubted—though not in the most recent cases—whether "frustration" applies to a time-charter, when the chartered period has not expired and the ship has not been lost. The result, however, is plain. From Aug. 16 both parties were released from further performance, but both remained bound to perform such things as they had become bound to before that date. What provision, then, does the charter contain? There can be no doubt that an Aug. 10 the full sum of £9,250 was due and payable in advance, and it was not paid. The words applicable are these: "The payment of the hire shall be made . . . monthly in advance" and "the" hire (not merely hire) is £9,250 per calendar month and pro rata for any fractional part of a month, payable "as hire . . . until her re-delivery to owners as herein stipulated," that is, at a United Kingdom coal port. No one could then tell for certain the date of re-delivery. A strike of dock labourers at Toulon might cause such delay as to make another month's hire fall due on Sept. 10. On the other hand, the ship might be re-delivered at almost any time after fourteen days, or might break down or be lost within the month. The charter provides for these cases, but for the case of frustration, which happened, it makes no provision at all. The words

"pro rata for any fractional part of a month" refer only to a period of time terminating with re-delivery as stipulated and not to any other period. The period from Aug. 10 to 16 did not terminate with re-delivery as stipulated. A portion of a month terminating with the loss of the ship and a period the currency of which is suspended by a breakdown and renewed on further readiness for service, are expressly provided for elsewhere and otherwise. It is true that on Aug. 10 such rights as these provisions involve were rights which the charterers were entitled to enjoy, but they were entitled to enjoy them only in the events upon which the charter makes them contingent. If the ship occupied only a fractional part of thirty days in reaching her port of re-delivery and in being tendered to the chartered owners there, if she lost time from any breakdown within cl. 12, if she was lost or missing, then, but not till then, the terms of cll. 5, 12, or 18, as the case might be, would become applicable. In fact, on Aug. 16 further performance of this charter on either side became impracticable, because the ship was requisitioned, and the charter was silent about the consequences. The legal rights thereupon arising are those stated by COLLINS, M.R., in *Elliot* v. *Crutchley* (3) ([1904] 1 K.B. at p. 568):

> "In the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the contract must remain where they are when that contingency occurs; the party who has paid them, and by the contract was bound to pay them, cannot recover them back, but, as regards future liabilities, the contract is at an end."

I cannot see why these words should be less applicable to a case where the contingency has occurred during and not before the commencement or performance of the contract, or what distinction can be drawn between the obligatory directions of the Shipping Controller, for which unexpired event this pre-war form of charter made no provision, and the unexpected cancellation of the Coronation procession.

It is, no doubt, true that the object of payment in advance is to secure the chartered owner in dealing with a foreigner, but that is no measure of the meaning of the stipulation which requires it. I daresay that in some events to require payment in advance is stringent, but the debtor takes his chance and in most cases covers himself by insurance. This obligation cannot be measured by such considerations, nor is any special perspicuity necessary to the expression of it. In the case of prepaid bill of lading freight and of chartered freight for a voyage paid in advance, the risk is run every day and the law is clear; the loss of ship and cargo next day leaves the money prepaid in the receiver's hands. The reason is because payment is to be "in advance"; it is not also stipulated to be "on account." The money is not deposited, it is paid. Here the charterers got six days' service, at any rate, for their money, and when, on Aug. 16, the further service was frustrated, the chartered owners reserved all their rights and the ship's service ended at Toulon. This was the charterers' misfortune; it was not the chartered owners' fault. The parties had made no provision for the event, and, if a court were to make compensation to the charterers at the chartered owners' expense by taking a mere proportion of a month's hire, several important stipulations would be overlooked and injustice would be done. Under this charter the charterer has to pay hire from the date when the steamer is placed at his disposal till he re-delivers her at the stipulated port of re-delivery in same good order as when delivered to him, and not on a Sunday or legal holiday. The length of this period cannot be fixed exactly in advance, and, therefore, all time charters have to be made with a certain elasticity in the charterer's interest. In this case the period was four months plus any further time needed to complete a voyage current on the expiry of the four months. It is a fallacy to suppose that this results in a hiring consisting of separate and disparate periods, to which different considerations apply. The period of hiring is one and continuous, though it is longer or shorter according as the ship is or is not on a voyage at the expiration of the four months, and, in fact,

this last part of the hiring is expressed like the other to be "on the conditions herein stipulated." In this way the owners not merely get hire for the ship's use but, under cl. 3, they are freed from a large part of the costs of bringing her back to a convenient port of re-delivery, such as coals, port charges, pilotages, tug-assistance, etc. The relevance of this is that, if there were a simple refund of hire paid in advance, proportionate to the number of days during which the ship was not at the charterer's disposal because she had been requisitioned and the charter "frustrated," the owner would be returning too much, for he would be getting no compensation for the loss of the advantage of having her brought home in large part at the charterer's expense, although he himself was in no default under the charter. I would venture to ask this question: If cl. 5 provides generally for a readjustment of a provisional advance by repayment of hire not earned, or if the hire, which is to be paid in advance under cl. 5, means only hire for an efficient vessel placed at the charterers' disposal and does not extend to hire for a vessel not placed at their disposal, why are the clauses as to breakdown and loss of the ship required at all? The former is otiose; the latter should have been confined to the words prescribing the date for presumption of the loss. I agree that, if at the date of prepayment the charterers had a general right to have their advance payment readjusted in all events, for any fractional part of the month during which the ship might not prove to be at their disposal from any cause, the subsequent frustration would not defeat that right, but I fail to see how such a meaning can be extracted from the words of the charter. The charterers were relieved from having to bring the ship back to England to a coal port of their selection; they had no more hire to pay, no more bunkers to provide, but that is all. The word "hire" does not mean a payment commensurate with user; indeed, it is expressly provided that hire is not recoverable when the opportunity for using the ship fails because, though efficient per se, she is weather bound and so of no use to anybody. Where a fractional payment constitutes hire, the charter says so; when advance payments are to be repaid, it says so; when it makes no provision in terms, none can be supplied by your Lordships. Where is there any provision for repayments in the event of frustration? The shipowner was thereby excused from earning his hire; why is he, nevertheless, required to repay it? The judgments of four learned judges of great experience in these matters have been given in favour of the shipowners. After a careful re-examination of the matter I believe them to be in accordance with the current of authority in these matters for many years, and to be right.

LORD PARMOOR.—This is an appeal from an order of the Court of Appeal, affirming an order of BAILHACHE, J., to the effect that a full month's hire was payable to the respondent shipowners under the terms of a time charterparty, dated Mar. 13, 1919, between the respondents as owners of the steamship *Ardoyne*, and the appellants as charterers. The order of BAILHACHE, J., was made on an award, in the form of a Special Case, in an arbitration under the terms of the charterparty. The owners and the charterers submitted certain points of law to the umpire, but the only question now left in dispute is whether the umpire was right in awarding that the French Marine were not on Aug. 10 liable to pay a whole month's hire, but were only liable to pay a fractional part thereof. It is not disputed that the commercial adventure, contemplated in the charterparty, was frustrated as from Aug. 16, 1919, by the direction of the Shipping Controller that the steamer should proceed to Australia, to carry from there a cargo of wheat for account of the Royal Commission on Wheat Supplies.

The charterparty in question is a time charter. The charterers under cl. 5, undertake to pay hire monthly in advance, in cash, in London, without discount until re-delivery of the ship to the owners. Re-delivery under the terms of the charter was made impossible after the frustration of the commercial adventure by the direction of the Shipping Controller. The provision "pro rata for any fractional part of a month" is a provision applicable when the ship has been re-

delivered at such time, or under such conditions, that an adjustment of the amount of hire is necessitated under the terms of the charterparty. In this sense the amount paid in advance is a provisional payment, and if this is the meaning of the decision in *Tonnelier* v. *Smith* (1) I am in agreement with the Court of Appeal in that case. It is necessary, therefore, further to consider whether at the date of the frustration of the contract any right of pro rata adjustment had accrued. It had not, I think, accrued either under the re-delivery clause, the breakdown clause, or the loss of steamer clause. The ship was on voyage at the expiration of the period fixed by the charter, but under cl. 7 the charterers are to have her use at the rate and on the conditions therein stipulated to enable them to complete the voyage; that is to say, on the payment of the monthly hire in advance, subject to any provisions in the charter for pro rata adjustment. The provision in cl. 7, as to the deposit of money in dispute, has no application to the matters in dispute in the arbitration, and I cannot find that either party placed any reliance on this provision. There is no suggestion of a breakdown under cl. 12, or of the loss of the steamer under cl. 18. Under the terms of the charter there has been no re-delivery of the ship within the terms of the charterparty, such re-delivery being rendered impossible by the direction of the Shipping Controller, which frustrated the commercial adventure.

When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded ab initio, but the parties are released from further performance. Thus any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed, but the courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into. It has been pointed out that this principle may not in all cases provide an equitable settlement, but that there is no preferable alternative: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (4); *Chandler* v. *Webster* (5); *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2). It follows that the money paid in advance for the full month cannot be recovered back in respect to the part of the month after the frustration unless the right to a pro rata adjustment had previously accrued. In my opinion, no such right had accrued under the terms of the charterparty. The simple fact is that the parties at the time of the making the contract did not contemplate the contingency of a commercial frustration consequent on the order of a Shipping Controller, due to the outbreak of a European war, and made no provision to meet any such contingency. The appeal should be dismissed.

LORD WRENBURY.—When the Ministry of Shipping intervened, there resulted two consequences—first, both parties were discharged from further performance of the contract, for further performance had been rendered impossible; and, secondly, the charterers' obligation to pay hire until re-delivery of the vessel at a United Kingdom coal port was at an end because such re-delivery had been rendered impossible. Having stated these two consequences, I have stated all the consequences resulting from the frustration of the contract. Existing rights remained undisturbed. The contract was not torn up. It was not dead—it was partially paralysed. Some of the contractual terms retained, others had lost, their living force.

In *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2), hire had been paid in advance and the contract was frustrated by the detention of the ship by the British government. Pickford, L.J., is there reported to have said that as a result of the intervention of the government "the contract was at an end." And upon the question of the charterer's right to recover the hire paid in advance he is reported to have said that "the implication arising from" cl. 21 in the charter

> "could only arise while the contract remained in existence. When the charter was put an end to, that implication did not arise. They could only recover

the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision under which the money could be recovered." A

I doubt whether PICKFORD, L.J., can be correctly reported. The report, being only in the TIMES LAW REPORTS, will not have been revised by the judge, and I doubt whether he can have said that which is attributed to him and have laid down so general a proposition as is contained in the words I have quoted. If he is correctly reported I must say with all respect that I do not agree with that general proposition. As regards right existing at the time of frustration the contract is, in my judgment, not impaired. B

To ascertain those existing rights I have to read and construe the contract. That which remains is, in my judgment, merely a question of construction. The questions to be determined are, first, whether on Aug. 10 or 16 the shipowners were entitled to sue the charterers for a full month's hire (what was at that time the existing right of the shipowners in this respect?); and, secondly, if they were so entitled whether the charterers could, in an appropriate state of facts, recover a proportion of the amount. Hire is, primâ facie, a payment made for user. This primâ facie meaning may be displaced by provisions in the contract. The charterer may have agreed to pay for the expectation of user; or he may have agreed to pay, whether he has user or not. I find that in this contract there are provisions that the charterer is not to pay if, in certain circumstances, he has not the user: see cl. 12. This, at first sight, seems to imply that, except in the defined circumstances, he is to pay, whether he has the user or not. The events, however, in which he is not to pay are confined to cases in which the ship is not in a condition efficient for user. If she is efficient, but time is lost by other causes, he is to pay. From these provisions arises an implication that hire in this contract means payment to be made for an efficient steamer whether the charterer has the actual user or not, but not an implication that it includes payment to be made for a steamer whose user has by frustration been made impossible. It does not follow, therefore, that in this contract the primâ facie meaning of hire, namely, payment for user, is displaced. Upon this question, cl. 18 is, again, instructive. If the steamer is lost, hire is not payable after the date of the loss, and "hire paid in advance and not earned" is to be returned. Here is a plain indication that hire is not earned unless there be user or the opportunity of user. Further, as regards the hire itself, I look to see whether the hire is necessarily so much a month (neither more or less), whether the use be for a month or less than a month, or whether the contract contemplates fractional sums for periods less than a month. The answer is that it does contemplate fractional amounts in some events at any rate. Under cl. 5, the hire during the four months ending on Aug. 10 is so much a month in advance, for any further period the hire is a fractional part to be calculated to the date of re-delivery. For my purpose it is not material for the moment to inquire whether the particular case in which a fractional payment is to be due is this case or not. The point is that a fractional and not an entire payment is in some circumstances "hire" under this contract. A similar observation arises upon cl. 7. In the circumstances there contemplated the hire is to be "at the rate" stipulated by the contract—i.e., at the rate of so much a month, and, as the period of time for which the calculation at that rate is to be made may be uncertain, provision is made for deposit in joint names until that question has been settled. Lastly, by cl. 21, the charterer is to have a lien on the steamer for all moneys "paid in advance and not earned." Upon this the following passage in *Tonnelier* v. *Smith* (1) is relevant: C D E F G H I

> "The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the incurred payments were repaid."

With this I agree. And again, upon the question of construction it is not material that re-delivery of the ship is not now possible.

These being the provisions of the contract, the conclusion at which I arrive upon the question of construction is that hire here means payment due for an efficient vessel which the owners place at the disposal of the charterers whether from outside causes the charterers are able to make use of the efficient vessel or not, but does not extend to payment to be made for a vessel which the owners do not (because they cannot) place at the disposal of the charterers; that during the time when the owners do not place an efficient vessel at the disposal of the charterers the hire is "not earned"; that the provision of cl. 21 that the charterers shall have a lien on the ship for moneys "paid in advance and not earned" (however difficult this may be to apply practically having regard to the provision as to hire continuing to accrue until re-delivery) shows that, if the sum paid in advance turns out to be too large, the charterers will have a right to recover. Payment was not made on Aug. 10 in advance—the question is whether the charterers are now liable to pay a full month's hire or a fractional part. It is not, I think, material to inquire whether the obligation was, and is, to pay a full month with a right of recovery of a proportionate part or to pay a fractional part. In either case the charterers, I think, are right in saying that the owners cannot demand and retain a full month's payment when the vessel was taken from the charterer during the currency of a month. For these reasons I think that this appeal should be allowed.

Solicitors: *Holman, Fenwick & Willan*; *William A. Crump & Son.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

MASON, HERRING AND BROOKS *v.* HARRIS AND ANOTHER

[King's Bench Division (Shearman, J.), January 22, 1921]

[Reported [1921] 1 K.B. 653; 90 L.J.K.B. 993; 125 L.T. 180; 37 T.L.R. 334]

Rent Restriction—Premium—"Grant, renewal or continuance of tenancy"—Premium required by tenant as condition of assignment of tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8 (1).

By s. 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [see now Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1)]: "A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this Act applies require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration. . . ."

A tenant to whose tenancy s. 8 (1) applied assigned the unexpired portion of her tenancy in consideration of a payment of £75, for which the assignee gave a cheque which was dishonoured.

Held: an assignment was not a "grant, renewal or continuance of a tenancy" within s. 8 (1), and, therefore, the requirement of payment for it did not contravene the subsection and the £75 was recoverable by an action on the cheque.

Notes. Section 8 (1) of the Act of 1920 was repealed by the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) of which contains provisions corresponding to those of the repealed s. 8 (1). Section 2 (2) of the 1949 Act expressly pro-

hibits the requiring of a premium as a condition of the assignment of a controlled tenancy, but this report is included for its construction of the words "grant, renewal or continuance of a tenancy" which appear in s. 2 (1).

Approved: *Remmington* v. *Larchin*, ante, p. 298.

As to the prohibition of premiums for rent-controlled tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 798–805; and for cases see 31 DIGEST (Repl.) 688–690. For the Landlord and Tenant (Rent Control) Act, 1949, see 13 HALSBURY'S STATUTES (2nd Edn.) 1094.

Action in the short cause list tried by SHEARMAN, J.

The plaintiffs claimed the sum of £80 11s. 1d. from the defendants as drawers of a cheque, dated Nov. 11, 1920, payable to the plaintiffs' order, which cheque was dishonoured on presentation.

In October and November, 1920, one of the defendants entered into negotiations with the plaintiffs as agents for a Mrs. Walters, who, at that time, was the holder of the lease of a flat at St. John's Wood, for an assignment to them of the residue of the term. The original lease of the premises in question was granted for seven years from July 18, 1918, at the yearly rent of £70 per annum. Therefore, the premises came within the scope of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On Nov. 11, 1920, by an indenture of that date, Mrs. Walters assigned the residue then unexpired, of the term to the defendant, Julius George Harris, in consideration of £75 paid by that defendant to Mrs. Walters. The plaintiffs, who were estate agents, acted as agents for Mrs. Walters, and they received from the defendant J. G. Harris on Nov. 11, 1920, a cheque drawn by himself and the other defendant for £80 6s. 8d., being the above £75 together with certain other items. Payment of the cheque was stopped at the bank on the same day. Thereupon, the plaintiffs brought the action claiming the amount of the cheque together with interest.

The defendants set up the defence that the payment of the sum of £75 included in the amount of the cheque was illegal under s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as being a premium payable on the assignment of a lease of premises within that section, and that the defendants consequently stopped payment of the cheque. With regard to the balance of £5 6s. 8d., the defendants said that they were ready and willing to pay that sum.

Section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided:

> (1) A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after the 25th day of March, 1920, the amount or value thereof shall be recoverable by the person to whom it was made or given. . . .
>
> (2) A person requiring any payment or the giving of any consideration in contravention of this section shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order the amount paid or the value of the consideration to be repaid to the person by whom the same was made or given, but such order shall be in lieu of any other method of recovery prescribed by the Act.

D. N. Pritt for the plaintiffs.

A. W. Elkin for the defendants.

SHEARMAN, J.—In this case, the facts are not in dispute. The question is whether the assignment of the residue of a term of some premises at St. John's Wood was a "grant, renewal, or continuance of a tenancy" within the meaning of s. 8 of the Act of 1920. The premises in question are within the purview of the Act. By an indenture of Nov. 11, 1920, a Mrs. Walters who then held the lease

assigned the premises to one of the defendants for the unexpired residue of the term, in consideration of the payment of £75. The defendants got the assignment and gave a cheque and afterwards stopped payment of that cheque. The plaintiffs now sue on that cheque and the defence is set up that the assignment was a "grant, renewal, or continuance" of a tenancy within s. 8 of the Act of 1920, and that therefore the payment of £75 in respect of that assignment was unlawful, as being a premium given for the grant of a tenancy contrary to sub-s. (1) of that section. In other words it is contended that a person can only assign the tenancy if he does so for nothing. The defendants contend that this assignment is a "grant" within the meaning of the subsection. In my opinion, "grant" refers to the creation of a tenancy between the grantor and the grantee, and an assignment of the residue of a term is not a "grant" within the meaning of s. 8 (1) of the Act of 1920. The defence, therefore, fails and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Mayo, Elder & Co.*; *A. J. Evans.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

VER MEHR *v.* VER MEHR

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Henry Duke, P.), July 4, 1921]

[Reported [1921] P. 404; 90 L.J.P. 349; 126 L.T. 108; 66 Sol. Jo. (W.R.) 4]

Restitution of Conjugal Rights—Alimony pendente lite—Power of court to order after decree.

In suits for restitution of conjugal rights alimony pendente lite may be allotted up to and at any time before the time for compliance with a decree for restitution has expired.

Notes. The Matrimonial Causes Act, 1884, s. 2, has been replaced by s. 22 of the Matrimonial Causes Act, 1950, which gives the court power to order interim alimony, alimony, and periodical payments in suits for restitution essentially similar to those it possessed under the Act of 1884.

Considered: *M.* v. *M.*, [1928] All E.R.Rep. 589.

As to time for allotment of alimony pendente lite, see 12 HALSBURY'S LAWS (3rd Edn.) 349; for cases see 27 DIGEST (Repl.) 487–491, 494, 495; and for the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to in argument:

Latham v. *Latham and Gethin* (1861), 2 Sw. & Tr. 299; 30 L.J.P.M. & A. 163; 9 W.R. 680; 164 E.R. 1011; 27 Digest (Repl.) 497, *4383*.

Ellis v. *Ellis* (1883), 8 P.D. 188; 52 L.J.P. 99; 49 L.T. 223; 31 W.R. 942, C.A.; 27 Digest (Repl.) 497, *4384*.

Interlocutory Appeal by a husband against a registrar's order for alimony pendente lite in a restitution suit by a summons adjourned into court.

The petitioner, Magdeleine Ver Mehr, sued her husband, John Mahn Ver Mehr, by petition filed on April 8, 1921, for restitution of conjugal rights, and on April 20 filed a petition for alimony pendente lite, the hearing of which was postponed by various applications made on behalf of the husband whose answer thereto was only filed on May 31. On June 7 application was made on behalf of the wife for

an appointment for hearing, and this was fixed for June 16 before Mr. Registrar Pereira, but on June 15 the suit came on for hearing, and a decree of restitution was made to be obeyed in fourteen days. Objection was taken on behalf of the husband at the hearing before the registrar on June 16 that, the suit being no longer pending, no order for alimony could be made, but this objection was overruled, and an order made allowing the wife alimony at the rate of £500 a year. The husband appealed by summons to the judge.

Noel Middleton for the husband.
Cotes-Preedy for the wife.

SIR HENRY DUKE, P. (after reciting the facts).—This appeal raises a question of considerable importance on which there is no direct authority. If the husband's argument were accepted, no provision could be made for the period between a decree of restitution and the ascertainment of compliance or non-compliance with it, a period which, if the husband happens to be abroad, may extend to months. Reason and convenience, therefore, are against the husband's contention. Alimony can be ordered pending suit, and s. 2 of the Matrimonial Causes Act, 1884, provides, as the means of enforcing a decree of restitution, an order of permanent maintenance. The husband's argument leaves a hiatus between these two periods, and if I had to look only to the statute of 1884 I should hold that alimony pendente lite must run till permanent maintenance can be ordered in its place. But the power to provide alimony for a deserted wife is a much older one. The citation in the suit for restitution makes the husband subject to the jurisdiction of the court, and he remains subject to it till the decree is satisfied. The statute of 1884 has only relieved him of the liability to be committed for disobedience. Otherwise the former authority of the court survives.

The learned President then dealt with the question of amount, and, holding that there was no reason to think that the husband could not, if he chose, comply with the registrar's order, dismissed the appeal with costs.

Solicitors: *Lawrence, Webster, Messer & Nicholls*; *Dunderdale & Dehn.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

REEVES *v.* DAVIES

[Court of Appeal (Lord Sterndale, M.R., Scrutton and Younger, L.JJ.), February 21, 1921]

[Reported [1921] 2 K.B. 486; 90 L.J.K.B. 675; 125 L.T. 354; 37 T.L.R. 431]

Rent Restriction—Application of the Acts—Tenant adjudged bankrupt—Vesting of tenancy in trustee—Disclaimer by trustee—No re-vesting in tenant.

Where the tenant of a dwelling-house to which the Rent Acts apply is adjudicated bankrupt, the protection of his tenancy which those Acts would otherwise have afforded him can no longer be relied upon, as the interest which he had in the property by virtue of such tenancy is divested from him by operation of the provisions of the Bankruptcy Act, 1914, and is vested in the trustee in bankruptcy, who may sell or disclaim the same. If he disclaims, nothing re-vests in the tenant.

Notes. Considered: *Roe* v. *Russell*, [1928] 2 K.B. 117. Referred to: *Mellows* v. *Low*, [1923] All E.R.Rep. 537; *Parkinson* v. *Noel*, [1923] 1 K.B. 117; *Stafford* v. *Levy*, [1946] 2 All E.R. 256.

As to the nature of statutory tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 805–808; and for the Increase of Rent and Mortgage Interest (Restrictions) Act, see 13 HALSBURY'S STATUTES (2nd Edn.) 981. As to the effect of disclaimer by a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn) 459–461; for cases see 3 DIGEST (Repl.) 697 and 5 DIGEST 1014–1021; and for the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P.Jo. 349, C.A.; 31 Digest (Repl.) 638, *7455*.

Also referred to in argument:

Barton v. *Fincham*, ante p. 87; [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 37 T.L.R. 386; 65 Sol. Jo. 326; 19 L.G.R. 185, C.A.; 31 Digest (Repl.) 701, *7912*.

Lord Hyton v. *Heal*, [1921] 2 K.B. 438; 90 L.J.K.B. 606; 125 L.T. 178; 37 T.L.R. 288; 65 Sol. Jo. 311; 19 L.G.R. 196, D.C.; 31 Digest (Repl.) 713, *7987*.

Hunt v. *Bliss* (1919), 89 L.J.K.B. 174; 122 L.T. 351; 84 J.P. 37; 36 T.L.R. 74; 64 Sol. Jo. 116; 18 L.G.R. 45, D.C.; 31 Digest (Repl.) 701, *7911*.

Appeal from a decision of ROCHE, J.

By an agreement dated Sept. 21, 1916, the plaintiff let to the defendant a dwelling-house and shop for a term of three months from June 24, 1916, and so on from quarter to quarter, at a rent of £60 a year. The defendant had been previously in occupation of the property as the plaintiff's tenant for some two years, the original rent being £50 per annum. In March, 1917, the plaintiff raised the rent to £65. On April 13, 1920, a receiving order was made against the defendant, and on April 30, he was adjudicated bankrupt. On May 27 the official receiver, as trustee in bankruptcy, disclaimed the tenancy. The defendant remained in occupation, and on July 10 he sent a cheque for a quarter's rent to the plaintiff, who returned it to the defendant. On July 21 the plaintiff commenced this action claiming possession of the property. The action came on for trial before ROCHE, J., who decided in favour of the plaintiff and made an order for the recovery of possession. From that decision the defendant now appealed.

Section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides as follows:

> "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. . . ."

Hawtin for the tenant.

W. Tindale Davis, for the landlord, was not called upon to argue.

LORD STERNDALE, M.R.—On Sept. 21, 1916, an agreement was executed whereby the defendant became tenant of the plaintiff of a dwelling-house and shop at a rent of £60 a year, increased in March, 1917, to £65 a year. On April 13, 1920, a receiving order was made against the tenant. On April 30 he was adjudicated bankrupt, and the whole of his property has become vested by law in the official receiver as trustee. From that moment the tenant had no beneficial interest in the property of any kind. The tenant has since tendered a cheque for rent, but the landlord has refused to accept it. The tenant contends that he is entitled to remain in possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as having a statutory tenancy. ROCHE, J., has held that those

provisions have no application to the state of things which exists here, and I entirely agree. It is admitted that there is no authority directly in point, but I go further and say that, in my opinion, the authorities which have been referred to by counsel for the tenant have no bearing on the point. The decisions as to holding over have no application, neither have the decisions as to the position of a sub-tenant. I base my judgment simply upon this, that where by statute the interest of the tenant of a house has been entirely divested or taken away from him and vested in his trustee in bankruptcy by operation of law, he (the tenant) has no more interest in the property than any passer-by in the street, and has no right to intervene. Where, as in this case, every possible interest is taken, out of him by a person who is acting under the law, the fact that the trustee disclaims the lease makes no difference. The order of the learned judge was quite right, and this appeal will be dismissed with costs.

SCRUTTON, L.J.—It seems to me that the persons responsible for the drafting of this statute have shown a great lack of consideration for various events which may arise. It is sufficient in the Court of Appeal to say that I am amazed that it never appears to have struck them what was to occur in the case of bankruptcy. There is nothing in the Act to show what is to happen in the case of a tenant becoming bankrupt. A question might arise as to what might happen in the case of a sub-tenant in similar circumstances, but it is not necessary to consider that point now. The difficulty in the present case, in my view, is this: Subsection (1) of s. 5 of the Act says that:

> "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless"

certain conditions are fulfilled. But none of the conditions imposed by the section relates to the present case. The words of the section impose restrictions on the action of the court. Some limitation must be placed upon the words of the Act. In *Remon* v. *City of London Real Property Co.* (1) we held that the words in s. 15, "a tenant who by virtue of the provisions of this Act retains possession" referred to a tenant who was such because he was protected from ejectment by the restrictions of s. 5. I do not think that a person becomes a statutory tenant by reason of the trustee having disclaimed the lease. Section 5 of the statute does not apply to the present tenant. Suppose the tenant had assigned his interest voluntarily, could he be said still to be a tenant. I expressly reserve that case for consideration. But where the tenant has lost his interest by the action of a person to whom the law has entrusted the power of making a disclaimer, I do not see that the conditions of a statutory tenancy are fulfilled.

YOUNGER, L.J.—I am of the same opinion. The facts of the present case are perfectly simple. The bankrupt here was the original lessee, and not a lessee by assignment. He was adjudicated bankrupt on April 30, 1920, when his property passed away from him and vested in his trustee in bankruptcy. The trustee has disclaimed the lease, but there is no provision in the Bankruptcy Act, 1914, for re-vesting the lease or any portion of the lease in the bankrupt upon such disclaimer. The trustee was in a position to do either one of two things, if the lease was valuable to sell it, if it was of no value, to disclaim it. The effect of the disclaimer was that the whole interest in the property re-vested in the lessor by virtue of the Act. What then is the interest of the bankrupt in the property? The reply is that he had none at all. It ceased and determined immediately upon his adjudication. The result is that the bankrupt having been divested of all his interest in the property, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had no application to the case at all.

Solicitors: *Peet & Manduell*; *Tucker & Co.*

Appeal dismissed.

[*Reported by* E. A. Scatchley, Esq., *Barrister-at-Law.*]

A

WILLMOTT *v.* WILLMOTT

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), January 17, February 21, 1921]

B [Reported [1921] P. 143; 90 L.J.P. 206; 125 L.T. 27; 37 T.L.R. 429; 65 Sol. Jo. 358]

Injunction—Husband and wife—Occupation of matrimonial home during pendency of matrimonial suit.

Husband and Wife—Matrimonial home—Right to residence pending matrimonial proceeding—Matter for court on facts of each case.

C There is no absolute right in all circumstances of either party to a matrimonial suit to remain in the matrimonial home. The matter is one for the court to deal with on the facts of each case.

Notes. As to injunctions in matrimonial suits, see 12 HALSBURY'S LAWS (3rd Edn.) 477, 478; and for cases see 27 DIGEST (Repl.) 683.

D Cases referred to in argument:

Callaby v. *Callaby and Perowne* (1920), 37 T.L.R. 241; 27 Digest (Repl.) 683, *6526.*

Northledge v. *Northledge* (1894), 70 L.T. 815; 6 R. 660; 27 Digest (Repl.) 683, *6524.*

Motion on behalf of a wife, the petitioner in a pending suit for restitution of conE jugal rights, for an injunction restraining the husband from preventing her from living at the matrimonial home, or otherwise molesting her.

It appeared from the affidavits filed that the husband had withdrawn from cohabitation at the matrimonial home in October, 1920, leaving the wife there, and that she had continued to reside there, and on Jan. 8, 1921, presented a petition for restitution of conjugal rights. On the same day the husband, through his F solicitor, informed her that he did not intend to live with her again, but that he intended returning to his home, and desired that she should leave at once, but offered to allow her £5 a week. On Jan. 11, in a further letter, the husband's solicitor gave the wife notice to leave the house before Jan. 17, and intimated that, if she did not do so, she would be ejected. The house was admittedly the husband's, but there was a controversy as to the ownership of the furniture. On G Jan. 13, the wife obtained leave to serve short notice of the motion for an injunction for January, when the motion was adjourned for a month on the husband's undertaking not to molest her in the meantime. The husband filed an answer in the restitution suit alleging just cause for his refusal to cohabit with the wife by reason of her habitual drunkenness. In pending alimony proceedings he admitted an income of £500 a year, while the wife alleged that his income was not less than H £1,200.

Clifford Mortimer for the wife.

J. B. Melville for the husband.

HILL, J.—This is a motion to restrain a husband from turning a wife out of the matrimonial home pendente lite. The suit is for restitution of conjugal rights, I and all sorts of charges are made against the wife. There is a great controversy on the affidavits, and the husband says that he is justified in refusing further cohabitation because of the drunken habits of his wife. This the wife denies. At present there is a matrimonial home, and the wife is there. She made the application originally on letters which she received requiring her to leave the house. The husband wishes to live there. He says the children are at school, and he desires them to come home there for the holidays, and it would be undesirable for the wife to be there at that time. The application is to restrain the husband, and it is said that the court cannot do otherwise than grant an injunction,

as the wife has an absolute right to remain in the matrimonial home until the hearing of the case, or, at any rate, until the amount of alimony has been settled. There is a petition for alimony pendente lite to be heard, and an order for discovery has been made. The wife alleged that her husband has an income of £1,200 a year. He says that his income is £500, and he has offered the wife an allowance of £5 a week, suggesting accommodation at a boarding-house at Brighton. It is not controverted on the affidavits that the wife's mother and her sister have offered her accommodation. The wife insists on remaining where she is, and—whatever the court says—she states that she will remain. It is clear that these two people are at daggers drawn, and there is an acute controversy between them, which I cannot determine to-day, whether the wife is a drunkard or a reclaimed drunkard.

What is to be done in the meanwhile? I am not at all prepared to assent to the proposition that there is an absolute right in all circumstances for one party to a matrimonial suit to remain in the matrimonial home. That is a matter for the court to deal with according to the circumstances of each case. The husband's offer is in this case a sufficient offer. I am not prejudging the facts; the offer may be proportionate to the husband's income even if his income be larger than he suggests. There would be grave trouble if I granted this injunction; and on the facts of the case, and regarding myself as entitled to deal with each case on its own facts, I refuse to grant the relief for which the wife asks. She would show herself sensible if she took herself elsewhere. In the circumstances, however, the application was not an unreasonable one, and I grant the wife her costs.

Judgment accordingly.

Solicitors: *John Carnegie*; *Ewart Craigen.*

[*Reported by* J. A. C. Skinner, Esq., *Barrister-at-Law.*]

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